

Written Statement for the Record

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Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

Thank you Chairman Goodlatte, Chairman Coble, Ranking Member Conyers, Ranking Member Nadler and members of the Committee. My name is Paul Doda. I am the Global Litigation Counsel at Elsevier Inc. With our parent company, we have almost 15,000 US employees and Elsevier has major offices in New York, Pennsylvania, Missouri, California and Massachusetts. I appreciate this opportunity to provide the Committee with the perspective of a company that is both a 130-year old publisher of copyrighted content and a company that embraces the power of technology to fuel innovation. In addition to creating and publishing world class medical books, reference works and journals, Elsevier uses technology to create products that allow researchers and clinicians to leverage massive amounts of information to pursue science and medical breakthroughs.

Elsevier's statement will provide examples of the challenges it faces in relying on DMCA Section 512 to address the unauthorized distribution of its copyrighted works online and will urge actions under the current statute that can improve copyright protection without unreasonably burdening legitimate web sites, service providers and internet users.

Introduction

Since Congress enacted the Digital Millennium Copyright Act ("DMCA") in 1998, major technological advances – like the ability to connect billions of people around the world to information on the internet at increasingly faster speeds -- have had a positive impact on society and have opened a world of future possibilities for the internet. Technology has paved the way for new sites and service providers that did not exist fifteen plus years ago, many of them crucial to how we live today.

An unfortunate byproduct of these positive developments is that the unauthorized sharing of copyrighted works has grown exponentially. The notice and takedown system has become overtaxed by an explosion of sites and services globally and the increased speeds and methods by which they can allow copyrighted works to be shared. As a consequence, companies like Elsevier must send more notices to more sites globally, for the same infringing files, the same infringing works, and the same infringing users, in what has become a largely futile attempt to keep pace. The system is imposing increasing costs in time, resources and money for both conscientious "senders" and "receivers" of notices alike, but resulting in little to no effective protection of copyrighted works.

The problem is made worse by certain sites that do, in effect, harbor infringement. Some sites exploit weaknesses in the takedown system to profit from persistently uploaded and re-uploaded infringements. They rely on desirable copyrighted content to draw users to their sites (to whom they serve ads or charge premiums for faster downloads), with takedowns at best only temporary disruptions before unauthorized copyrighted works reappear or get replaced by other infringing material. As to these sites, copyright owners like Elsevier often provide notices concerning a particular work only to see a new unauthorized copy or link to the same work reappear on the same site right after it is taken down.

Elsevier's Specific Experiences with DMCA Takedowns

Specific details and examples from Elsevier's 2013 takedown program for infringing copies of books illustrate these challenges.

- Like most large publishers and other global distributors of copyrighted works, Elsevier employs a third party specialist to search for infringements and issue its takedown notices. In 2013, Elsevier issued an average of 20,537 takedown notices a month, a total of 246,441 notices. While this is a relatively large volume for a publisher, it is likely only a fraction of the infringements of Elsevier's works available on the internet because not all sites can be readily searched and there are limits to Elsevier's and its vendor's resources. It is also just a fraction of the tens of millions of notices sent to sites and service providers each month.¹
- Month over month, the same sites with high volumes of Elsevier works that respond to takedowns have 500 to 1,000 infringements, suggesting that takedown notices, even when honored, have little to no effect on the steady overall volume of infringing works on the sites.
- The *same books* are repeatedly re-uploaded on the *same sites* hundreds of times after being taken down, such as

a Genetics book *571 times* on www.4shared.com;

a Human Anatomy book *384 times* from on www.4shared.com;

an Ophthalmology book *298 times* on www.4shared.com;

a Physiology book *281 times* on www.4shared.com;

an Embryology book *245 times* on www.4shared.com;

a Psychiatry book *231 times* on www.uploaded.net;

a Neurology book *112 times* on www.uploaded.net;

a Psychiatry book *373 times* on www.share-online.biz; and

6 other book titles removed over *100 times each* from many other sites.

- Even the sites that are the most responsive to takedowns take on average *7 days* to remove works, with all others taking on average *9 days*, and this does not account for the time it takes Elsevier's agent to discover and verify the infringements. During this time, the books can be and are being downloaded by millions of users, again raising the question of whether takedowns have any meaningful remedial effect at all.

¹ Google alone receives over 20,000,000 takedown notices a month. See <http://www.google.com/transparencyreport/removals/copyright/>.

