DMCA § 512

What it is, why it affects your startup, and how to get involved
This presentation provides general information related to the law. It does not, and is not intended to, provide legal advice and does not create an attorney-client relationship. If you need legal advice, please contact an attorney directly.
Contents

1. Intro to § 512, notice-and-takedown, safe harbors
2. Why it matters to startups
3. Current policy debates
4. Getting involved
Types of services covered

- § 512(a) ➔ e.g., Internet service providers
- § 512(b) ➔ e.g., caching
- § 512(c) ➔ e.g., online platforms, (most) websites
- § 512(d) ➔ e.g., search engines
Limitations on liability

Service provider should not be liable for user-generated infringement, if:

- No actual or “red flag” knowledge of infringement
- No direct financial benefit w/ right & ability to control
- Implements notice & takedown
- Accommodates “standard technical measures”
- Implements repeat infringer policy
Notice & takedown

- Identifies alleged infringement
- Sends takedown notice

Copyright holder

Service provider
- Takes down accused content
- Notifies user

Internet user
- Content removed
- May file counter notice
Improper takedowns

- Approximately 30% of takedown requests are problematic, e.g.
  - Substantially incomplete
  - Designed to harass or hurt a competitor
  - Seeking removal of fair use
  - Seeking removal of things notice sender does not “own”
  - Attempt to silence users

Counter notices

**Copyright holder**
- May file suit against user, which also preserves takedown

**Service provider**
- Notifies notice sender
- Restores content in 10-14 days, unless . . .

**Internet user**
- Notifies service provider content was improperly removed
- Provides contact info & consents to suit
Why does it matter to startups?

- Most service providers (esp. startups) rarely encounter infringement
- Legal certainty & avoidance of (even meritless) litigation
- Costs of litigation (even if the startup wins)
  - $500,000 to summary judgment
  - Mere existence of litigation can be enough to slow or stop nascent company
  - Statutory damages quickly add up (at $150,000 per work)
- Investors do not want to spend on legal fees
Why does it matter to startups?

● Filters are very expensive, imperfect, and/or non-existent

○ Cost: e.g.,
  ■ YouTube spent over $100M to build Content ID
  ■ Off-the-shelf fingerprinting can cost over $10,000/month

○ Error rates: promote over-takedown of non-infringing content

○ Inherent limitations: technology cannot know what is protected, what is licensed, what is fair use

○ Non-existent: software programs, architecture design, physical goods, etc.
Article 17

● Requirements for service providers:
  ○ Best efforts to license content appearing on the site
  ○ Best efforts to “ensure unavailability of specific works”
  ○ Best efforts to block future uploads

Why get involved?

- Policymakers routinely hear from and think about big companies—big tech companies, traditional content companies, etc.

- But changes to § 512 would have the biggest impact on startups, Internet users, your current (or potential) customers
Key policymakers

● Congress
  ○ Senate Judiciary Committee; IP Subcommittee
  ○ House Judiciary Committee; Subcommittee on Courts, IP, & the Internet

● Copyright Office

● (Courts)
How to get involved?

● Share your experiences and opinions with:
  ○ Policymakers
  ○ Other startups
  ○ Entrepreneur support organizations
  ○ Advocacy organizations (like Engine)

● Phone calls, letters, or meetings with your representatives and Members of relevant committees

● Attend townhalls and roundtables with policymakers
How to get involved?

- Many congressional reps have a business liaison—build a relationship
- Consult local ESOs, incubators, accelerators to see if they have relationships with policymakers
- Submit comments to agency or congressional requests for input
- Collective voices can be better & easier:
  - Engage with organizations like Engine
  - Provide feedback & insights
  - Co-sign joint letters
  - Participate in Congressional Startup Day
Questions?