mozilla

February 21, 2017

Ms. Karyn Temple Claggett, Acting Register of Copyrights
United States Copyright Office,
101 Independence Avenue S.E.,
Washington, D.C. 20559

RE: Section 512 Study, Request for Additional Comments, FR Doc. 2016-26904

Dear Ms. Temple Claggett,

Thank you for the opportunity to submit additional comments on the Copyright Office's section 512 study. Mozilla's mission as a non-profit organization is to promote openness, innovation, and opportunity online. As a core principle, we believe that the open Internet, as the most significant social and technological medium of our time, is an invaluable public resource that must be protected. It is from this perspective that we offer our comments.

Characteristics of the Current Internet Ecosystem

1. [T]here is great diversity among the categories of content creators and ISPs who comprise the Internet ecosystem. How should any improvements in the DMCA safe harbor system account for these differences? For example, should any potential new measures, such as filtering or stay-down, relate to the size of the ISP or volume of online material hosted by it? If so, how? Should efforts to improve the accuracy of notices and counter-notices take into account differences between individual senders and automated systems? If so, how?

Any change to the notice and counter-notice system *must* take into account differences between the participation of individuals and automated systems. In practice, responders are almost always individuals, but senders can be either. When one or more automated senders come up against an individual responder, there is an asymmetry of human effort which means that the responder can be overwhelmed, whatever the merits of their case. A different kind of asymmetry also exists when a more well-resourced entity is abusing the notice and counter-notice system to target a smaller competitor or critic, effectively imposing a burdensome transactional cost on their commercial or artistic activity. In both cases, the asymmetry is to the benefit of the notice sender, and against the respondent.

This asymmetry should be rectified by having penalties for improper notices strengthened (see below), and structuring such penalties in a way which takes these dynamics into account. That would include penalizing those who appear to be intentionally abusing the system to levy costs

on their market or political opponents, as well as those who are using automated systems that are poorly tuned and thus generating excessive erroneous notices of infringement. Certainly the precise thresholds for such a penalty scheme would need to take into account the volume of filings made as well as whether individual senders, automated systems, or a combination are being used, with those filing a higher volume of notices being held to particularly exacting standards of accuracy and completeness.

2. Several commenters noted the importance of taking into account the perspectives and interests of individual Internet users when considering any changes to the operation of the DMCA safe harbors. Are there specific issues for which it is particularly important to consult with or take into account the perspective of individual users and the general public? What are their interests, and how should these interests be factored into the operation of section 512?

The age of media consumed primarily via broadcast is fading, and the public today does not just read, watch or hear, but regularly interacts with, comments on, excerpts, remixes and transforms the content that they encounter in life and on the internet.

So, members of the general public in 2016 are not solely consumers, but are creators - ones for whom the copyright on their creative inputs is as important as, or more so than, the copyright on their creative outputs. Most of these creators are not attempting to make money from their creations. However, if their work is suppressed unduly due to a copyright claim related to one of their creative inputs, that is of great relevance to them, as they are no longer able to share their work with other members of the public. And such an event should also be of great relevance to the Copyright Office, if their work took advantage of a lawful exception but was nevertheless suppressed (temporarily or permanently) by a DMCA notice or other tool of law or technology.

The “general public” thus has twin interests, in consuming and in creating. As the publishing industry will correctly point out, they wish to see high quality content produced that they can experience. But they also wish not to be fettered in their ability to deal with that content to the maximum extent that fair use and other copyright exceptions allow. The great risk of tinkering with the safe harbor setup today is interfering with the fulfillment of that second public interest. In contrast, recognizing and protecting that interest creates the greatest opportunity for positive policy change. Creating space for proper fair use of a work can benefit all parties - the increased publicity may improve awareness and sales of the original.

Operation of the Current DMCA Safe Harbor System

3. Participants expressed widely divergent views on the overall effectiveness of the DMCA safe harbor system. How should the divergence in views be considered by policy makers? Is there a neutral way to measure how effective the DMCA safe harbor regime has been in

achieving Congress' twin goals of supporting the growth of the Internet while addressing the problem of online piracy?

Measuring the success of Congress in achieving the first goal mentioned has a significantly different level of difficulty to measuring the second. No one can seriously dispute that the internet has grown, but finding good metrics for piracy and translating them to reasonable measures of economic harm is problematic.

