

Unsafe Harbors: Abusive DMCA Subpoenas and Takedown Demands

The DMCA has been used to invade the privacy of Internet users, harass Internet service providers, and chill online speech. The subpoena and takedown powers of Section 512 are not limited to cases of proven copyright infringement, and are exercised without a judge's review. The following is a small sampling of abuse, overreaching, and mistakes in the use of Section 512(h) subpoenas, Section 512(c)(3)(A) notices, and equivalents. Judicial oversight could curb these abuses without interfering with copyright enforcement.

- **Plain Error:** RIAA sent a DMCA notice to Penn State's Department of Astronomy and Astrophysics, accusing the university of unlawfully distributing songs by the musician Usher, and nearly forcing the department's servers offline during exam period. As it turned out, RIAA had mistakenly identified the combination of the word "Usher" (identifying faculty member Peter Usher) in conjunction with an *a cappella* song performed by astronomers about gamma rays as an instance of infringement. In apologizing, RIAA noted that its "temporary employee" had made an error. RIAA admitted that it does not routinely require its "Internet copyright enforcers" to listen to the song that is allegedly infringing.¹
- **More Plain Error:** RIAA recently admitted to several dozen additional errors in sending accusatory DMCA notices - all made in a single week. But RIAA has refused to provide additional details about these errors, professing concern that to do so would compromise the "privacy" of its employees and of the victims of its false accusations.²
- **Uncopyrightable Facts:** Wal-Mart sent a Section 512(h) subpoena, along with a 512(c) notice, to a comparison-shopping website that allows customers to post prices of items sold in stores, claiming incorrectly that its prices were copyrighted. Wal-Mart sought the identity of the user who had anonymously posted information about an upcoming sale. Other retailers, including Kmart, Jo-Ann Stores, OfficeMax, Best Buy, and Staples, also served 512(c) notices on the website based on the same bogus theory.³
- **Public Domain Materials:** The Internet Archive is a well-known website containing numerous public domain films, including the historic Prelinger collection. Many of these films have numerical file names. A purported copyright owner sent a DMCA notice to the Internet Archive in connection with films 19571.mpg and 20571a.mpg. The sender mistook Prelinger public domain films on home economics for the copyrighted submarine movie "U-571."⁴
- **Public Domain Materials:** An individual who simply wishes to erase the public record of his past, uncopyrighted messages has invoked 512(c) in an attempt to force ISPs to take down the material.⁵
- **Fair Use:** A DMCA claim was made against an individual who posted public court records that contained copyrighted material. The material was removed from the web until he filed a counter-notification.⁶
- **Social Criticism:** The Church of Scientology has long been accused of using copyright law to harass and silence its critics. The Church has discovered the ease with which it can use the DMCA to take down the speech of its critics. It has made DMCA claims against a popular search engine, Google, to bully the engine to stop

including in its index any information about certain websites critical of the Church.⁷

- **Misuse and Overreaching:** Trademark owners are not protected under the DMCA. Nevertheless, some trademark owners, eager to take advantage of the easy silencing of others under the 512(c) process, have invoked the DMCA.⁸
 - **ISP Harassment:** In 2002, Pacific Bell Internet Services and its affiliates were given more than 16,700 DMCA notices by RIAA agent MediaForce; in July 2003, RIAA attempted to serve more than 200 subpoenas through various affiliated entities. Titan Media, a purveyor of pornographic materials, sent a single subpoena demanding identities of alleged infringers at 59 different dynamically assigned IP addresses, then dropped the subpoena when Pacific Bell announced its intent to challenge its enforcement.⁹
 - **Improper Identification:** After receiving an RIAA subpoena, Massachusetts Institute of Technology released the name of a Romanian student with whom it associated the listed IP address. Despite having been
- out of the country at the time of the alleged infringement and declaring that he did not even own a computer, the student was unable to prevent release of his name and identifying information.¹⁰
- **Extra-jurisdictional Subpoenas:** The RIAA has served more than 1,600 subpoenas from the D.C. District Court, many on parties more than 100 miles from Washington, D.C. MIT and Boston College had to go to court to quash these subpoenas. RIAA then re-issued them from the proper district, in Boston.¹¹
 - **Erroneous Complaint:** Seven record labels mistakenly sued a 65-year-old Massachusetts woman for copyright infringement. They had filed a complaint against Sarah Ward based solely on KaZaA screenshots and Comcast's disclosure of her name and address in response to a subpoena. The record labels were forced to dismiss the complaint after learning that Ward used only a Macintosh computer incapable of running the KaZaA software.¹²

¹ See McCullagh, RIAA Apologizes for Threatening Letter, *CNET News.com*, May 12, 2003, <http://news.com.com/2100-1025_3-1001095.html>.

² See McCullagh, RIAA Admits It Sent Erroneous Letters, *CNET News.com*, May 13, 2003, <<http://www.msnbc.com/news/913204.asp?0dm=C16LT>>.

³ See <<http://www.fatwallet.com/forums/messageview.cfm?catid=18&threadid=129657>>; McCullagh, Wal-mart Backs Away from DMCA Claim, *CNET News.com*, Dec. 5, 2002, <<http://news.com.com/2100-1023-976296.html>>.

⁴ See <<http://www.chillingeffects.org/notice.cgi?NoticeID=595>>.

⁵ See <<http://www.chillingeffects.org/notice.cgi?NoticeID=312>>.

⁶ See <<http://www.chillingeffects.org/notice.cgi?NoticeID=348>>.

⁷ See <<http://www.chillingeffects.org/notice.cgi?NoticeID=232>>; see also Loney and Hansen, Google pulls Anti-Scientology Links, *CNET News.com*, March 21, 2002, <<http://news.com.com/2100-1023-865936.html>>.

⁸ See <<http://www.chillingeffects.org/notice.cgi?NoticeID=310>>.

⁹ See Complaint, *Pacific Bell Internet Services v. Recording Industry Association of America*, C03-3560-JL.

¹⁰ See Winstein, MIT Names Student As Alleged Infringer, *The Tech*, Sept. 9, 2003, <<http://www-tech.mit.edu/V123/N38/38riaa.38n.html>>.

¹¹ See Orders Aug. 8, 2003, *Massachusetts Institute of Technology v. Recording Industry Association of America*, 1:03-mc-10209-JLT; *Boston College v. Recording Industry Association of America*, 1:03-mc-10210-JLT.

¹² See Schwartz, She Says She's No Music Pirate. No Snoop Fan, Either., *New York Times*, Sept. 25, 2003; Gaither, Recording industry withdraws suit, *Boston Globe*, Sept. 24, 2003