

IN THE MATTER OF SECTION 512 STUDY: NOTICE AND REQUEST FOR PUBLIC COMMENT

DOCKET NO. 2015-7

COMMENTS OF

ETSY, FOURSQUARE, KICKSTARTER, MAKERBOT, MEETUP, SHAPEWAYS, AND STRATASYS

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Introduction

Commenters are online service providers (OSPs) that connect millions of creators, designers, organizers, and small business owners to each other, to their customers, and to the world. OSPs are a critical platform for free speech and economic activity that empower individuals and small businesses to easily post content online and connect to a global audience. Commenters appreciate the opportunity to participate in this proceeding.

OSPs' key role in the online ecosystem derives in part from their mass accessibility. OSPs empower millions of users to create and publish content with a low barrier to entry. Before OSPs existed, people needed considerable resources to widely disseminate their content. Today, user-generated content reaches a global audience after simply accepting an OSP's terms of use.

However, with this mass accessibility comes a potential conflict affecting the free flow of ideas, the dissemination of innovation, and small business-fueled economic growth. When OSPs are exposed to liability for the content generated by their users, it restricts the OSPs' ability to support the freewheeling communities that have been the basis for so much economic, cultural, and political activity.

Congress has recognized this risk to OSPs and partially addressed it by passing laws such as Section 230 of the Communications Decency Act (CDA) and the online safe harbors of the Digital Millennium Copyright Act (DMCA), the subject of this proceeding. In the specific context of copyright, Congress wisely refrained from requiring OSPs to analyze every file posted by a user for potential copyright infringement. This decision protects the benefits provided by OSPs by limiting disputes to the parties most directly involved: the purported rightsholder bringing the complaint and the user alleged to have uploaded the work in dispute. This encourages disputes between parties to be resolved directly without involving the OSPs that simply provide a platform for the content in question and allows OSPs to continue to operate as platforms empowering individuals to connect with the internet.

While the practical implementation and use of copyright safe harbors have raised a number of important questions, Commenters focus this comment on a specific development that is distorting the notice and takedown process designed by Congress. The increasingly common practice of combining allegations of trademark infringement with Section 512 copyright infringement notices effectively transforms a notice and counter notice process into a notice and stay down process. Holistic review of the current state of the Section 512 safe harbors would be incomplete without considering the impact that these combined notices have on its real world operation.

Commenters

Etsy is an online marketplace where people around the world connect to make, sell, and buy unique goods. Etsy's mission is to reimagine commerce in ways that build a more fulfilling and lasting world.

Foursquare creates technology to help people explore the world and provides a wide range of location products and services to businesses.

Kickstarter is the world's leading funding community for creative projects – everything from films, games, restaurants, and music to art, design, and technology. Since launching in 2009, over 9.5 million people have pledged nearly \$2 billion to projects on Kickstarter, successfully funding 95,000 creative ideas.

MakerBot believes there's an innovator in everyone, and sets the standard in reliability and ease of use. As a global leader in the desktop 3D printing industry, MakerBot offers a set of solutions that illuminate and guide every stage of the 3D printing process, making it easy to go from idea to end result. Founded in 2009, MakerBot has one of the largest install bases in the desktop 3d printing industry. MakerBot also runs Thingiverse, the largest 3D design community in the world. The company's industry-leading customers include designers, educators, engineers, and consumers.

Meetup is the world's largest network of local community groups, enabling people to connect with others online and engage in activities offline.

Shapeways is the world's leading 3D printing marketplace. Designers can 3D print their designs and open shops offering their custom 3D printed objects to the public.

Stratasys, Inc. has been at the forefront of 3D printing innovation for more than 25 years. It is trusted worldwide by leading manufacturers and groundbreaking designers, makers, thinkers and doers. As a proud innovation partner, Stratasys offers the best mix of technologies and deep industry expertise. Stratasys, Inc. is the owner of the GrabCAD Community, which helps designers and engineers accelerate the design process by tapping into one of the largest sources of mechanical engineering content and knowledge in the world.

The Importance of Safe Harbors

It would be hard to overstate the importance of the safe harbor protections established by Section 512 in the development of online platforms such as those of Commenters. Commenters allow third parties from around the world to post a boggling diversity of content online. The Section 512 safe harbors allow Commenters to invest in improving and supporting their businesses without fear that a single infringing upload could result in debilitating copyright litigation.

The safe harbors also give users the opportunity to dispute claims by overly aggressive rightsholders. The notice/counter notice process allows users to push back against infringement claims they feel are unwarranted without needing to first convince the OSP to join in the challenge. Just as the safe harbor is key to the development of OSPs, the counter notice process gives individuals a powerful tool to protect their own rights.