One commonly-made but fallacious assumption is that every illegally-acquired copy of a work represents a lost sale at full value. Not only does this assumption not take into account streaming services and their different economic model, but it also fails to take into account those users who would opt not to spend any money and not experience the content if that were the only alternative. Certainly some unlicensed copies of content are substitutes for sales, and certainly there is some economic harm in the unlicensed transfers. But that harm must be appropriately quantified, not hidden behind dramatic rhetoric of "theft" and "piracy". Changes in consumption patterns (the rise of streaming, for example) also make comparisons over time difficult. We do not claim to know the 'neutral' way of properly making such assessments, but wish to warn against extreme interpretations of the figures which inflate losses in order to bolster arguments for change which tips the balance of the system away from the legitimate public interest.

We also suggest that "supporting the growth of the internet" is not the only positive goal Congress has in this area, but that they also have an interest in promoting technology innovation. Strong, consistent and reliable safe harbors underpin this by providing certainty to businesses who deal with content on behalf of the public.

5. A number of study participants identified the timelines under the DMCA as a potential area in need of reform. Some commenters expressed the view that the process for restoring access to material that was the subject of a takedown notice takes too long, noting that the material for which a counter-notice is sent can ultimately be inaccessible for weeks or months before access is restored. Other commenters expressed the view that the timeframe for restoring access to content is too short, and that ten days is not enough time for a copyright holder to prepare and file litigation following receipt of a counter-notice. Are changes to the section 512 timeline needed? If so, what timeframes for each stage of the process would best facilitate the dual goals of encouraging online speech while protecting copyright holders from widespread online piracy?

As the question suggests, senders and recipients of notices have diametrically opposed desires relating to the timeline. Any simple adjustment in the number of days will advantage one and disadvantage the other.

One way to cut this Gordian knot might be to introduce a presumption of innocence for recipients who have already successfully challenged more than a certain number of notices on a particular platform. Sections 512(g)(2) requires that content be kept down for at least 10 business days, even if a counter-notification is filed immediately. In doing this, it assumes the *prima facie* validity of the takedown request in all circumstances. Altering this presumption in some cases may provide a way to improve the situation of everyone.

The group who are most unfairly disadvantaged by the inaccessibility of their content are those who regularly attempt to take advantage of their fair use rights, perhaps as part of a business or a hobby. Such people can find themselves in receipt of a large number of DMCA notices, and have to take the time and effort to challenge each one. If their understanding of fair use is correct, their challenges will be successful - but in the interim, their content has been inaccessible, and their production costs have skyrocketed.

So we propose that, after a defined number of successful counter-notices, platforms might be empowered to offer notice recipients the presumption of innocence - that is, to permit their content to remain accessible while the notice process works itself out. At the moment, platforms are not able to do this without losing their liability protection, which they are reluctant to do because it effectively makes them a risk partner in the recipient's enterprise. So a change is needed to introduce this reform.

This would have the secondary, desirable effect of causing notice senders to refrain from sending notices that they are not willing to back up with a court filing - because if such notices are challenged and proceedings are not filed, the recipient would get closer to the presumption of innocence threshold. Combined with increased penalties for false notices, that should lead to a significant reduction in system abuse.

7. Some participants recommended that the penalties under section 512 for filing false or abusive notices or counter-notices be strengthened. How could such penalties be strengthened? Would the benefits of such a change outweigh the risk of dissuading notices or counter-notices that might be socially beneficial?

Mozilla provided specific practical suggestions on how to strengthen the penalties in our response to question 12 of the initial consultation. To recap from our earlier finding: there is an asymmetry between the low-cost-per-notice automated systems copyright owners may use to trigger substantial fixed damages, and the extensive and expensive legal challenges recipients must employ to reap only the most uncertain of reward - actual damages, which must be proven. Changing either side of the imbalance would address this concern. Given relevant international treaties, it seems more feasible to impose statutory damages as a penalty for abusive notices than to modify infringement to trigger only actual damages.

Specifically, in our filing, we proposed a system where there are two possible paths for rightsholders:

1. To seek and receive a judicial decision that the act of posting is in fact infringing in context; or
2. To submit a compliant DMCA notice, as now, but a) assert under penalty of perjury that the information in the notice is accurate (as opposed to penalty of perjury applying solely to the authority of the complaining party to act), and b) face statutory damages if the notice is later determined to be unfounded and an abuse of the process.

By ensuring that notices are filed on the basis of accurate information (for which there is no validation step in current rules), the Copyright Office can target false and abusive notices specifically, with minimal impact on legitimate and socially beneficial action.

Potential Future Evolution of the DMCA Safe Harbor System

10. How can the adoption of additional voluntary measures be encouraged or incentivized? What role, if any, should government play in the development and implementation of future voluntary measures?

Often, voluntary measures designed and adopted by an intermediary can generate scalable solutions with meaningful impact to the benefit of most or all parties involved. Certainly, it's understandable that government should seek to encourage good outcomes as a result of voluntary measures. However, the more government attempts to encourage or incentivize measures, the less voluntary they become in practice. Yet their ostensible voluntary nature means they were not developed through open and participatory policy processes, and that the public may have had no opportunity (and certainly not equal opportunity) to engage. All too easily, the outcome becomes harmful to the public interest, rather than beneficial.

