General

One

http://lquilter.net/pubs/UrbanQuilter-2006-DMCA512.pdf

Efficient Process Or "Chilling Effects"? Takedown Notices Under Section 512 Of The Digital Millenium Copyright Act

chilling_effects dmca notice_and_takedown google copyright

This study was conducted in 2006 by Jennifer M. Urban and Lauren Quilter, surveying the effects of Section 512 of the Digital Millennium Copyright Act on the Internet. The two used an empirical approach to look at the situation, and collected data about the number and type of takedown notices that were sent in recent times. Constituting the majority of the data, Google provided all the notices the company had received between 2002 and 2005, with non-trivial supplements coming from the Chilling Effects project. The researchers were careful to point out a variety of issues with the data set, including a potential bias in the Chilling Effect notices, since these were self-reported cases. The Google information also is flawed to a degree, since notices sent to a search engine like Google are not necessarily emblematic of the entire notice and takedown climate. This is displayed by a discrepancy between the data and common perception, with music and movie company accounting for few of the takedown notices, since they find it more useful sending takedown notices to non-search engines. Acknowledging the need for additional data and further research, the study concluded that there a large number of claims had serious substantive questions. While anticipating some notices to be unjustifiable, the finding of a high number of problematic notices was "particularly troubling." The researchers even applied a high threshold of what would be considered questionable, choosing the classify cases where fair use only *could* be a legitimate defense as a proper infringement claim. Even so, enough claims were made without sufficient justification or sometimes without any at all (claims regarding material which are not subject to copyright) for the study to conclude that the "implications for expression on the Internet of this extrajudicial process appear, from our limited data, significant."

The study is going to be very helpful in my paper, since it will be one of the few but important statistical analyses I use. Most of the other works are theoretical expositions by professor and academics citing specific cases and expanding out the reasoning by analogy to apply to more generic cases. However, this study uses nearly 1,000 data points to arrive at significant conclusions that will aid me in my argument. Most importantly, I will reference the high rate of improper claims, representing the low barrier to entry to submit even a fraudulent claim, and it's negative impact on free speech on the internet.

Two

http://www.maximumpc.com/article/columns/copywriting_wrongs

Copywriting Wrongs

diebold copyright notice_and_takedown free_speech Scientology

This article by Quinn Norton offers a criticism of people and organizations who improperly use the notice and takedown system not to primarily protect their intellectual

property, but rather to stifle free speech and bad publicity. The first example cited is the case of Diebold, the infamous maker of electronic voting machines, where internal memorandums acknowledging machine malfunction were leaked onto the internet, contradicting the public statement by the company. Instead of coming clean about the failures and admitting that it had originally mislead, the company tried to eradicate the documents from the internet, covering up the evidence instead of confronting it. Similar anecdotes about Scientology, Jehovah's Witnesses, and radio host Michael Savage all evidence the practice of using the DMCA to silence critics.

Norton's article is important to my paper because of her simple and succinct conclusion that the takedown process is "a weak way to shut people up." Her examples provide relatable, real-world examples about how free speech can be put down via notice and takedown, but it is her overriding message that a perversion of copyright is not an acceptable way to achieve that end is what I take away from the article.

Three

http://dmca.cs.washington.edu/dmca_hotsec08.pdf

Why My Printer Received a DMCA Takedown Notice

dmca notice_and_takedown bittorrent torrent copyright

This paper was written by researchers at the University of Washington, an explores the difficulties associated with monitoring P2P file sharing networks for copyright infringement. Two experiments were conducted, one in August 2007 and a second in May 2008, where researches intentionally implicated their own University controlled IP addresses in BitTorrent activity, but without any uploading or downloading of copyright infringing material. As a result, the researchers received a variety of takedown notices from the music and movie industries, over 400 false positives between the two experiments. Additionally, they were able to maliciously implicate other IP addresses in their experimentation, heavily suggesting that independent third parties without any connection to possible copyright infringing activity could receive takedown notices. They find that indirect monitoring of BitTorrent and other P2P networks, while less costly and resource intensive, is much less accurate than direct monitoring, resulting in the numerous amount of false claims. The current methods used to monitor these networks is highly inconclusive.

