

THE NOTICE AND TAKEDOWN PROCEDURE UNDER COPYRIGHT LAW: DEVELOPING A MEASURED APPROACH

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Abstract

More than a decade has passed since the 'notice and takedown' procedure has been in effect. The area has developed rapidly, especially in the last five years. Several initiatives within the takedown regime and branching off of alternate approaches have occurred during this period. These efforts indicate attempts to achieve a balance and ensure a measured approach as regards the application of this procedure. This article examines and appraises the notice and takedown structure, drawing upon US resources, and with comparative reference to Australia and other jurisdictions.

I INTRODUCTION

With constant evolution in technology, the law has to adapt to meet the demands of a new medium. With the advent of the internet a similar need was felt, especially in context of copyright law. Pursuant to the adoption of the two internet treaties¹ of the World Intellectual Property Organization ('WIPO'), member countries were obligated to implement provisions that would ensure a modulated growth of the internet and new technology.

The internet, like the printing press, has created a new medium for the copyright law-technology interplay to unfold. As digital works can be copied and distributed worldwide virtually instantaneously, assurance was needed to build belief in this medium. At the same time, the standing of the main caretakers of this medium, the service providers,

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1 *The WIPO Copyright Treaty*, opened for signature 20 December 1996, S Treaty Doc No 105-17; 36 ILM 65 (entered into force 6 March 2002) and *WIPO Performances and Phonograms Treaty*, opened for signature 20 December 1996, S Treaty Doc No 105-17, 36 ILM 76 (entered into force 20 May 2002).

the copyright holders, and the users too, needed clarification to provide them with sufficient incentive to invest in the new medium. The 'safe harbours' in copyright law was structured to achieve such a balance. In furtherance of this intention, besides other factors, the 'notice and takedown procedure' was created to assist copyright owners in ensuring rapid removal of allegedly infringing material from the Internet, while guaranteeing compliant service providers a safe harbour from liability for any internet users' acts of copyright infringement.

The delicate poise of copyright and technology can be maintained only through cooperation. However, the leeway provided by the law to the parties to maintain the balance has often been exploited advertently or inadvertently to achieve intentions other than those envisaged by the constitution as the mainframe of copyright law.

This article seeks to draw out the varied implications of the takedown provision. Furthermore, more than a decade has passed since the takedown procedure has been in effect and the field has developed quite rapidly, especially in the last five years. Several initiatives within the takedown regime and branching off of alternate approaches have occurred during this period. These efforts indicate attempts to achieve a balance and ensure a measured approach as regards the application of this procedure. This article seeks to make an appraisal of the takedown structure, its weaknesses and grey areas and how these are being addressed.

Part II of the article is a general commentary on the takedown process. Part III is an appraisal of the efficacy and controversial aspects of the notice and takedown regime, essentially dealt with under three heads - the legal issues, the procedural issues and its interface with business and commercial agendas. Part IV highlights the manner in which the takedown and notice regime has developed and the attempts at achieving a measured approach within the regime and the various alternates which have evolved. Finally, Part V concludes the article with certain observations and recommendations. This article has drawn heavily on United States ('US') resources, with comparative reference to Australian resources. At appropriate places, to mark developments and evolution of the US takedown model, references have been made to policies in effect in the European Union ('EU'), the United Kingdom ('UK'), Japan, Hong Kong, and New Zealand.

II THE NOTICE AND TAKEDOWN REGIME

The liability of online service providers and internet access providers for copyright infringement due to transmission or storage of potentially

infringing material over their networks has been a controversial issue.² Several countries have addressed this issue in their respective manner, laying down ground rules to provide greater certainty for service providers as regards their legal stance. The regulations generally provide immunity or limitation of liability to a service provider from online copyright infringement issues for monetary, injunctive or equitable relief, among other things, as long as it falls under certain ‘safe harbours.’

