



American Intellectual Property Law Association

February 21, 2017

Karyn A. Temple Claggett
Acting Register of Copyrights
U.S. Copyright Office
101 Independence Avenue, SE
Washington, DC 20559-6000

Re: Comments Submitted Pursuant to Request for Additional Comments Regarding Section 512 Study, 81 Fed. Reg. 78,636 (Nov. 8, 2016); Request for Comments Regarding Section 512 of the Digital Millennium Copyright Act, 80 Fed. Reg. 81,862 (Dec. 31, 2015)

Dear Acting Register Temple Claggett:

The American Intellectual Property Law Association (AIPLA) is pleased to offer comments in response to the above-referenced U.S. Copyright Office Notices of Inquiry, and specifically in response to the recent Request for Additional Comments regarding Section 512 of the Digital Millennium Copyright Act (DMCA).

AIPLA is a national bar association of approximately 14,000 members who are primarily lawyers engaged in private or corporate practice, government service, and the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping to establish and maintain fair and effective laws and policies that stimulate and reward invention and authorship while balancing the public's interest in healthy competition, reasonable costs, and basic fairness.

Section 512 of the DMCA is a staple of the digital copyright marketplace.¹ It is a system of takedown provisions and safe harbor protections designed to spur innovation on the Internet while protecting copyrights in an online environment. Although the mechanisms of Section 512 are used now more than ever, many stakeholders believe the system can be improved substantially, and in a variety of ways that reflect the “great diversity among the categories of content creators and ISPs who comprise the Internet ecosystem.”²

With that as background, AIPLA offers the following comments:

General Effectiveness of the DMCA System (Question 3)

AIPLA believes that the growth of the digital copyright marketplace, together with its ever-increasing utilization, indicates that Section 512 functions properly to an appreciable extent. Despite the burden of

¹ While it is conventional to refer to Section 512 of Digital Millennium Copyright Act, it was actually Section 202 of that Act which created the codified Section 512 of Title 17.

² 81 Fed. Reg. 78641.

addressing an increasingly high volume of takedown notices, certain Internet Service Providers (ISPs) have found this burden to be manageable under the current regime.³

While AIPLA recognizes that various stakeholders have raised concerns as to the general effectiveness of Section 512, it notes that content creators appear to be significantly less satisfied. There appears to be significant concern over the high volume of takedown notices necessary to address infringement, as well as the need to constantly police infringement and enforce rights without significantly reducing overall access to infringing content. While these problems are particularly acute for smaller content creators, the technology-based searching and takedown mechanisms available to larger organizations may raise other issues, as discussed below.

Nevertheless, AIPLA acknowledges that no one perspective should be the standard for judging Section 512's efficacy, and notes that certain concerns (such as abusive takedown notices) are common to all stakeholders, and encourages an objective analysis.

DMCA's Ability to Deter Infringement (Question 3)

While all stakeholders acknowledge that some amount of infringement is inevitable, it is apparent that the DMCA does not adequately deter infringement. Section 512 seems to have succeeded in allowing online platforms to thrive, but it can be further refined to more effectively deter certain kinds of infringement, such as repeat infringement.

Transparency of the Notice-and-Takedown Process (Question 3)

AIPLA believes that difficulties surrounding an objective evaluation of Section 512 are compounded by a lack of transparency in the process itself. Specifically, detailed information relating to the success, quality, and efficacy of takedown notices, the number of abusive notices as a percentage of total infringement, and other key metrics is limited at best. Absent such information, it is difficult for the Copyright Office to objectively evaluate the views of various stakeholders and reach a true middle ground. While some ISP's have made efforts to increase transparency as to the operability of Section 512,⁴ asymmetry in useful information is likely to persist as long as the process itself remains essentially a series of private arrangements among various stakeholders.

Standardization of Notices and Counter-Notices (Question 4)

AIPLA supports the standardization of notices and counter-notices served in accordance with Section 512. Such standardization is likely to increase the efficiency of a process that many believe could be made more efficient, and the notice-and-takedown process currently varies drastically between ISPs. Such problems are compounded by difficulties in locating ISP and DMCA agent contact information on websites, spam pop-up ads during the notice submission process, and requirements that copyright owners become members of the website before being able to submit a notice.

To increase the efficiency of the notice-and-takedown process, AIPLA recommends that the Office undertake further inquiry to prepare and adopt a standardized notice and make it available on the Copyright Office website. AIPLA further recommends that this study address whether a centralized recordation of takedown notices by the Copyright Office could benefit the operability of Section 512 and/or allow the Office to better assess its functionality in the future.

³ 81 Fed. Reg. 78638.

⁴ <https://www.google.com/transparencyreport/>

Publication of Circular Regarding DMCA Safe-Harbor (Question 9)

AIPLA supports the publication of a Copyright Office Circular that provides guidance on Section 512 and its various provisions based on case law and data collected through Copyright Office studies. While AIPLA envisions a Circular that would extend to a host of issues related to Section 512, all of which are deserving of clarification and explanation, the following are important areas for elucidation:

- available technical measures (the publication of which could facilitate future adoption as standardized technical measures); and
- summarize court holdings providing guidance relating to repeat infringer policies with citations to authorities interpreting 512(i).

Automation and Attorney Ethical Obligations (Question 16)

AIPLA notes the potential tension between the increased automation of notice-and-takedown processes and the ethical obligations of attorneys.

To the extent that sending a takedown notice constitutes asserting a claim of infringement,⁵ attorney review or supervision also may be appropriate to comply with the statutory requirement that each notice include a “statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.”⁶ *See Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1153 (9th Cir.) (2016), *cert. pending*, No. 16-217 (Sup. Ct.) (holding that “because 17 U.S.C. § 107 created a type of non-infringing use, fair use is ‘authorized by the law’ and a copyright holder must consider the existence of fair use before sending a takedown notification under § 512(c).”). Similarly, ISPs’ use of automation to disable content must also comply with the obligation of good faith in order to qualify for limitations on liability under Section 512.⁷

While automation may allow stakeholders to more effectively manage increased volumes of infringement, there is evidence that such automation has not been entirely free of errors.⁸ Due consideration should be given to the necessity, nature and basis of automated systems and whether such systems and algorithms are capable of forming the “good faith” beliefs required throughout Section 512 without attorney review.

AIPLA recommends that the Office study these issues and consider working with stakeholders to develop “best practices” for automated systems, to help parties ensure that any takedown notices generated by such systems are rooted in “good faith” beliefs as required under Section 512.

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⁵ 17 U.S.C. § 512(3)(A), and 3(A)(ii) and (iii).

⁶ 17 U.S.C. § 512(c)(3)(A)(v).

⁸ Jonathan Bailey, Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 2 (Feb. 16, 2016) (“With this automation has come increased mistakes. Machines are simply not as good at detecting infringement and fair use issues as humans.”).

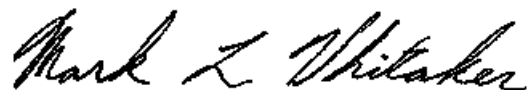
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AIPLA will continue to monitor developments regarding Section 512 and welcomes the opportunity to provide Congress and the Copyright Office with any assistance and comments on the issue in the future.

Respectfully submitted,

A handwritten signature in black ink that reads "Mark L. Whitaker". The signature is written in a cursive style with a large, stylized initial "M".

Mark L. Whitaker

AIPLA President