- Over a 3-month period in early 2013, one site removed 6,195 infringing links in response to takedown notices, but later re-enabled 6,024 of the links that were previously removed (without cause or valid counter-notice) (www.nakido.com).
- Another site with among the highest volume of infringements simply did not respond to approximately 8,500 notices sent to the site in 2013 (www.rus.ec).
- Finally, Elsevier publishes confidential nursing exams for proctored use by professional nursing schools to prepare students for national licensing requirements. Despite notifying several sites that such exams can never be offered for sale legally and that offers for them should be removed, many sites have not complied or have not invoked their repeat infringer policies, allowing the same anonymous sellers to continue to offer the stolen exams. This problem not only hurts Elsevier and other publishers of confidential exams that are meant to be administered and used strictly by educators, but also subverts the academic process itself and the quality and qualifications of students later entrusted with providing health care to patients.

An enormous number of takedown notices are sent every day by companies in the content industries and independently by authors, artists and musicians, but mistakenly issued notices are very rare. Elsevier received *no counter notices* for its book infringement takedown program in 2013.

We take great care to ensure that our takedown notices are only issued in clear instances of infringement. Elsevier's vendor uses both automated and manual procedures to make sure that it accurately identifies infringing content. It first searches for book "metadata" to identify infringements, then uses two *manual* reviews by trained staff to verify that a full copy of the work is involved. This process is followed for *every* instance of potential infringement to guard against "false positives." The time and resources it takes for this commitment to accuracy make it even more difficult to keep up with the constant wave of infringements. Moreover, not all publishers have the same resources as Elsevier, making it still more difficult for them to identify infringements or to address constant re-uploads of copyrighted works.

Despite the hundreds of thousands of notices Elsevier sends in good faith each year, Elsevier must unfortunately "compete" against thousands of sites that enable unauthorized access to free copies of virtually any of its copyrighted works, at any time. For Elsevier and other global distributors of copyrighted works, the infringements are simply becoming too widespread, too continuous, and too persistent to locate and efficiently address them, let alone to do so in a cost-effective manner with any lasting effect.

Reasonable Technical Measures

While the views of content providers and online service providers may differ radically regarding which parties should bear certain burdens in addressing large scale piracy, there should be no dispute that all parties who participate in the takedown system fairly and in good faith would benefit from reducing the volume of notices that must be sent and acted upon.

Elsevier believes the best way to accomplish that goal, and to address the constant reappearance of the same unauthorized works, is through the use of reasonable technical measures. Section 512(j) of the DMCA suggests that in 1998 Congress expected copyright owners and service providers to develop “standard technical measures” to identify and protect copyrighted works and envisioned a “multi-industry standards process” to develop a “broad consensus” on appropriate measures.

Congress’ vision of the interested parties voluntarily coming together to collaborate on infringement issues in the digital age was a worthy goal, but the stakeholders have not made substantial progress toward devising or implementing reasonable technical measures in the past 15 years. To spur progress, Congress should direct that there be a broadly inclusive, multi-stakeholder, standards- setting process to recommend voluntary technical measures that can reduce online infringements without materially impeding the legitimate functionality of sites or unreasonably preventing legal uses of copyrighted works. We favor bringing all relevant stakeholders (including content owners, site and service providers, user advocacy groups and technology companies) together for this purpose under the guidance of an expert governmental agency with relevant technological expertise.²

Common Principles for Filtering

Elsevier believes that a good starting point for establishing standard technical measures are the *Principles for User Generated Content Services* (UGC Principles) developed several years ago by major technology companies and global distributors of copyrighted video and audio content for filtering of that content.³ We think that, while more details need to be considered, the principles can apply equally or be adapted to address text-based content. Among those principles are:

- That *matching* copies of a copyrighted work are proper subjects for automatic content filtering on upload;
- That care must be taken to ensure that automatic content filtering *only* limits uploads that substantially match a copyrighted work;⁴
- That care must be taken to ensure that *users are promptly notified* and have an *opportunity to dispute* the filtering of content;
- That as meaningfully *enhanced filtering technologies* become available on *reasonable terms* they *should be adopted*; and

² Digital rights advocates have also suggested that Congress could enlist expert advisory bodies like the former Office of Technology Assessment to guide copyright reforms in response to challenges presented by new technologies. See Pamela Samuelson, *Is Copyright Reform Possible*, 126 HARV. L. REV. 740, 765-66 (2013).

³ See Principles for User Generated Content Services at <http://www.ugcprinciples.com/index.html>.