In 1998 the US Congress passed the *Digital Millennium Copyright Act* (‘DMCA’) to update copyright law and make digital networks safe places to disseminate and exploit copyrighted materials. This legislation implemented the two WIPO treaties mentioned above. The Act is divided into five titles, detailing different aspects of digital copyright law. Title II (the Online Copyright Infringement Liability Limitation), in the second chapter of the DMCA, added a new section, namely, § 512 to the US *Copyright Act*, 17 USC, which provided four safe harbours to shelter service providers from liability for copyright infringement.³ Under the DMCA the safe harbours from liability cover certain core aspects of the internet essential to its functioning, namely (a) transitory digital network communications,⁴ (b) system caching,⁵ (c) information residing on systems or networks at the direction of users,⁶ and (d) information location tools.⁷ Regarding qualifying for safe harbours, Ian Chuang states thus:

Content hosts must satisfy three requirements to claim a safe harbor defense ... First, the host must not possess actual knowledge that the material on its network infringes on any copyrighted material. Therefore, if the host learns of any infringing

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- 2 See for example, *Religious Technology Center v Netcom On-line Communications Services*, 907 F Supp 1361 (ND Cal, 1995); *Playboy Enterprises v Frena*, 839 F Supp 1552 (MD Fla, 1993); *Marobie-FL v Nat Assn Of Fire Equipment Distributors*, 983 F Supp 1167 (ND III, 1997).
- 3 In a bid to address the challenges posed to Australian copyright law by emerging digital technologies, the Australian government passed the *Copyright Amendment (Digital Agenda) Act 2000* (Cth), which amended the *Copyright Act 1968* (Cth) accordingly. Middleton states that ‘[t]he categories of online activities in sections 116AC to 116AF of the ... [*Copyright Act 1968* (Cth)] to which the limitation on remedies under section 116AG apply are similar to the four “safe harbours” of the US DMCA’: Gaye L Middleton, ‘Copyright Conundrum - Liability of ISPs for Online Copyright Infringement’. See also generally the following which provides further commentary on the Australian position: Yijun Tian, ‘Wipo Treaties, Free Trade Agreement and Implications for ISP Safe Harbour Provisions (The Role of ISP in Australian Copyright Law)’ (2004) 16 (1) *Bond Law Review* 186 <<http://epublications.bond.edu.au/blr/vol16/iss1/7>>; Bryan Mercurio, ‘Internet Service Provider Liability for Copyright Infringements of Subscribers: A Comparison of the American and Australian Efforts to Combat the Uncertainty’ (2002) 9(4) *Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v9n4/mercurio94.html>>.
- 4 *Copyright Act*, 17 USC § 512(a) (1976). See also *Copyright Act 1968* (Cth) s 116AC.
- 5 *Copyright Act*, 17 USC § 512(b) (1976). See also *Copyright Act 1968* (Cth) s116AD.
- 6 *Copyright Act*, 17 USC § 512(c) (1976). See also *Copyright Act 1968* (Cth) s116AE.
- 7 *Copyright Act*, 17 USC § 512(d) (1976). See also *Copyright Act 1968* (Cth) s 116AF.

material, it must remove the content immediately ... Second, the host must not 'receive a financial benefit directly attributable to the infringing activity.' Third, upon receipt of the copyright holder's takedown notice, the host must remove or disable access to the infringing material. Last, the host must clearly post its copyright law policy, including the notice and takedown policies set out in the DMCA.⁸

Besides other qualifying criteria,⁹ one of the most essential criterions is the provision of notice and takedown.¹⁰This procedure is a 'formalization and refinement of a cooperative process that has been employed to deal efficiently with network-based copyright infringement.'¹¹ The law does not require use of the notice and take-down procedure in order to determine infringement.¹² However, following it, entitles a service provider for the safe harbour mentioned above in clauses (b), (c) and (d). Analogously, the 'failure of a service provider's conduct to qualify for limitation of liability ... shall not bear adversely upon the consideration of a defence by the service provider that the service provider's conduct is not infringing'.¹³

The procedure comes into play if the alleged infringer makes copyrighted material available on the internet, without the copyright owner's authorisation. It essentially involves the copyright owner informing the service provider of the existence of the infringing material and requesting the service provider to take down the material. Like the service providers, 'copyright owners are not obligated to give notification of claimed infringement in order to enforce their rights.'¹⁴ Neither actual knowledge nor awareness of an infringing activity may be imputed to a service provider based on information from a copyright owner that does not comply with the notification provisions.¹⁵

Service providers are required to institute a takedown infrastructure, where an agent needs to be designated to handle notifications regarding infringement claims, and its contact information be made readily available.¹⁶

8 Ian Chuang, 'Be Wary of Adding Your Own Soundtrack: *Lenz v Universal* and How the Fair Use Policy Should be Applied to User Generated Content' (2009) 29 *Loyola of Los Angeles Entertainment Law Review* 163, 169.

9 *Copyright Act*, 17 USC § 512 (1976). See also *Copyright Act 1968* (Cth) s116AH.

10 *Copyright Act*, 17 USC § 512(k)(2) (1976); See also, *Copyright Act 1968* (Cth) s 116AH.