However, Commenters increasingly receive infringement allegations that combine copyright and trademark claims in a single takedown request. Intentional or not, including trademark claims in such requests can have the effect of removing the Section 512 safe harbor protections and the counter notice provision from the equation, because there are no safe harbor protections for OSPs in the realm of

trademark law. As a result, the protections and balance established by Congress are rendered unavailable to rightsholders, OSPs, and end users alike. A carefully balanced notice and takedown process becomes a much less even playing field if rightsholders can eliminate an OSP's safe harbor protections by simply mentioning trademark infringement in a request.

Examples of Trademark Abuse

It may be helpful to highlight the direct impact that trademark abuse has on content creators. Examples of such abuse occasionally appear in the media. A political action committee supporting the candidacy of Hillary Clinton issued takedown requests targeting parodies of its logo.¹ The basis of the requests involved an unclear mix of copyright and trademark law. On the other side of the aisle, Republican presidential candidate Ben Carson sent takedown requests regarding the use of Carson's name on merchandise referring to his candidacy.² As with the Clinton-related issue, the Carson takedown request was grounded in a seemingly indiscriminate grab bag of intellectual property claims including trademark and copyright.

Examples happen outside of the political realm as well. As Commenter Etsy documented in its 2014 transparency report, trademark-related takedown notices and combination takedown notices outnumber pure copyright-related takedown notices.³ Commenter Etsy has received trademark notices, or combination copyright and trademark infringement notices involving the following examples: A graphic designer uses the trademarked name of a television show to describe custom invitations for a viewing party. An artist creates a humorous oil painting of a popular copyrighted cartoon character and uses its registered trademark name in the work's title. A small business owner repurposes food packaging into purses, glues building blocks into earrings, and cuts liquor bottles into cups. Each of these examples has potential defenses to infringement allegations. However, due to a lack of trademark safe harbors, OSPs are not able to institute a counter notice policy for infringement claims that are not exclusively copyright claims. Therefore, the users targeted by these takedown requests do not have the opportunity to challenge the allegation by filing a counter notice to fight to keep their work online. Additionally, reposting or replacing the content could lead to additional trademark/trademark-copyright combination takedown notices, which could lead to termination of the user's account due to the statutory requirement for OSPs to refuse service to repeat copyright infringers.

¹ Mike Masnick, *Hillary Clinton PAC Sends Bogus Takedown Over Parodies On Zazzle and CafePress*, TechDirt (June 10, 2014) <https://www.techdirt.com/articles/20140609/17534527530/hillary-clinton-pac-sends-bogus-takedowns-over-parodies-zazzle-cafepress.shtml>.

² Mike Masnick, *Ben Carson's Lawyer Threatens CafePress Because Ben Carson Supporters Are Creating T-Shirts Supporting Carson* (September 17, 2015) <https://www.techdirt.com/articles/20150917/11350332285/ben-carsons-lawyer-threatens-cafeexpress-because-ben-carson-supporters-are-creating-t-shirts-supporting-carson.shtml>

³ http://blog.etsy.com/news/files/2015/07/Etsy_TransparencyReport_2014.pdf

Similarly, commenter Shapeways has detailed that over 76% of the copyright takedowns it receives are paired with trademark complaints.⁴ Shapeways does not generally accept counter notices in response to infringement notices that include non-copyright claims, as there are no safe harbor protections for OSPs in the realm of trademark law. This means that the majority of Shapeways users targeted by copyright takedown requests are unable to respond with a counter notice within the system established by Section 512.

Impact of Allegations of Trademark Infringement on Safe Harbors and Users

While OSPs are protected by safe harbors when users submit DMCA counter notices, many OSPs are wary of allowing challenges to trademark-related takedown requests in order to avoid being drawn into costly litigation. The result is that a trademark claim – even one built on a weak foundation – can effectively and permanently quash the speech and economic activity of others. This type of unchecked ability to remove content from the internet was precisely what Congress intended to avoid in establishing the Section 512 safe harbors.

Rightsholders have little incentive to respond to or even acknowledge users who dispute an infringement claim outside of a statutory safe harbor. While Section 512's counter notice provision allows a user to repost the content if the rightsholder fails to seek a court order against the user within a period of time – which often incents the parties to resolve the issue without getting the courts involved – rightsholders can simply file repeat notices of combination trademark-copyright infringement against users who dare to repost the content at issue. This puts pressure on OSPs to terminate services to users lest the rightsholder sue the OSPs for not implementing a reasonable repeat infringer policy.

OSPs often receive such a high volume of infringement complaints that they must make quick decisions based on limited information in the best interest of the company. Many OSPs are not equipped to conduct extensive research or make complex legal decisions for a David user against the Goliath rightsholder. Simply put, especially in edge cases, OSPs often err on the side of removing content. Combined with the lack of opportunity for a user to challenge content removed due to trademark claims, the balance tips heavily in favor of purported rightsholders. Pairing a copyright infringement claim – regardless of its validity – with a spurious trademark claim can upend the viability of the small businesses and individual speakers who rely on OSPs. A claim can force the targeted user to discontinue creating products or speaking in a manner that is perfectly legal, or even beneficial, to society as a whole.