This dynamic is particularly striking where "voluntary" measures are adopted and encouraged because their functionality is desired by some parties, but does not serve the general public interest and thus cannot be adopted by official government policy processes. Government endorsement, encouragement, or incentive must not be allowed to turn a "voluntary" measure into an involuntary one in practice. And in particular, mandating or "encouraging" technology which blocks content would lead to significant harms, as we noted in our previous engagements in this proceeding and as we outline in our next answer.

11. Several study participants pointed out that, since passage of the DMCA, no standard technical measures have been adopted pursuant to section 512(i). Should industry-wide or sub-industry-specific standard technical measures be adopted? If so, is there a role for

government to help encourage the adoption of standard technical measures? Is legislative or other change required?

Mozilla has a general position of support for technical standards which are openly and collaboratively developed and which are implementable by all without fee or other discrimination, and are very happy to engage in dialogue about potential standards of this type. However, we would suggest that in this case no such measure has been created because a technical measure that fits the criteria in 512(i) would not be useful in practice. 512(i) talks about measures used "to identify or protect copyrighted works". Proprietary technologies do exist that find matches between works in a library and works in another corpus, which are often used to identify copies of copyrighted works from the library which are present in a body of uploaded content. However, mandates to implement such a technology would cause significant harm, for two reasons.

Firstly, such systems, even at their current level of sophistication, are not easy to engineer, and require continuous maintenance and improvement to remain effective. As far as we are aware, the system owned by one major content hosting company cost tens of millions of dollars to develop, and occupies dozens of engineers. If creating such a system becomes a prerequisite to entering the market, that would be a significant barrier to entry to new competitors who wish to take on the current major players. Obtaining a system from elsewhere might also be difficult, as the current systems tend to be the property of existing players - i.e. one's competitors.

Secondly, *the posting of a copyrighted work, or a part of it, is not per se an infringing act, and so a positive result from such a system is not conclusive proof of an illegal action.* This point seems to be regularly overlooked in discussions of the problems of unauthorized content, and so requires great emphasis. There is no such thing as "infringing content" - only content *in a context* is or can be infringing, and automated systems are not good at assessing context or fair use criteria, because such criteria are subjective. Fully-automatic blocking will continue to produce both false positives and false negatives - but with asymmetrical scale and impact as, for a system whose content matching algorithms were "good", only a small fraction of copyright-infringing acts would not be caught yet a large fraction of fair-use-protected activities that lawfully incorporate copyright-protected works would be.

Before any protected activity can be prohibited outright through technology or law, it is imperative that a human being with an understanding of fair use review its outputs before confirming that they believe infringement is occurring, and that the human being take responsibility for that belief.

12. Several study participants have proposed some version of a notice-and-stay-down system. Is such a system advisable? Please describe in specific detail how such a system

should operate, and include potential legislative language, if appropriate. If it is not advisable, what particular problems would such a system impose? Are there ways to mitigate or avoid those problems? What implications, if any, would such as system have for future online innovation and content creation?

We believe that a so-called 'notice-and-staydown' system is not advisable except perhaps in extremely limited circumstances.

Any form of notice-and-staydown would hinge on the notion of the "reappearance" of a piece of content on a service - which is, in practice, a complex notion. It could be narrow, focused on the reappearance of an entire specific work after takedown by the same person, or it could be broader, encompassing re-posting of pieces of the work by others. With a narrow definition, the notice-and-takedown process remains sufficient as a baseline, and any additional automated mechanisms or policies that are tied specifically to the content at issue run the risk of preventing licensed subsequent actions by the same user. Adopting notice-and-staydown with broader definition would lead to particularly poor policy outcomes, as a subsequent upload may be authorized by a license, or may constitute a fair use (e.g. reviewing the content or parodying it). This would undermine fair use and other permissible activity under copyright law. Any form of "notice-and-staydown" functions essentially as a permanent injunction, and will prevent some activity that copyright law permits, with significant risk of broad scale socioeconomic harm. Such harms would be particularly clearly seen in the extreme form of notice-and-staydown which involves a copyright holder submitting a work to a platform with a request that they never permit any part of this work to appear anywhere on that platform. Such a request, if honored, would inevitably squash the exercise of legitimate fair use rights.

We are very grateful to the Copyright Office for the opportunity to comment further on section 512. We hope that our additional comments prove helpful in reforming this section to further promote openness, innovation, creativity and opportunity online.

Respectfully submitted,

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Mozilla