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The New York Intellectual Property Law Association®

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July 24, 2020

By email: Jamie.Simpson@mail.house.gov

Jamie L. Simpson, Chief Counsel
Subcommittee on Courts, Intellectual Property
and the Internet Committee on the Judiciary
U.S. House of Representatives
Rayburn House Office Building
Washington, DC, 20515

Re: Bar Association Roundtable Regarding Copyright Office Report on DMCA

Dear Ms. Simpson,

Thank you on behalf of the New York Intellectual Property Law Association ("NYIPLA") for the opportunity to participate in the Bar Association roundtable on the Copyright Office's Section 512 report on Thursday, Aug. 20, from 1.00-2.30 pm Eastern Time. As requested, we provide below background information regarding our organization and identify three proposed topics for discussion at the roundtable.

NYIPLA Background

The NYIPLA is a professional association of attorneys whose interests and practices lie in the area of patent, trademark, copyright, trade secret, and other intellectual property law. The NYIPLA's members include a diverse array of attorneys specializing in copyright law, including in-house counsel for businesses that own, enforce, and challenge copyrights, as well as attorneys in private practice who advise a wide array of clients on copyright matters and procure copyright registrations through the U.S. Copyright Office. Many of the NYIPLA's member attorneys participate actively in copyright litigation, representing both owners and accused infringers. The NYIPLA, its members, and the clients of its members share an interest in having the standards governing the enforceability of copyrights be reasonably clear and predictable. Through its Copyright Committee, the NYIPLA has engaged in public discourse with respect to copyright law, including the filing of amicus briefs on copyright matters before the federal courts and responding to requests for information from the Copyright Office and Congress.

The NYIPLA will be represented at the roundtable by the co-chair of its Copyright Committee, Mitchell C. Stein, a partner from Sullivan & Worcester LLP, practicing in the area of copyright and trademark law.

Proposed Issues to Be Discussed at the Roundtable

Below are the three issues that NYIPLA would like to see discussed at the roundtable, with a brief explanation as to why the issues are important:

1. The Report's recommendation that the knowledge requirement of section 512, which has been interpreted narrowly to protect service providers under the safe harbor as long as they do not have knowledge of the specific infringement, be expanded to include "red flag knowledge" of the infringement (See Report, pp. 113-124);

Discussion: Finding the appropriate level and type of knowledge required for an online service provider before obligating the service provider to take action against an infringement is among the most challenging and important issues raised by the Copyright Office in its DMCA report. Imposing an obligation on an online service provider to act in the face of “red flag” knowledge of an infringement will impose significant additional burdens and costs on online service providers. On the other hand, requiring online service providers to act only in the face of knowledge of specific infringements does not comport with Congressional intent and permits too many infringements to go unaddressed. The NYIPLA supports a standard that finds an appropriate balance requiring online service providers to take action beyond situations involving actually identified infringements, but less burdensome than a general requirement of red-flag knowledge.

2. The Report’s recommendation that Congress consider legislation addressing section 512’s requirements that service providers establish and implement policies for addressing repeat infringers, as the standards are currently so low as to be impractical, thereby placing undue burdens on rights holders (See Report, pp, 95- 110); and

Discussion: The NYIPLA believes that developing more clarity on how online service providers identify and respond to repeat infringers is an essential element of rebalancing the distribution of responsibilities among the interested parties to ensure that there is a reliable and effective course of action against repeat infringers. The current “Whack-a-Mole” approach to addressing repeat infringers is ineffective and does not serve the purposes behind the DMCA’s intended goals with respect to repeat infringers.

3. The Report’s recommendations regarding what information should be required to be included in takedown notices (for example: do all infringements need to be identified or just representative examples), and whether and under what conditions a service provider’s use of takedown notice forms, which may require a great detail of information to complete, places an undue burden on rights holders that is not required by the statute. (See Report, pp, 136-145).

Discussion: The NYIPLA believes that the DMCA should set forth the specific requirements of information to be requested in take down notices, with online service providers having only limited discretion in requiring information in addition to that set forth in the DCMA that is both reasonable and necessary for the online service provider to take the requested action. Again, an appropriate balance needs to be struck so that the online service provider can move effectively and promptly in order to respond to takedown notices,

We look forward to attending the roundtable on August 20.

Sincerely,



Colman B. Ragan, NYIPLA President

Cc (e-mail only)

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