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The Copyright 'Notice and Takedown' System Needs Modernizing

by

Randolph May* and Seth Cooper**

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Google, Facebook and other popular Internet platforms generate multibillions of dollars in revenues from ads they run with user-uploaded media content. Yet those lucrative Internet platforms can avoid legal responsibility by looking the other way when users post movies, music and other content that infringe copyrights on their websites.

It's time for Congress to modernize the so-called notice and takedown system for removing copyright-infringing works by making online websites more responsible for the infringement that occurs on their sites.

On Feb. 11, the Senate Subcommittee on Intellectual Property held the first of a planned series of hearings this year to review the Digital Millennium Copyright Act of 1998 (DMCA). The DMCA contains the notice and takedown system that was intended by Congress as a means of removing copyright-infringing content from the Internet. Online platforms that respond to takedown requests from copyright owners and expeditiously remove infringing content receive a "safe harbor" from liability for claimed infringement.

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

But as several witnesses at the Senate hearing testified, the DMCA is technologically out of date. The law was geared to the low-volume, slow-speed, dial-up Internet era, when user-upload sites like YouTube and Facebook didn't exist. The DMCA predated the high-traffic, fast-speed Internet era of peer-to-peer networks and popular streaming services. Today, an online platform like YouTube may receive hundreds or even thousands of takedown notices regarding a single copyrighted movie posted on its site because as soon as the admittedly infringing work is taken down it reappears.

Witnesses also identified court decisions that have interpreted the DMCA in ways that give undeservedly broad immunity to online platforms that host infringing content. Under those decisions, an online platform's general awareness of certain infringing music or movie content on its site is insufficient to trigger a duty to expeditiously locate and remove such content. Instead, copyright owners must show that the online platform has specific knowledge about a specific copyright work on a specific web page. An online platform may be more likely to avoid legal responsibility by remaining determinedly oblivious to infringing activity on its site.

As a result of these developments since the DMCA's adoption in 1998, the notice and takedown system is now overburdened with takedown requests, and it is largely ineffective at stemming copyright infringement. While user-upload platforms generate billions in ad revenues tied to page views of both lawful and infringing content, copyright owners lose hundreds of millions of dollars annually as result of online infringement.

In our new book, "Modernizing Copyright Law for the Digital Age: Constitutional Foundations for Reform," we call on Congress to give the DMCA a 21st century update. The law's basic policy of providing immunity for online platforms in exchange for expeditious removal infringing content should be retained. But the implementation of that policy should be reworked to better protect copyright owners in today's digital age.

As we explain in our book, an online platform seeking a safe harbor from liability should be required to assume greater responsibility when it actively performs content editing and publishing functions. Thus, an online platform service that proactively seeks viewers by curating content based on perceived interest should have a heightened duty to remove expeditiously infringing content that is made accessible on its website. In other words, if an online platform spotlights infringing content in order to drive viewership and corresponding ad revenues, it should not be able to easily avoid legal liability by claiming it lacked knowledge that the specific infringing content resided on its site.

Furthermore, once an online platform like YouTube receives a takedown notice from a copyright owner containing a representative list of web pages containing infringing copies of a creative work, the service should have a heightened duty to remove expeditiously all reasonably ascertainable pages containing that infringing content. In such circumstances, the online platform seeking to avail itself of legal immunity also should be required to act proactively take down new postings of the very same infringing content.

The Senate Intellectual Property Subcommittee's DMCA review is a welcome opportunity for considering legislation that increases online platform accountability and that begins to curb widespread mass infringement.

Congress also should pass the Copyright Alternative in Small-Claims Enforcement Act (CASE Act). It would provide copyright owners of modest means a less expensive, voluntary venue to bring online infringement claims for damages less than \$30,000. The CASE Act passed the House of Representatives in October 2019 and is pending Senate action.

The status quo embedded in the Digital Millennium Copyright Act of 1998 is inflicting substantial losses on copyright owners. The law's grant of immunity for expeditious removal of copyright-infringing content needs to be modernized to comport with today's digital realities. A fundamental principle compels reform: Securing copyrights is an obligation included in the U.S. Constitution of 1789. Despite changes in technology and the marketplace, Congress remains no less obligated to fulfill this constitutional obligation in 2020 and beyond.

- Randolph May is President and Seth Cooper is Director of Policy Studies and a Senior Fellow of the Free State Foundation, an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland. *The Copyright 'Notice and Takedown' System Needs Modernizing* was published in *The Washington Times* on March 10, 2020.