11 US Congressional Senate Rep No 105-190, 45 (1998).

12 See *ibid*.

13 *Copyright Act*, 17 USC § 512(l) (1976).

14 US Congressional Senate Rep No 105-190, 45 (1998).

15 See *ibid*.

16 *Copyright Act*, 17 USC § 512(c)(2) (1976) (Information Residing on Systems or Networks at Direction of Users).

A notification is required to be in a prescribed format, covering certain essentials.¹⁷ If a notification fails to comply substantially with the provisions, then it shall not be considered in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.¹⁸ However, where, the notification though not complying substantially with all the provisions, still covers certain statutorily prescribed essentials, then the onus shifts to the service provider to promptly attempt to contact the person making the notification or take other reasonable steps to assist in the receipt of notification that substantially complies with the requirements.¹⁹

To avail the protection of the safe harbour, the service provider is required to respond 'expeditiously' to a notice and either remove or disable access to the claimed infringing material.²⁰

A service provider is provided immunity against all parties for good faith in disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.²¹ However, the procedure requires that the service provider take reasonable steps to notify the alleged infringer that the material has been removed where the information is residing on systems or networks at direction of users.²²

Furthermore, the alleged infringer is sought to be protected from

17 *Copyright Act*, 17 USC § 512(c)(3) (1976): Elements of a Notification: (a) it must be a written communication and should be submitted to the service provider's designated agent; (b) it must contain a physical or electronic signature ...; (c) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site; (d) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material; (e) Information reasonably sufficient to permit the service provider to contact the complaining party ...; (f) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; (g) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed

18 *Copyright Act*, 17 USC § 512(c)(3)(B)(i) (1976).

19 *Copyright Act*, 17 USC § 512(c)(3)(B)(ii) (1976).

20 See, *Copyright Act*, 17 USC (1976) - § 512(b)(2)(E); § 512(c)(1)(A)(iii); § 512(c)(1)(c); § 512(d)(1)(c); § 512(d)(3). See also *Copyright Act 1968* (Cth) s 116AH(1).

21 But see *Copyright Act*, 17 USC § 512(g)(1) (1976) for exceptions and qualifications to the immunity provision.

22 *Copyright Act*, 17 USC § 512(g)(2)(A) (1976).

mistaken takedowns and misuse of this extra-judicial process principally through a counter-notification procedure, through which he or she can contest and demand replacement of the removed or disabled material.²³ If after 10 to 14 days following the receipt of the counter-notification, the complainant does not notify the service provider that it has filed an action against the alleged infringer, then the service provider may put back the material.²⁴

Remedies for bad faith action are provided for, under which, any of the three parties - the copyright holder, the alleged infringer, or the service provider - can be awarded damages, costs and attorneys' fees if either the copyright holder or alleged infringer makes knowing, material misrepresentations in a notice or counter notice.²⁵

III APPRAISAL OF THE NOTICE AND TAKEDOWN PROCEDURE

In order to 'incentivize cooperation between copyright owners and service providers, burdens for each party had to be reasonably proportional and adequately tailored to reflect the various functions of different service providers.'²⁶ The notice and takedown regime was the outcome of the attempt to achieve this balance. As commentators, Urban and Quilter explain:

In theory, granting OSPs [online service providers] safe harbor from contributory copyright infringement for their removal of material in response to a DMCA notice has several benefits. First, it greatly diminishes any incentive for OSPs to monitor their users' Internet expression for fear of secondary liability. Second, it is, at least theoretically, less burdensome on OSPs than any scheme that would require them to monitor their users' behavior. Third, it is a quick and easy way for victims of copyright infringement to short-circuit Internet distribution of copyrighted material - probably faster, and certainly much less expensive, than obtaining a temporary restraining order or preliminary injunction from a court. The alleged infringer is in the position of having material removed before any court review; but the counternotice procedure is also quick and easy.²⁷

However, several empirical studies, prominently those carried out by Professor Jennifer Urban and Laura Quilter,²⁸ and Marjorie Heins and Tricia Beckles,²⁹ have raised questions regarding the efficacy of the

23 *Copyright Act*, 17 USC § 512(g)(3) (1976).

24 *Copyright Act*, 17 USC § 512(g)(2)(C) (1976).

25 *Copyright Act*, 17 USC § 512(f) (1976).

26 Emily Zarins, 'Notice Versus Knowledge under The Digital Millennium Copyright Act's Safe Harbors' (2004) 92 *California Law Review*, 257, 271.