This paper is a valuable resource in that it takes no sides in the forthcoming "arms race" between infringers and monitors, but rather surveys the current landscape and makes determinations about the effectiveness of the current strategies. It does not offer an opinion on fair use or protected speech, but it is essential in illustrating how takedown notices and issues without extensive care. To receive a notice when no uploading or downloading of an infringing file has occurred, or even worse when a person is arbitrarily and incorrectly framed for being involved in using Bittorrent, exemplifies the failures of the current system. Anecdotally speaking, the example of the printer receiving a takedown notice for downloading an illegal file is specifically poignant.

Four

http://fepproject.org/policyreports/WillFairUseSurvive.pdf

Will Fair Use Survive?

fair_use dmca notice_and_takedown copyright

This policy paper by the Brennan Center for Justice sought to determine how strong the fair use doctrine remains in the digital age. For the section analyzing the role notice and takedown plays, the catalog of 2004 letters received by Chilling Effects was used as the data set. To determine issues concerning fair use and the First Amendment, a subset of 153 letters was used. The authors mention that it is more likely than not that this data sample under represents possible speech-suppressing efforts because only those knowledgeable enough to submit their letter to Chilling Effects in the first place are included. With this in mind, the complaints were split into cases of strong, reasonable, possible, and weak fair use claims. The results were troubling, with 20% of the claimants having a weak claim to copyright or the alleged infringer having a strong claim to fair use. Another 27% of claims can be added if the standard is lowered to include *possible* fair use defenses. In total, almost one in two takedown notices has the potential of improperly hindering free expression. The paper concludes that censorship power is put "in the hand of the IP owners."

Although a likely assumption, this study demonstrates the correlation between strength of the fair use defense and likelihood that material was removed. Naturally, the most substantive the fair use/First Amendment claim, the more likely the alleged infringing content would remain online. I will possibly use this in support of the idea that the notice and takedown system is not as reckless and arbitrary as some would claim. However, I will also be sure to point out that even in cases of strong fair use, there was a significant occurrence of free-speech suppression, with over 40% of material partially or entirely removed.

Five

http://proxy.library.upenn.edu:2097/stable/pdfplus/3481448.pdf

Notice versus Knowledge under the Digital Millennium Copyright Act's Safe Harbors

dmca copyright notice_and_takedown 512 direct_liability

This article from the California Law Review attempts to highlight the difference between notice and knowledge regarding cases of infringement. When Section 512 of the DMCA was written, Congress intentionally did not make service providers directly liability for infringing material, anticipating that this would burden providers and slow growth of the internet. In creating the notice and takedown system, Congress wanted to create a system where notices would be sent for "potential liability" and to spark an investigation by the service provider and not simply removal of the material. The author says that because service providers have conflated the simple *notice* of potentially infringing material with the *knowledge* that the material is infringing, they have become prone to removing the material, fearing that they will be sued for contributory copyright infringement. The author does not believe that the receipt of a notice is equivalent to outright knowledge of infringement, and is not sufficient to put the service provider at risk. The author also remarks that this practice "poses serious First Amendment issues."

The confusion surrounding when a service provider becomes liable itself will be an important factor in my paper. In trying to prove that the DMCA's notice and takedown provision

has been manipulated and abused, this article pointing out the origins of the problem will be essential. On a fundamental level, the misinterpretation of what a takedown notice actually means and its conflation with actual knowledge of infringement represents a systematic problem that originates at the beginning.

McCain-Palin/YouTube

Six

http://pubcit.typepad.com/clpblog/2008/10/abusive-copyrig.html

Abusive Copyright Takedowns Aimed at McCain and Obama Show the Need to Amend the DMCA

dmca mccain obama copyright youtube free_speech fair_use notice_and_takedown

In this article, Paul Alan Levy echos the calls by some to combat abuse of the DMCA notice and takedown system by shaming those who make illegitimate claims and those who needlessly comply, as well as take possible legal action against them. Levy argues that the better approach would be to reform the DMCA itself, especially since both the McCain and Obama had problems with the system, and one of the would be present next year, and the other a powerful member of the Senate. He proposes 5 specific changes in the DMCA. The first would be to allow ISPs and service providers from not effectively requiring immediate takedown of allegedly infringing material while still maintaining safe harbor status. Secondly, he proposes making it easier for people who receive bogus takedown claims to receive compensation via statutory damages, presumably deterring holders from filing false claims. He also suggests notification by the service provider to the possible infringer *before* the content is removed, as well as requiring takedown notices to be submitted to a public database for viewing. Finally, Levy also argues for all intellectual property types to be protected, not just copyright. His agenda is put forth at a time when both potential presidents, having felt the effects of the DMCA, may be more motivated to remedy it.