⁴ See Fair Use Principles for User Generated Video Content at <https://www.eff.org/pages/fair-use-principles-user-generated-video-content>, para. 2, suggesting that, for filtering purposes, only matching copies where “nearly the entirety (e.g., 90% or more)” of the challenged content is comprised of a single copyrighted work should be prevented or removed.

- That *infringement claims should not be brought against sites that adopt filtering technologies in good faith* for any copyrighted content that remains on the site despite good faith efforts.

“Fingerprinting” systems seem to be an appropriate and effective method to ensure that only copies that are complete or a substantially complete copy of a copyrighted work are prevented or removed by sites. Elsevier agrees with the goal of carefully ensuring that technical measures only prevent or remove clear infringements. That is essentially the same standard Elsevier and other publishers use to verify infringements for purposes of accurately issuing takedown notices.⁵

If well-intentioned sites and service providers have legitimate concerns that implementing certain technical measures would be unduly costly or would materially impact the legitimate functionality of their site or service, these concerns can and should be addressed in the multi-stakeholder standards-setting process. It is likely that the process will not yield a “one size fits all” approach. Rather, a range of recommended measures, including various filtering technologies, can likely be developed, taking into account the variety of sites at issue and their capabilities and functions.

Different measures may apply to different sites and the recommended measures will not apply to all sites. For example, not all sites are structured, intended or used for uploading or downloading content on a large scale. Technical measures may be unnecessary, impractical or unreasonable for such sites, and other approaches, like manual reviews of uploaded content, may even be preferred by low volume sites. The adoption of measures by these sites should be voluntary and they may appropriately choose to continue to primarily rely on notices and takedowns to address infringements.

There Should Be Incentives for the Adoption of Voluntary Technical Measures

Where technical measures are appropriate, adoption of them can dramatically reduce the challenges presented by large scale infringement. There are already successful examples like www.scribd.com, which has successfully used filtering mechanisms to reduce unauthorized uploads and re-uploads of infringing books, with good results: a sharp reduction of infringements without harm to the site’s legitimate functionality, and reduced burdens and costs related to takedown notices.⁶ Google’s Content ID is another example, where one of the world’s largest service providers created powerful and precise filtering technology that can readily distinguish between complete copies of works and partial copies or clips.

Stakeholders should discuss meaningful incentives for the implementation of technical measures to address constantly recurring infringements of the same works. As it stands now, there are possibly “perverse incentives” against adoption, such as the fear that using technical

⁵ Automated content filtering systems do not currently seem suitable to address uploaded copies of works that might require more detailed infringement analysis or “Fair Use” analysis.

⁶ Scribd uses a “fingerprint” system. “Fingerprinting” for books involves the creation of digital reference files by extracting unique characteristics from the digital content, which can be stored in a database and queried as content is uploaded to detect whether the content is infringing.

measures could create “red flag” knowledge of infringement that would expose a site to liability, or that adopting technical measures while competitors do not adopt them will be a competitive disadvantage. One way to incent standard technical measures is for copyright holders to adhere to the UGC Principle that infringement claims should not be brought against sites that adopt reasonable technical measures in good faith. Other means to create incentives should be explored by all relevant stakeholders.

Congress May Have to Incentivize the Adoption of Standard Technical Measures

On the other hand, as noted in Elsevier’s examples, some sites are plagued by serial re-uploads of the same copyrighted works hundreds of times. Some form of “notice and stay down” for these works through the use of filtering mechanisms like www.Scribd.com would address this issue. If sites that need technical measures the most “drag their feet” or refuse to consider reasonable technical measures at all -- regardless of the precision of the tools, their cost-effectiveness, or recommendations by peer companies through a standards-setting process -- it may be necessary for Congress or the courts to step in and provide remedies to copyright owners.

One potential means for Congress to do that is through DMCA Section 512(i). Congress could make the adoption of standard technical measures a requirement for DMCA safe harbor protection for certain sites that have substantial serial re-uploading. Like the standard-setting process itself, we think this recommendation is consistent with Congress’ intent in 1998 to deny safe harbor protection to sites that refused to accommodate standard technical measures relevant to that era, updated to treat today’s non-compliant sites the same way if they refuse to adopt filtering while being overrun by the constant re-uploading of copyrighted works.

