



**Computer & Communications
Industry Association**
Tech Advocacy Since 1972

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Via Electronic Mail (Info@copyright.go.ke; Cc: esigei@copyright.go.ke)

Dr. Marisella Ouma
Executive Director
Kenya Copyright Board

Re: *Proposed Amendments To Provide Web Blocking Measures In Cases Of Copyright
Infringements Online*

Dear Dr. Ouma:

On behalf of the Computer & Communications Industry Association (CCIA)¹, I write in response to the Kenya Copyright Board's solicitation for input on proposed amendments to provide "web blocking measures" in cases of copyright infringements online. CCIA welcomes the opportunity to comment.

Limitations on Internet service provider (ISP) liability, which are envisioned in the proposed amendments to Kenyan law, are a crucial foundation for the development of a successful Internet industry. As you may be aware, online services in the United States and numerous other jurisdictions around the world have been operating with "notice and takedown" provisions, conjoined with liability limitations, for well over a decade. The United States provision, often referred to as the "DMCA safe harbor," was enacted with the 1998 Digital Millennium Copyright Act (DMCA), and is codified at 17 U.S.C. § 512. Similar provisions are also found in multiple free trade agreements, and are likely to be included in the recently concluded Trans-Pacific Partnership agreement (TPP).

The European E-Commerce Directive similarly establishes that online services are not to be held liable for substantively unmodified information transmitted from one party to another, of that party's choosing.² Like the U.S.-originating safe harbors, "[t]he EU's liability regime relies on a simple, yet powerful principle: it is the person or entity responsible for posting content or goods for sale that has

¹ CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. CCIA members employ more than 600,000 workers and generate annual revenues in excess of \$465 billion. A list of CCIA members is available at <https://www.cciagnet.org/members>.

² European E-Commerce Directive, 2000/31/EC of the European Parliament and of the Council of 8 June 2000, arts. 12-15.

legal responsibility for the content or goods in question, not the intermediary hosting the content or the platform on which the good is traded or the information is exchanged.”³

To the extent that these provisions broadly reflect an evolving international consensus toward limiting the potential liability of online services as an incentive to encourage services to take down allegedly infringing content upon notice, CCIA supports the objective of the proposed amendments. CCIA observes with concern, however, that the Copyright Board’s proposals depart considerably from the international consensus on an important matter. Insofar as section 35A(5) would impose criminal penalties on firms that fail to respond to takedown notices in 36 hours, the reform proposal is outside the mainstream.

Criminal penalties for not complying with a takedown notice would be extremely harmful to Internet companies and to the broader public for at least two reasons.

Short response times discriminate against small businesses and startups. The remarkably brief proposed response time of 36 hours will have the effect of discriminating against small businesses that may not be able to meet such a standard. While large multinational firms may be able to process takedown requests within a day, or even in a matter of hours, such may not be the case for small businesses, including future Kenyan startups. Recognizing that different enterprises of differing capacities would be able to respond to alleged infringement more quickly than others, the Digital Millennium Copyright Act requires online services to respond to claims of infringement “expeditiously,” but the Act prescribes no specific time. “Expeditious” for a multinational Internet company may be a matter of hours, whereas “expeditious” for a small local business, service provider, or blog may take far longer, depending on the basis of the claim. Even for the largest service providers, investigating potentially abusive notices may take longer than responding to obvious claims. Imposing a standard that small businesses and startups cannot meet may have the unfortunate effect of impeding the growth of local online businesses.

Potential criminal penalties will exacerbate abuse of takedown processes. The ability to force information to be disappeared from the Internet within 36 hours is a powerful tool that can be abused to harm competitors and to silence opposition. Since 1998, the United States has experienced measurable abuse of its DMCA notice and takedown process. While most takedowns are for entirely legitimate purposes relating to the legitimate interests of a rightsholder, abusive takedowns have been documented in cases involving business competitors and political campaigns,⁴ news reporting and criticism,⁵ and

³ Martin H. Thelle & Svend T. Jespersen, *Online Intermediaries: Assessing the Economic Impact of the EU’s Online Liability Regime*, at 7 (2012), available at <http://www.europeandigitalmedia.org/uploads/Press/documents/Copenhagen%20Economics-Online%20Intermediaries-201201.pdf>.

⁴ Matt Schruers, *Observations on DMCA Reform and Notice & Takedown Abuse*, Disruptive Competition Project, May 23, 2013, <http://www.project-disco.org/intellectual-property/052313observations-on-dmca-reform-and-notice-takedown-abuse/>.

⁵ Matt Schruers, *This Post Is No Longer Available Due to... (Why DMCA Abuse Occurs)*, Disruptive Competition Project, Aug. 14, 2013, <http://www.project-disco.org/intellectual-property/081413-this-post-is-no-longer-available-due-to-why-dmca-abuse-occurs/>.

technical errors.⁶ Due to the fact that U.S. service providers do not face the threat of criminal penalties, they are able to counteract this abuse to some extent, and promptly reinstate lawful content. Where claims are flagrantly abusive and aimed at censoring the speech of others, U.S. services will occasionally disregard a takedown notice entirely. Although service providers risk potential *copyright* liability in such cases, the fact that DMCA compliance is ultimately discretionary helps to partially mitigate takedown abuse. By backing takedowns with the implied threat of criminal prosecution, however, the power to issue takedowns may inadvertently function as a form of censorship.

The result of criminal penalties for non-compliance may be to encourage ISPs to disable access to lawful content and speech, due to the threat of criminal prosecution, which would deprive citizens of news and other information in the public interest. ISPs should have the discretion to disregard abusive or otherwise wrongful takedown notices when they know that they are referring to material which is not infringing.

Section 35A(5) also suggests imposing penalties for false or malicious takedowns. This appears to anticipate abuse of takedown tools, which is prudent. U.S. copyright law has a provision, albeit weak, intended to serve a similar purpose, codified in 17 U.S.C. § 512(f). As noted above, abuse of safe harbors still occurs in the United States, and thus safeguards stronger than Section 512(f) appear to be appropriate.

Thank you for your consideration of this input. Please let me know if our association may be of any further assistance.

Respectfully submitted,

Matt Schruers
VP, Law & Policy
Computer & Communications
Industry Association
900 Seventeenth Street NW, 11th Floor
Washington, D.C. 20006
(202) 783-0070
mschruers@ccianet.org

⁶ Matt Schruers, *This Post is No Longer Available Due To... (Why DMCA Abuse Occurs, Part II)*, Disruptive Competition Project, Feb. 5, 2014, <http://www.project-disco.org/intellectual-property/020514-this-post-is-no-longer-available-due-to-why-dmca-abuse-occurs-part-ii/>.