This article is extremely beneficial in that it provides a significant number of ways to amend the DMCA and resolve the current notice and takedown problem. His position is not explicitly based in anger, aggravation, or retribution, and offers a clear list of ways to fix a broken system. I will primarily use this article to offer constructive remedies to the problem I plan to expose.

Seven

http://www.pcmag.com/article2/0,2817,2332528,00.asp

Update: YouTube Denies McCain DMCA Request

dmca mccain obama copyright youtube free_speech special_treatment abuse fair_use

This article recounts the details of former presidential candidate John McCain's disagreement with YouTube over a questionable infringement claim by national news media. After the campaign created advertisements using well known news video and audio and uploaded them to YouTube, news organizations like CBS sent YouTube DMCA takedown notices for hosting videos that they believed infringed on their copyright. Central to their claim was the fact that they did not want their videos and personality to be seen as endorsing one candidate or

another. YouTube promptly removed the videos, which drew the ire of the McCain campaign. Even though YouTube was properly following DMCA protocol, McCain lamented that the process took too long to be resolved, and asserted that YouTube should make a fair use judgement itself before removing the video. McCain especially asked for special treatment, allowing for political speech to be looked at differently when receiving takedown notices. YouTube declined these requests, responding that it was simply following the procedure laid out in the DMCA to protect it's safe harbor status. A McCain representative claimed that the DMCA does not necessarily define with what specific speed a host must comply with a takedown notice, and responding automatically is not mandated.

The article provides one of the two central examples I will use in my paper. McCain's difficulties with the intricacies of the DMCA provide a high profile example of how certain provisions can be abused. It is particularly valuable because even though the correspondence is between the McCain campaign and YouTube, both organizations are complaining, to different degrees, about the DMCA. Even as YouTube says it is simply following protocol, it criticizes those who abuse the takedown process.

Eight

http://www.eff.org/deeplinks/2008/10/mccain-campaign-feels-dmca-sting

McCain Campaign Feels DMCA Sting

dmca mccain obama copyright youtube free_speech eff media

This legal analysis by Fred Von Lohmann of the Electronic Frontier Foundation is empathetic of the McCain campaign's fair use/YouTube problem, as the EFF has been championing internet freedom and fair use principles for many years. However, he is highly critical of McCain proposed solution, which would put the burden on YouTube to conduct legal reviews of videos posted by political candidates that receive takedown notices. He thinks this notion is backwards, and in terms of political speech, amateurs are the ones that need particular protection from phony takedowns. Despite the failings of the McCain proposal, he goes on to identify the true problems in this situations: the news media organizations. He believes they need to refrain from sending these bogus takedown notices and all for legitimate fair use. As for a legitimate response by people when they don't, he encourages public shaming of the companies, as well as potential lawsuits for submitting a takedown they knew was illegitimate. He also supports the claim made by the McCain campaign that it is not incumbent upon YouTube to follow this strict procedure in the case of fair use, which YouTube itself could reasonably determine with human intervention.

Lohman's analysis will be useful in that it finds fault with all parties involved in the process: the alleged infringers, the copyright holders, and the host. He also puts forth a compelling reason why McCain's solution would not be ideal from a societal point of view. The actual reason McCain's proposal was rejected was because YouTube said that their hands were tied in the process; Lohman says that even if YouTube could treat politician's videos differently that they shouldn't. The author is transparent in placing most of the blame on the news organizations themselves. Other articles refrain from making the obvious claim that if it weren't for the media foolishly asserting a broad claim to copyright, this wouldn't be a probably. Finally,

he corroborates the assertion made by the McCain campaign that YouTube does not necessarily need to act with as much immediate speed as it says it does.

Let's Go Crazy

Nine
http://www.eff.org/files/filenode/lenz_v_universal/lenzorder082008.pdf

This order is from the US District Court for Northern California and rejects Universal Music Group's request to dismiss the lawsuit against the group by Stephanie Lenz. Months after posting a clip of her son dancing to a Prince song to YouTube, Universal ordered the video host to remove the clip, claiming copyright infringement of the song "Let's Go Crazy." Following the procedure under the DMCA, Lenz told YouTube that her video was indeed legal, and it was restored – Universal did not pursue legal action against Lenz since her use was clearly fair. However, in conjunction with the EFF, Lenz sued Universal for acting in bad faith, and asked for compensation covering her legal costs. This order covers the most recent development, as Judge Jeremy Fogel refused to dismiss the lawsuit as Universal wanted, and declared that copyright holders must take fair use into account before sending DMCA takedown notices. Universal had argued that it was not incumbent on copyright holders to consider potential fair use, and that doing so would be costly and disruptive. The Judge rejected this argument, and while admitting that he did not believe it to be likely that Lenz could eventually win the lawsuit against Universal, still allowed to progress nonetheless.

