

■ IP dispute resolution models for platforms

WIPO Conference: As the UDRP turns 20: looking back, looking ahead

Geneva
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2

20 years ago ...

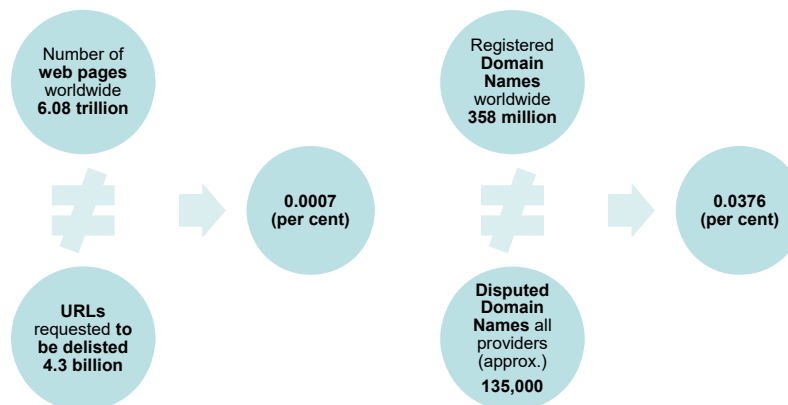
	UDRP	DMCA
Space	<u>Public:</u> gTLDs (incl. new) ccTLDs	<u>Private:</u> OSPs (Yahoo)
Infringed right	TM	Copyright
Criteria	Simplified non-national principles	National law
Decision-maker	Independent (panelists)	OSP (staff)
Remedy	Transfer/cancel domain name	Take-down material
Speed	Months	Days
Scale (p.a.)	1,000s	10,000s
Internal appeal	No	Sort of
Transparent	Yes	No

... and now

	UDRP	DMCA	“DMCA auto” / “DMCA plus”
Space	Public: gTLDs (incl. new) ccTLDs	Private: OSPs (Yahoo)	Private: OSPs (Amazon, Google, YouTube, Facebook) Public: new gTLDs (.movie)
Infringed right	TM	Copyright	Copyright, TM, patent, privacy, reputation, ...
Criteria	Simplified non- national principles	National law	Complex national law No law / privatized principles
Decision-maker	Independent (panelists)	OSP (staff)	OSP (automated) Rights-holder (automated)
Remedy	Transfer/cancel domain name	Take-down material	Take-down material Not put-up material
Speed	Months	Days	Seconds
Scale (p.a.)	1,000s	10,000s	100,000,000s
Internal appeal	No	Sort of	Not really
Transparent	Yes	No	Hardly

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Taken down web pages (URLs) vs total worldwide webpages



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Intellectual Property Protection Strategies of Online Intermediaries

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Introduction

- Benefits of online services for users, economy
- The Internet sector makes significant efforts to prevent copyright infringement online, in large part enabled by the prevailing legal framework worldwide: "notice-and-action" ("notice-and-takedown" in the U.S.)
- In addition to copyright compliance, services remove content that infringes trademark rights, or violates community guidelines



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Notice-and-Action/ Notice-and-Takedown

What is notice-and-action/notice-and-takedown?

- Follows U.S. Digital Millennium Copyright Act (DMCA Section 512) and EU E-Commerce Directive (Articles 12-15)
- Widely implemented globally
- Common in free trade agreements



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"DMCA plus" – Voluntary Efforts Fostered by Notice-and-Takedown

What is "DMCA plus"?

- Many services have invested in IP protection processes and tools beyond what is required by law, e.g.:
 - "Trusted user" programs that facilitate bulk notice sending for "trusted" senders and fast-track takedown
 - Direct access to back-end systems, so senders can remove content proactively
- "DMCA plus" systems provide value when deployed voluntarily by firms that have the resources to do so competently



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Examples

Voluntary IP protection programs and tools include:

- Amazon Brand Registry
- eBay Verified Rights Owner Program
- Facebook Rights Manager
- Facebook Commerce & Ads IP Tool
- Google Search Trusted Copyright Removal Program
- YouTube Content ID



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Notice+Takedown: big and fast

Alibaba Group's Achievements in Intellectual Property Protection



Protecting Copyright in Google Search

4 billion pages removed from our index for copyright infringement

1.7 billion ads removed from our system for infringement of our policies

in 2016

Protecting IP on Facebook and Instagram

Turnaround Time

- Reports are regularly handled within one day
- Often, reports are processed within hours or even minutes
- Copyright: < 2 hours
- Counterfeit: < 3 hours
- Trademark: < 8 hours