Another way for Congress to encourage the adoption of needed technical measures by these sites is to amend DMCA 512(j) to clarify that injunctive relief is available to prevent the reappearance of the same specific works on the sites. If repeated notices and takedowns do not prevent the same infringing works (for example, the 571 reappearances of Elsevier’s Genetics book on www.4shared.com) from appearing on a site that refuses simple measures to address the problem, courts should not be handcuffed by the safe harbor from providing any relief whatsoever to the copyright owner.⁷

Sites that Refuse Takedowns and all other Measures

There are sites that simply refuse to comply with takedown notices or any statutory or judicial requirements, many times because they successfully hide their operator’s identities and locations or are essentially beyond the reach of reasonable rights holder enforcement capabilities. The large scale infringement on these non-compliant sites cannot be addressed at all through notice and takedown measures, or through voluntary (or even court-ordered) reasonable technical measures. For these non-compliant sites, it is essential that copyright

⁷ Cases in Germany against www.rapidshare.com decided under the EU safe harbor (as adopted in Germany) provide a model for this recommendation. In Germany, sites with business models and practices that in effect encourage infringement can be subject to injunctive relief imposing increased obligations to prevent recurring infringements of specific works in suit. After injunctions were imposed in those cases, Rapidshare terminated its “rewards” program and adopted a filter to limit infringements.

owners and the legitimate third-party services used by these non-compliant sites cooperate to address large scale infringements.

Elsevier is encouraged by efforts by certain groups of stakeholders to enter private agreements and to create “best practices” to prevent support for parties and sites engaged in piracy and counterfeiting, including voluntary efforts involving payment processors and advertising services.⁸ These agreements and best practices, however, are not currently well suited to efficiently prevent support for large-scale piracy sites.

Elsevier believes that where a US court with jurisdiction over a site finds that the site is non-responsive and liable for copyright infringement for which no DMCA safe harbor is afforded, the court should have authority to enter orders requiring third parties located in the US that provide services to the site to suspend those services.

Improvements to Notice and Takedown and Repeat Infringer Practices

While Elsevier’s primary focus is on the increasingly urgent need for technical measures to address large scale infringement and the consequences that should result for the bad faith refusal to adopt such measures or otherwise comply with legal requirements, there clearly is a continued role for the notice and takedown system. Among other purposes, the notice and takedown system will continue to address uploaded materials not appropriate for filtering systems because they do not meet “matching” requirements and for sites with little or no third party uploading or downloading activities that may continue to rely on notices and takedowns.

Elsevier agrees with the recommendations of the Association of American Publishers to improve the notice and takedown system, which were made in its Comments on the Department of Commerce “Green Paper.” Those recommendations include efforts to standardize and streamline notices and submission processes to eliminate technically non-compliant notices and to prevent barriers to automated submissions of notices to sites. In addition, we agree with AAP’s recommendations on improvements to DMCA repeat infringer requirements and practices, including specifically the need to require sites to properly identify and track the number of repeat infringements by users and to adhere to policies calling for termination of repeat infringers in appropriate circumstances.

Conclusion

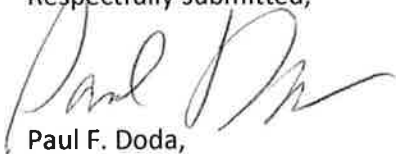
Elsevier’s experience demonstrates that the volume of necessary takedowns for its copyrighted works is growing, but that its good faith notices are having little, if any, impact on the problem. One contributing factor is the constant re-uploading of the same works to the same sites. Elsevier believes that standard technical measures like filtering could help address the problem and advocates a government-guided, multi-stakeholder, process to establish voluntary measures. Elsevier also advocates that if sites that need such measures the most because of large scale serial re-uploading on their sites unreasonably refuse to adopt such

⁸ The International Anti-Counterfeiting Coalition, composed of payment processors and content and product owners, has created a “Payment Processor Portal” to prevent financial support for parties engaged in counterfeiting and piracy. The Interactive Advertising Bureau and ad networks have introduced “Best Practices Guidelines to Address Piracy and Counterfeiting.”

measures, it may be necessary for Congress and the courts to create and impose legislative and legal remedies. For sites that currently fail to fulfill the requirements for safe harbor protection, Elsevier would like to see further development and compliance with best practices whereby third parties that support infringing sites would terminate support, and would welcome court-ordered remedies for the same purpose. Finally, Elsevier agrees with recommendations made by AAP to improve existing DMCA notice and takedown processes and repeat infringer policies and practices.

Thank you for allowing Elsevier to submit this written statement and for the opportunity to provide testimony. We look forward to responding to any questions or requests for further information you may have.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul Doda", written over the printed name.

Paul F. Doda,
Elsevier Inc.