Fogel's decision is going to play a big role in my paper, as this order sets precedent for other courts to look fair use at when determining takedown-abuse cases. The decision is unique in that it helps defines what a copyright holder must do to clear the "materially misrepresents" hurdle set in Section 512, adding consideration of fair use. Previously, it could have been possible for copyright holders to more recklessly send takedown notices to service providers, and make a credible claim that they were not active in misrepresenting, and that a limited amount of care was given to the process. With the addition of fair use, the burden is higher, which I will argue is beneficial to the takedown process.

Ten
http://latimesblogs.latimes.com/technology/files/ioveoh_ruling.pdf
IO Group, Inc. v. Veoh Networks, Inc.
safe_harbor dmca copyright veoh notice_and_takedown

This is a case where IO Group, the maker of adult entertainment videos, sued Veoh, a YouTube-like online video site, for hosting IO's infringing content. Instead of sending Veoh a takedown notice, IO directly sued Veoh in the US District Court. Veoh claimed it was protected by the safe harbor provisions, and asked for the case to be dismissed. The judge denied IO's request for summary judgement, saying that Veoh qualified for the protection of safe harbor. The case is interesting in that it amounts to a copyright holder being unsatisfied with the amount of work that a service provider does to prevent infringement. IO believed that Veoh's policies were inadequate and needed to do more to prevent repeat offenders from creating multiple account and

continuing to uploading infringing content. The Judge ruled that a "policy is unreasonable only if the service provider failed to respond when it had knowledge of the infringement."

This case will be an example of one extreme in the notice and takedown debate. While I will be arguing for a reform of the procedure outlined by Section 512 because it is too easily abused, IO thought it was so insufficient as to not even use it, and instead sought immediate relief at court. The judge's affirmation that Veoh had properly followed the rules and that it did not need to take additional preventative measures to stop infringement.

1. Journal Article
2. Column
3. Journal Article
4. Policy Report
5. Blog
6. Magazine Article
7. Legal Analysis
8. Court Case
9.
10. Court Case

Not Useful?

• 10 Years of the DMCA: Safe Harbor Provisions
http://www.publicknowledge.org/node/1861

• DMCA Takedown Shakedown
http://etech.eweek.com/content/security/takedown_shakedown.html

• Unsafe Harbors: Abusive DMCA Subpoenas and Takedown Demands
http://www.eff.org/wp/unsafe-harbors-abusive-dmca-subpoenas-and-takedown-demands

• Google Begins Making DMCA Takedowns Public
http://www.linuxjournal.com/article/5997

• Google DMCA Takedowns: A three-month view
http://www.chillingeffects.org/weather.cgi?WeatherID=498

http://www.cl.cam.ac.uk/~rnc1/Judge_and_Jury.html
Judge & Jury

• McCain's YouTube Takedowns Inspire Fair Use Fervor
http://www.citmedialaw.org/blog/2008/mccains-youtube-takedowns-inspire-fair-use-fervor

• McCain Campaign's Run In With The DMCA
http://www.publicknowledge.org/node/1800

• Lessig on McCain-Palin/YouTube
http://lessig.org/blog/2008/10/mccainpalin_to_youtube_get_rea.html
http://lessig.org/blog/2008/10/mccainpalin_seeks_special_rule.html
http://lessig.org/blog/2008/10/youtube_responds_to_mccain.html

• McCain Fights for the Right to Remix on YouTube
http://bits.blogs.nytimes.com/2008/10/14/mccain-fights-for-right-to-remix-on-youtube/

http://www.eff.org/files/filenode/lenz_v_universal/lenzorder082008.pdf
Lenz v. Universal

Sender of DMCA takedown notice should consider fair use
http://blog.internetcases.com/2008/08/20/sender-of-dmca-takedown-notice-should-consider-fair-use/

http://newmedialaw.proskauer.com/2008/08/articles/copyright/lets-go-crazy-what-does-it-mean-to-consider-fair-use/
Let's Go Crazy: What Does It Mean to "Consider" Fair Use?
dmca lenz universal_music_group notice_and_takedown prince good_faith_belief