

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

DOCKET NO. 2015-7

COMMENTS OF

Kickstarter, Makerbot, Meetup, and Shapeways

February 22, 2017

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 take this opportunity to reiterate the concerns originally raised in comments during the first round of this proceeding (“First Round Comments”).¹ Those comments highlighted the way in which claims of trademark infringement distort the real world application of the safe harbor system established by Section 512. Then, as now, any study of the Section 512 safe harbors is incomplete unless it recognizes the notice and takedown system as it is actually operated by myriad OSPs across the internet.

Commenters also take this opportunity to urge the Copyright Office to recognize the highly variable nature of OSPs in any report on the 512 safe harbor system. While policy discussions are often framed in the context of the largest OSPs, framing solutions exclusively in terms of those OSPs will inevitably harm the richly diverse online ecosystem.

The Impact of Trademark Takedown Requests on the 512 Safe Harbor System

As detailed in the First Round Comments, rightsholders often pair copyright-based takedown requests with accusations of trademark infringement. The practical effect of such a pairing is to remove the dispute from the Section 512 process and prevent the targeted user from challenging the accusation. This fundamentally undermines the balance between rightsholders and users inherent in the design of the Section 512 process.

Although the 512 safe harbor system provides a robust statutory process to protect the rights of both rightsholders and users accused of copyright infringement, no such statutory safe harbor exists for notices of trademark infringement. This lack of a statutory safe harbor means that OSPs may subject themselves to direct trademark infringement liability if they allow a user to challenge a takedown request.

When faced with such potential exposure, in edge cases OSPs will often err on the side of removing content and avoid providing accused users an opportunity to respond to the accusation against them. As a result, most users accused of a combination of both copyright and trademark infringement are not afforded an opportunity to counternotice in reply to an errant accusation. This removes a critical check in the Section 512 system against overly broad or aggressive takedown requests from rightsholders.

¹ <https://www.regulations.gov/document?D=COLC-2015-0013-89509> (“First Round Comments”)

This dynamic undermines the incentives established in the Section 512 system for rightsholders to carefully evaluate accusations before submitting them to OSPs and for both sides of a dispute to resolve the conflict without resorting to the judicial system. It also encourages the drafting of broadly worded takedown requests which vaguely assert that the accused user “is in violation of copyright, trademark, patent, or other intellectual property rights” without specifying which of those rights might be violated by a specific user or listing. While oftentimes combined in good faith, this dynamic allows unscrupulous rightsholders to capitalize on the absence of user protections by intentionally pairing copyright-based claims with trademark-based claims, effectively removing the accusation from the Section 512 system.

Commenters do not suggest that that majority of rightsholders are maliciously or faithlessly combining 512 takedown requests with claims related to trademark. However, Commenters do experience these combinations frequently enough to justify filing this comment and bringing the practice to the Copyright Office’s attention.

Commenters also recognize that trademark is beyond the scope of the Copyright Office’s authority and that trademark alone is beyond the scope of this study. Nonetheless, the practices described in the First Round Comment and reiterated in this comment have such a direct and specific impact on the operation of the Section 512 system that excluding it from this review would fail to take into account the real world operation of the system today.

The Copyright Office Must Account for Differences Between OSPs

Commenters were pleased to see the request for additional comments open with a question recognizing the diversity of OSPs operating under the Section 512 system. As evidenced by both comments in the first round of this study and discussions during the public roundtables, explorations of the Section 512 system are often examined primarily through the lens of experiences related to a handful of large OSPs. Unfortunately, the operational dynamics surrounding the largest OSPs often differ starkly from the vast majority of other OSPs. Focusing exclusively on these large OSPs will inevitably result in policy suggestions that fail to account for how the Section 512 system operates for the vast majority of OSPs.

Commenters themselves vary greatly in terms of size, maturity, the nature of the service offered, and even the types of works protected by copyright uploaded by their users. For all of this variation, the way Commenters interact with the Section 512 system is much more similar to the vast majority of OSPs than the handful of the largest OSPs often used to frame explorations into the workings of the Section 512 system. Most sites, including those of Commenters, do not have large automated systems designed to respond to millions of 512 notices annually that often serve as the starting points for discussions about the operation of the notice and takedown system.

While it can be tempting to structure an inquiry into the Section 512 system around these largest and highest profile of OSPs, both the problems identified and the solutions proposed from such an inquiry would critically distort the Copyright Office's understanding of how the Section 512 system operates for the millions of other sites that rely on the safe harbor to operate. This is especially true because these millions of other sites are unlikely to have the resources or infrastructure to participate in a multi-year inquiry into the Section 512 system itself.

In light of this, Commenters urge the Copyright Office to avoid the temptation to suggest broadly applicable fixes to concerns that apply narrowly to the largest OSPs. The current Section 512 system is flawed, but one of its strengths is that its structure is flexible enough to be implemented by OSPs of wildly varying sizes, sophistication, and technical ability. Establishing benchmarks or enshrining practices related to the largest OSPs would undermine that key to the Section 512 system's success.

Conclusion

Commenters appreciate the Copyright Office's continued attention to the current Section 512 system. Commenters hope that the Copyright Office will consider the distortive effects that accusations of trademark infringement can have on the Section 512 system operation in compiling this study. To the extent that the Copyright Office elects to include recommendations and conclusions in this study, Commenters also hope that the Copyright Office will avoid excessively focusing on challenges that impact a small number of the largest OSPs. This is especially true if such recommendations and conclusions would impose new burdens on all other OSPs.

Respectfully submitted,

_____/s/_____

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