The Trichordist

Artists For An Ethical and Sustainable Internet

#StopArtistExploitation

Safe Harbor Not Loophole: Five Things We Could Do Right Now to Make the DMCA Notice and Takedown Work Better[1]

By Chris Castle

There has been considerable discussion about how the DMCA notice and takedown procedures are "broken." We don't think that this is quite true—the procedures are manipulated, misunderstood and abused on a grand scale. That doesn't mean that the notice and takedown procedure is "broken" any more than the laws against burglary, theft and tax evasion are "broken." No statute can control unethical behavior by those who use the law as a flimsy excuse to get away with bad behavior.

Many Internet companies have interpreted the DMCA to permit bad behavior until the victim of the bad behavior notified the bad actor that they were behaving badly—each time they behaved badly. This "catch me if you can" interpretation of the DMCA was not at all what the Congress had in mind. We would go further and suggest that not only was it not what the Congress had in mind, it also wasn't what the participants in the discussions and negotiations and drafting of the statute had in mind, either.

A review of the history suggests that the true purpose of the DMCA notice and takedown procedure was to provide a *little* latitude to reasonable actors acting reasonably. There is nothing—*nothing*—in the legislative history that suggested that key legislative leaders were ever thinking that any one company would receive a million notices in a year, *much less a million notices in a week, week after week after week.* (Google recently announced that it receives a million notices a week *for search alone*.) [Editor's note: Since we first published this post in 2012, Google now receives more like ***FIVE*** MILLION NOTICES A WEEK!]

What is in the history is that the purpose of the DMCA was to provide a relatively low cost alternative to litigation for both creators and Internet companies when creators spot an

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unauthorized use of their work which should be a rare occurrence—and we think *should* be accorded a little latitude if reasonable people are acting reasonably. That's what a safe harbor is for—and the DMCA was intended to create a safe harbor, not a loophole.

There is also a threshold qualification to getting the safe harbor in the first place: The site operators shouldn't actually know or have reason to know that there is infringement occurring on their premises. If they find that some users are repeat infringers, the site needs to take them off. Sounds fair, right?

Actual knowledge is the kind of thing that was documented in the *Viacom v. YouTube* and Isohunt discovery. Having reason to know is called "red flag" knowledge, that you have so many indications that infringement is going on that it's like someone is waiving a red flag in your face that anyone could see. Like if you got a million notices a week that infringing was going on.

Another problem is that we have heard that some companies take the position that in countries where there is no safe harbor, they "deem" US law to apply. Aside from the obvious cultural arrogance, if you ask the local courts and lawmakers, we seriously doubt they would be so accepting of US law, so let's not deem that US law applies. Also known as "pretending" that US law applies.

With this in mind, here are five things that could be done today to preserve the good in the DMCA without having to open up the legislation in a negotiation between artists and Big Tech—a process we think would lead to an extraordinarily mismatched negotiation given the tens—soon to be hundreds--of millions that Big Tech is spending on lobbying in the US alone. These would apply as appropriate to any of the various companies that take advantage of the DMCA safe harbors.

1. Stop Playing Games with Red Flag Knowledge: If you receive a million DMCA notices a week, you look pretty stupid if you deny you have actual knowledge, and you seem incapable of sequential thought if you deny you have red flag knowledge that infringing is occurring. A more plausible explanation of this extraordinary burden that such a system places on the economy is that the system is defective, like an exploding gas tank.

Just like a car with an exploding gas tank, the car may do a lot of good and may be useful to consumers. But not with that gas tank. That gas tank has to go. And one reason it has to go is that the car with the exploding gas tank creates an unacceptable level of risk and harm to innocent people who randomly come in its path.

What search companies should do when they consistently receive thousands of notices for a particular site is block that site from search results, not just push them down in search results and continue referring customers to them. The burden would then shift to that blocked site to prove that all those millions of DMCA notices were wrong—even though Google has acknowledged that 97% are accurate.

The reality is that these sites will slither off into the Internet to find something else to do.

2. Block the File, not the Link to the File: The point of the DMCA was to stop the infringement, that is, block the infringing material, not to stop one link to the infringement. It has been interpreted by many, if not all, offending sites or search engines to require a link by link notice, or to require that artists litigate each link to a final nonappealable judgment before the link can be disabled, much less the file can be deleted.

This is a ridiculous interpretation of the law and is solely designed to allow the site to profit from infringement for as long as possible in the hopes that the less-well heeled will simply give up.

Google is particularly well-suited to discover blocked files due to its ContentID system on YouTube. This is not a burdensome task.

3. Don't Treat Sites that Haven't Registered a DMCA Agent as Though They are Entitled to the Safe Harbor: You don't get DMCA protection if you haven't registered a DMCA agent with the Copyright Office. This costs about $150. Other countries have similar laws. Don't act as if a site that hasn't even registered an agent (as a threshold step to claiming the safe harbor) is the same as one that has. If search engines and ISPs act as if sites like Hotfile are entitled to the safe harbor without going through the required steps, this only protects the bad guys and trivializes the proper safe harbor protection for legitimate actors (like those same search engines and ISPs).

4. Don't Support Automatic Reposting: Don't support automatic reposting of links you disabled under a DMCA notice. This turns the entire process on its head because as soon as an artist goes through the expense of taking down an infringing link, the web site allows the link to be reposted automatically and then requires the artist to send the notice all over again. This is not only outside the intent of the law, it is sadistic. Another reason why major offenders need to be blocked from search results by search engines that want to be in the business mainstream.

5. Issue Google-Style Public Transparency Reports: Google's "transparency report" is commendable and provides useful information as far as it goes. Note that the millions of notices Google reports it has received are just from the "premium" web tools it provides to heavy users. Imagine what the numbers would look like if it included notices that were sent manually and included all Google properties.

If each major search engine prepared these public transparency reports, it would be possible to prepare a list of websites that were major offenders based on the number of accurate DMCA notices received. That way, the Department of Justice could have better information on which to determine where to allocate its prosecutorial resources.

Since Google is so interested in letting the world know about the DMCA notices it receives by releasing them through Chilling Effects, surely Google will not object to organizing this part of the world's information as well.