Further, these assertions of rights can have the long-term impact of undermining public respect for and confidence in intellectual property enforcement by driving attention to stories of abusive and absurd actions by irresponsible rightsholders, powerless users, and risk-averse OSPs. Ironically, users can easily

⁴ <https://www.shapeways.com/legal/transparency/2015>

disseminate their poor experiences by broadcasting them all over the internet. Proper enforcement can only occur in an environment of public respect for intellectual property. A steady stream of examples of abuse can reduce the legitimacy of rightsholders as a whole in the eyes of the public, thus reducing public support for enforcement even in legitimate cases of infringement.

Safe Harbors Provide an Effective Check Against Over-Enforcement

As the Copyright Office is well aware, OSP safe harbors help protect against over-enforcement by allowing users to push back against problematic takedown requests. First, users do not need permission or agreement from OSPs protected by safe harbors before challenging an infringement claim viewed as illegitimate. Second, removing the OSP from the decision-making process facilitates user pushback against abusive claims. These challenges can lead to public litigation, bringing edge cases into the public discussion and creating legal precedent.

Key to understanding the value of safe harbors is recognizing the differing viewpoints of OSPs and their users. OSPs – Commenters included – must consider the best interests of their entire user base when evaluating a request to take down an individual item. Within that rubric, it is often rational for OSPs to comply with a marginal, but colorable, request for any individual item to be taken down in order to protect the larger viability of the user base and avoid costly litigation.

This is even truer for smaller OSPs who may be unable to afford legal fees required to consider the merits of the claim. Faced with threats of an expensive lawsuit due to an allegation of infringement, and devoid of the protection granted by a safe harbor, start-ups and small OSPs have more incentive to err on the side of over-accommodation of rightsholders – even at the expense of an users’ free speech and legitimate activity.

Individual users have a significantly different perspective. What is a single piece of content among many for a service provider may be the user’s livelihood. In those cases, the user’s motivation to challenge over-enforcement is much greater than the OSP’s. If OSPs had the security of safe harbor protections for non-copyright claims, OSPs could offer users the ability to push back against rightsholder claims.

A Review of 512 Safe Harbors is Incomplete Without Consideration of the Impact of Trademark Claims

Strictly limiting the scope of this review to copyright disputes creates an incomplete picture of the real world operation of today’s Section 512 notice and takedown process. In addition to pure copyright complaints, the notice and takedown process is significantly impacted by pairing copyright takedown requests with trademark infringement allegations. Such combinations effectively remove the dispute

from the Section 512 process, undermining its utility for all parties involved. Over time, this could relegate the counter notice protections that users currently enjoy to little more than a historical curiosity.

Addressing this problem is not necessarily a straightforward process, and Commenters recognize that a complete solution is likely beyond the scope of this review. Creating appropriate safe harbors relating to trademark would not be as simple as replacing “copyright” with “trademark” in the Digital Millennium Copyright Act safe harbor structure, or adding trademark to the scope of protections included in Section 230 of the Communications Decency Act. In the two decades since the U.S. Government has engaged with a consumer internet, many lessons have been learned about what works – and what does not work – in creating online safe harbors. It would be irresponsible not to apply those lessons to new safe harbors.

That being said, simply ignoring the impact that allegations of trademark infringement have on the current Section 512 process risks failing to appreciate the current nature of infringement notices online. In the experience of Commenters, the inclusion of trademark complaints has led to the exploitation of the limitations of Section 512 safe harbors, as well as the transformation of the interaction between rightsholders, users, and OSPs. Any report on Section 512 that fails to recognize this shift would therefore be incomplete.

Conclusion

Commenters commend the Copyright Office for engaging in this review of the current Section 512 safe harbor. Commenters hope that the Copyright Office will consider the impact of trademark infringement allegations in that review and, if appropriate, make recommendations regarding how to best protect Congressional intent in light of its findings.

Respectfully submitted,

_____/s/_____

Sarah Feingold
Etsy, Inc.
55 Washington St.
Suite 512
Brooklyn, NY 11201

Michal Rosenn
Kickstarter, PBC
58 Kent Street
Brooklyn, NY 11222

Brian Kimmelblatt
MakerBot Industries, LLC
One MetroTech Center
21st floor
Brooklyn, NY 11201

David Pashman
Meetup
632 Broadway
10th floor
New York, NY 10012

Brian Chase
Foursquare Labs, Inc.
568 Broadway
New York, NY 10012

Michael Weinberg
Shapeways
419 Park Ave. South
Suite 900
New York, NY 10016
MWeinberg@Shapeways.com

Gena Chapman
Stratasys, Inc.
7665 Commerce Way
Eden Prairie, MN 55344