27 Jennifer M Urban and Laura Quilter, 'Efficient Process or "Chilling Effects"? Takedown Notices under Section 512 of the Digital Millennium Copyright Act' (2005-2006) 22 *Santa Clara Computer & High Technology Law Journal*, 621, 636.

28 *Ibid.*

29 Marjorie Heins and Tricia Beckles, *Will Fair Use Survive? Free Expression in the Age of Copyright Control* (Brennan Center for Justice, 2005) <<http://fepproject.org/>

However, it is implementation itself which is the actual trial by fire for such policies. Even the takedown regime, when properly enforced, has the desired effect. However, it is the loopholes of the regime, which when exploited create disharmony.

C *Horizontal Approach*

As opposed to the vertical approach adopted by the United States and Australia in dealing with the liability of a service provider, the European Union ('EU'),¹⁰⁷ Japan and Canada have adopted the horizontal approach. In a horizontal approach, there is 'one liability regime applicable to any infringement, regardless of the area of law. Thus, the same regime will be applicable to any type of infringement, whether it is copyright, defamation, or privacy rights.'¹⁰⁸ It is argued that a horizontal approach is favourable because internet service providers (ISPs) do not have to monitor the content of the material published by their customers. 'If the EU had adopted a vertical approach that applied different legal liability regimes to the data flowing through the systems, ISPs would have been obliged to decode the bits that form the data and analyze all the content (music, images, etc) before posting. This would have been an extremely weighty burden to place on the ISPs' shoulders, with the possibility of converting them in censorship agents.'¹⁰⁹

Under Japan's safe harbour provision, in order to receive the benefit of immunity from liability, an ISP must when it receives a takedown notice, forward the notice to the alleged infringer and if within seven days an explanation is not received from the subscriber of why the content is not unlawful, only then may takedown the material.¹¹⁰ In addition, there are some exemptions from the seven day notice and takedown

107 See, Directive 2000/31/EC (Directive on Electronic Commerce).

108 Pablo Asbo Baistrocchi, 'Liability Of Intermediary Service Providers In The EU Directive On Electronic Commerce' (2002) 19 *Santa Clara Computer and High Technology Law Journal* 111, 117.

109 Ibid. See also, Dr. Nils Bortloff, *Notice and Take-Down Agreements in Practice in Europe-Views From the Internet Service Provider and Telecommunications Industries and the Recording Industry, Workshop on Service Provider Liability*, Geneva, December 9 and 10, 1999 <http://www.wipo.int/documents/en/meetings/1999/osp/doc/osp_lia3.doc> (The basic aim of the horizontal approach is to create a 'clear and uniform general framework to cover certain legal aspects of electronic commerce in the Internet market.' This differs from the approach taken by the US DMCA, which deals with both copyright and copyright-specific liability in the same piece of legislation. The intention in Europe is for both Directives (Copyright Directive (COM (1999) and E Commerce Directive (COM (1999)) to enter into force seamlessly in order to ensure there is no legal uncertainty (see recital 16a of the draft E Commerce Directive)).

110 See, Tian, above n 48; Mercurio, above n 48.

regime. In order to terminate expeditiously the online infringement and to circumvent the seven day period during which the service provider must wait for the subscriber's response, major associations of ISPs and copyright owners have produced a 'voluntary guideline'.¹¹¹ The guideline specifies a kind of special notice from the copyright holder or credibility certification organization that would enable the ISP to take down immediately the claimed files/activities of subscribers. This model called the 'notice and notice' model which has legislation and industry guideline working together makes the regime more complete. This also implies that service providers can make different responses to claimed online infringement according to different circumstances.

Similarly, Canada too has a 'notice and notice' system in place which it has attempted several times to codify. The system was put in place by the various industry stakeholders.

Highlighting the inadequacies of the notice and takedown regime, M Geist states that the system 'doesn't work in a peer-to-peer environment where there is nothing for the ISP to take down because it's residing on the individual's computer. That doesn't stop people from generating literally tens of thousands of these notifications.'¹¹²

Contrasting the 'notice and takedown' regime with the 'notice and notice' model, Rudkin-Binks and Melbourne enumerate the advantages:¹¹³

The primary advantage of this procedure is that it leaves the ISP as a mere go-between and places any legal decision making and interpretation of copyright legislation rightly in the hands of the courts. The removal of infringing material would only take place on judicial order after due consideration of the various interests involved in the dispute. Secondly, it confines the conflict between the copyright owner and the alleged infringer, leaving those parties to bear the costs of any legal proceedings. Thirdly, instead of blocking access to an entire website merely on allegations of copyright breach, it takes a less aggressive approach by passing the complaint to the alleged offender, thus not inhibiting freedom of expression.¹¹⁴

Suggestions have been made to club the 'notice and notice' model with the 'notice and takedown' model to address peer-to-peer issues:

111 See Tian, above n 48.

112 Symposium, '21st Century Copyright Law In The Digital Domain Symposium Transcript' (2006) 13 *Michigan Telecommunications and Technology Law Review* 247, 311.