IP Transparency Report

- July-December 2018 for Facebook and Instagram:
 - 2.6 million pieces of content removed based on 512,000 copyright reports
 - 216,000 pieces of content removed based on 81,000 trademark reports
 - 782,000 pieces of content removed based on 63,000 counterfeit reports

Instagram: Keyword Filters & Additional Measures

- Working with trusted rights holders, Instagram has implemented proactive measures to reduce the visibility and prevalence of potential counterfeits:
 - Hashtags containing certain combinations of brand names and replica keywords are blocked from Instagram search – e.g., #brand+keyword
 - Instagram posts that contain combinations of certain brand names and replica keywords (in text, separate hashtags, or combination of text and hashtags) are hidden from search – e.g., #brands+keywords
 - Instagram posts whose captions contain four or more brand-name hashtags are hidden from search – e.g., #brand+ #brand+ #brand+ #brand+
 - Automation detects repeated use of the same phone number containing the Chinese country code (86) in bios across multiple accounts



Domain registries and Trusted Notifiers



MARCH 6, 2017

A year has passed since the MPAA teamed up with Donuts Inc., the largest operator of new domain name extensions, to establish a **Trusted Notifier Program** to ensure that websites using domains registered with Donuts are not engaged in large-scale piracy. Following this unprecedented announcement, the MPAA also solidified a similar partnership with **Radix**, the first such agreement with a registry based outside the United States.

"Of the **eleven on which action was taken**, each represented a clear violation of law—the key tenet of a referral," Donuts explained. "All were clearly and solely dedicated to pervasive illegal streaming of television and movie content. In a reflection of the further damage these types of sites can impart on Internet users, malware was detected on one of the sites."

Donuts continued: "There has been concern on the part of some in the industry about this type of arrangement—namely, that it represented a 'slippery slope' toward inappropriate content control, or that hundreds of domain names would be snatched away from rightful registrants. **To the contrary**, however, and in line with the previously published characteristics of a Trusted Notifier Program, a mere handful of names have been impacted, and only those that clearly were devoted to illegal activity. And to Donuts' knowledge, **in no case did the registrant contest the suspension or seek reinstatement** of the domain."



NTIA Statement on Amendment 35 to the Cooperative Agreement with Verisign

- “These modifications ... create a new commitment to content neutrality in the (DNS), provide market-based pricing flexibility, and reduce the regulatory burden on Verisign.
- Verisign [commits] to participate in ICANN processes. To that end, ***NTIA looks forward to working with Verisign and other ICANN stakeholders in the coming year on trusted notifier programs*** to provide transparency and accountability in the .com top level domain.”

■ – November 2018

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Main Notice+Takedown drawbacks

Overall: still seen as something of a black box

- Substance: overbroad and imprecise notices
- Scope: automation casting too wide a net (false positives)
- Lack of meaningful counter notices
- No neutral decision makers
- Lack of transparency; no published decisions
- No obvious in-platform vehicle for IP stakeholders to raise “complaints” or suggestions for policy improvements
- Depending on one’s perspective: costs absorbed by platforms

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Policy research on automation consequences of Notice+Takedown

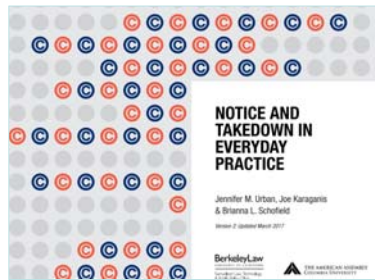
The Takedown Project

Collaborative research on Internet takedown law and policy

Home About Affiliated Researchers Projects Resources

Welcome

The Takedown Project is a collaborative effort housed at UC Berkeley School of Law and the American Assembly to study notice and takedown procedures. Researchers in the US, Europe, and other countries are working collaboratively to understand this fundamental regulatory system for global online speech.



“Who watches the watchmen?” An Empirical Analysis of Errors in DMCA Takedown Notices

An Empirical Study of DMCA Takedown Notices

Daniel Seng*

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Overbroad and imprecise notices

2. Questions of Accuracy and Substantive Judgment

Overall, the general picture that emerged from the Lumen data—an overwhelming focus on Google Web Search, a high level of automation and third-party notice sending, heavy use by major entertainment companies, and a focus on file sharing and torrent sites—still leaves open the question of how accurate these efforts are. As we observed in Study 1, for some senders and for DMCA Auto and DMCA Plus OSPs, notice and takedown has evolved from a low-volume process based on human decision-making to a process dominated by automated systems capable of sending and processing massive numbers of requests. As the scale of the process increases and significant human review becomes impossible, the integrity of the process comes to depend increasingly on the accuracy of these systems. So how accurate are automated notices? To answer this question for our dataset, we examined the substance of each takedown request and its underlying claim of infringement.