113 Jason Rudkin-Binks and Stephanie Melbourne, 'The New "Three Strikes" Regime For Copyright Enforcement In New Zealand - Requiring ISPs to Step Up to The Fight' (2009) 20(4) *Entertainment Law Review* 146, 149.

114 Jason Rudkin-Binks and Stephanie Melbourne, 'The New "Three Strikes" Regime For Copyright Enforcement In New Zealand - Requiring ISPs to Step Up to The Fight' (2009) 20(4) *Entertainment Law Review* 146, 149.

'Notice and notice' and 'notice and takedown' are complementary methods of dealing with online file sharing. They have often been portrayed as mutually exclusive processes. They are not. Notice and notice may be somewhat useful in dealing with P2P file sharing; notice and takedown is necessary to deal with files that are hosted by the ISP.¹¹⁵

Perhaps observing the relevancy of such arguments, Hong Kong has proposed a merged model which in general entails forwarding notices from the copyright holder to the alleged infringer and taking down the infringing material.¹¹⁶

D *Graduated Response*

Peer-to-peer infringement has emerged as a contentious issue. Individually the application of the various models in existence have failed to address peer-to-peer infringement, either due to legal mandates and/or technical limitations.

Regarding the applicability of the notice and takedown regime to peer to peer applications, Ginsburg CJ stated:

We are not unsympathetic either to the RIAA's concern regarding the widespread infringement of its members' copyrights, or to the need for legal tools to protect those rights. It is not the province of the courts, however, to rewrite the DMCA in order to make it fit a new and unforeseen internet architecture...¹¹⁷

Similarly, the notice and notice procedure 'is not effective in permanently stopping downloading'.¹¹⁸

Industry led initiatives too have deep legal implications. For example, there have been instances where service providers opted for restrictive controls over their networks, thus coming in conflict with the principles of net neutrality. Comcast, a service provider was enjoined by the Federal Communications Commission from throttling traffic to peer-to-peer torrent sites as the action violated rules of net neutrality.¹¹⁹

115 Barry Sookman, 'Copyright Reform for Canada: What Should We Do? A Submission to the Copyright Consultation' (2009) 22 *Intellectual Property Journal* 1, 21.

116 See, Hogan Lovells, Monique Woo and Brenda Lui, *Hong Kong Takes Steps to Improve Copyright Protection in the Internet Age: the Copyright (Amendment) Bill 2011* (July 21, 2011) <<http://www.lexology.com/library/detail.aspx?g=5d6729df-bbda-4c5b-9134-57dc6fe04099>>.

117 *Recording Indus Ass'n of Am, Inc v Verizon Internet Servs.*, 359 US App DC 85 (DC Cir 2003).

118 Sookman, above n 115, 22.

119 Kathleen Ann Ruane, *Net Neutrality: The Federal Communications Commission's Authority to Enforce Its Network Management Principles* (21 September 2009) <<http://www.fas.org/sgp/crs/misc/R40234.pdf>>.

Though repeat infringer policies are in effect even in the ‘notice and notice’ and ‘notice and takedown’ process, the policies still allow leeway as regards the determination of who a ‘repeat infringer’ is and the parameters for monitoring and terminating the account of a ‘repeat infringer.’ In *Roadshow Films Pty Ltd v Inet Ltd* the Federal Court of Australia stated:

Nowhere in the Act or the Regulations are the expressions ‘repeat infringer’ or ‘appropriate circumstances’ defined. This may suggest that it was the legislature’s intention that carriage service providers engaging in Category A activity [Section 116AH of Australia’s *Copyright Act, 1968*] should be given considerable latitude in determining who is a repeat infringer for the purposes of such a policy and in what circumstances the account of a repeat infringer should be terminated.¹²⁰

The quandary is that neither ‘notice and takedown’ nor ‘notice and notice’ models are effective in combating this issue ‘unless the individuals receiving the notices believe that sanctions could be imposed unless they cease such activity.’¹²¹ Hence, a new graduated response regime has recently developed which merges all existing models into one.