- One in twenty-five of the takedown requests (4.2%) were fundamentally flawed because they targeted content that clearly did not match the identified infringed work. This extrapolates to approximately 4.5 million requests²⁴⁶ suffering from this problem across the entire six-month dataset.

We found reason to be concerned when human review is replaced with a high degree of automation. The automated notices we examined in Study 2 were, in the main, sent by sophisticated rightsholders (or their agents) with a strong knowledge of copyright law, yet nearly a third of the notices raised questions about their validity, and one in twenty-five apparently targeted the wrong material entirely.

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Fair Use implications

About one in fifteen (6.6%) requests had at least one characteristic that likely weighs favorably toward fair use. These requests predominantly targeted such potential fair uses as mashups or remixes, or links to search results pages including mashups or

About 1 in 15 (6.6%) of requests were flagged with characteristics that weigh favorably toward fair use.

weigh favorably toward fair use, suggesting that further review could reveal a fair use defense. Over half of these were requests to take down allegedly infringing material on news sites. Others included requests where the allegedly infringing material was apparently being used for educational purposes, such as a scientific photograph of bacteria under a

We could not do a full fair use analysis, and focused on characteristics that reviewers could observe and record relatively easily. The final merit of any potential fair use claims within this set will vary. Our goal was to observe whether automated systems appeared to generate any significant number of notices for which more contextualized human review is needed to check for fair use. It appears that they do: around 7 million notices out of the full 108.3 million can be expected to present these issues.²⁸³

Lack of meaningful counter notices

4. Counter Notices: Inadequate and Infrequently Used

By its structure, section 512 mostly leaves due process for targets to the privately adjudicated notice-and-takedown process.¹²³ The main mechanism is the DMCA's "counter notice,"¹²⁴

content stays down pending the outcome.¹²⁵ If no action is taken within the ten days, the OSP may restore the content and retain safe harbor protection.¹²⁶ While some rightsholders expressed some faith in the counter notice process, OSPs mostly considered it a dead letter—impractical and rarely used. All OSPs and at least one rightsholder agreed that the counter notice procedure's practical ability to protect targets is limited.¹²⁷ All agreed that the process has major deficiencies.

Second, by all accounts, the actual use of counter notices is extremely infrequent. Only one respondent among both service providers and rightsholders reported receiving more than a handful per year. Many—including some large services handling thousands of notices per year—reported receiving none.

In the end, counter notice and putback give the appearance of due process for targets without the necessary components of definite notice of the claimed transgression, a reasonably exercisable ability to respond (preferably before action is taken), and an unbiased adjudicator.¹²⁸ In the recommendations section below, we build on others' efforts to offer suggestions for improving this situation. Moreover, further expansion of the notice

Lack of transparency

Despite the commonalities in OSPs' experiences, they uniformly reported having little knowledge of other service providers' notice and takedown practices. Knowledge about how services manage notice and takedown across the Internet sector remains remarkably limited.

Several OSPs told us that this lack of transparency leaves them in the dark about how others manage the DMCA's various ambiguities, at times leading them to make decisions and set policies conservatively. In general, OSPs agreed that more information would support good internal practices and potentially improve public relations by anchoring commitments to

Given Notice+Takedown drawbacks, the Challenge:

- Size and scale of Internet abuse is forcing reliance on blunt rough tool: automated/imprecise Notice+Takedown
- **A core question:** how to give (procedural and substantive) meaning and transparency/fairness to counter notice
- **A proposed solution:** UDRP-like procedures cannot address billions of abuses, but...
 - *for a certain path in the enforcement chain* could be made available

Then, what to import from the UDRP?

- Clarity on process
- Clarity on substantive criteria/application
- Human (i.e., non-automated) assessment of counter-notice (“appeals”)
- Neutrality of the assessor
- Appointment of the assessor by an independent body (i.e., a service provider like WIPO)
- Publication of decision, with reasons

... and what to import to the UDRP?

- Automation – can AI do some of what panelists do now?
 - Perhaps assessing: TM rights, confusingly similarity, and even (?) rights or legitimate interests
- Breadth – can the UDRP model be extended to a wider range of IP disputes (e.g., copyright, TM/counterfeiting)?