In a graduated response process, right holders and service providers work together to curb infringements. Colloquially referred to as the ‘three strikes’ regime, the model requires service providers to monitor their networks for infringing material and then give the copyright infringers two or a decided set of warnings before disconnecting their internet connection on the ‘third strike.’ Rudkin-Binks and Melbourne explains this:

To facilitate ISPs becoming aware of infringing material, it is anticipated that a rights holder may give notice to the ISP, for example, setting out the details of the infringing material on a third party website hosted by the ISP. This should prompt a graduated response starting with the ISP issuing an educational letter to the infringer. A further breach will then elicit a second warning and a third breach would require the ISP to terminate the user’s account.¹²²

Several countries are developing and enforcing variants of this model either legislatively or by industry, for eg, New Zealand,¹²³ UK,¹²⁴ and the US.¹²⁵

120 [2011] FCAFC 23.

121 Sookman, above n 115, 22.

122 Rudkin-Binks and Melbourne, above n 113.

123 See, *New Zealand Copyright (Infringing File Sharing) Amendment Bill 119-2 (2010)*.

124 See, UK *Digital Economy Act 2010*.

125 Telecompaper, *US ISPs Agree on Graduated Response System* (8 July 2011) <<http://www.telecompaper.com/news/us-isps-agree-on-graduated-response-system>>.

An issue that immediately comes to the fore is what would be the parameters of infringement determination? The potential for mistakes and abuse presented by takedown notices 'buttresses the argument that ... takedown notices should not be sufficient proof of infringement to trigger internet termination'.¹²⁶ However, invalidating any agreement that 'allow for termination of an internet connection on less than a showing of actual infringement strikes the right balance between protecting the legitimate interests of the subscriber, the ISP, and the copyright holder.'¹²⁷

Correspondingly, the model has also generated debate as it shifts the onus of a service provider from a passive intermediary to an active monitor. The central issue is that rather than internet service providers being mere intermediaries 'between rights holders and copyright infringers, they are now under onerous obligations which many see as being disproportionate to the overall objectives that are to be obtained.'¹²⁸ Several copyright laws, including that of Australia, the US, and the EU Directive, exempt active monitoring by service providers.

Furthermore, due process concerns emanating from the automated monitoring procedure have been raised, citing that it would 'cut off Internet access based on unproven allegations of infringement.'¹²⁹ However, policies are being posited to safeguard the user's rights, like option of hearing.¹³⁰

Despite the safeguards, Murtagh raises some valid queries regarding this scheme:

First, one can easily imagine subscribers being kept from lawful content and applications of their choice under such a system, although the government involvement and independent determination of infringement are improvements over a purely ISP-RIAA collaboration. Further, as it requires mediation in the event of a dispute, does this mean that the subscriber - who may still have been targeted based on an erroneous allegation - must now pay the costs of mediation to clear her name? Finally, the ... law requires only 'reasonable grounds' to suspect infringement. Like DMCA takedown notices, a 'reasonable grounds' standard may lead to errors, and the machinery of the state will be invoked against innocent people who will likely pay to avoid the trouble. Thus, like the proposed ISP-RIAA collaborations in the United States, all of these collaborations run the risk of depriving internet subscribers of lawful content and applications based on mere allegations.¹³¹

126 Michael P Murtagh, 'The FCC, The DMCA, and Why Takedown Notices Are Not Enough' (2009) 61 *Hastings Law Journal* 233, 254.

127 *Ibid* 269.

128 Rudkin-Binks and Melbourne, above n 113.

129 Sookman, above n 115, 21 citing Professor Geist <<http://speakoutoncopyright.ca/my-short-answer>>.

130 See, Simon Power, *Section 92A Proposal Released for Consultation* (14 July 2009) <<http://www.national.org.nz/Article.aspx?ArticleID=30377>>.

131 Murtagh, above n126, 269.

V CONCLUSION

As technology keeps evolving, the race to keep step with it is becoming more and more difficult for traditional laws. The myriad of implications thrown up become quite difficult sometimes to balance with the traditional concept of law. Copyright law has its basis in the evolution of technology - from the printing press to the internet. However, a limitation of such a technologically driven law is that as compared to other laws, copyright law seems to be relatively more legislatively and industry-wise advocated and propagated than judicially so. The judiciary has always to seek an accommodation of rights based on traditional concepts and apply them to future technologies.

The legislature should create a new infrastructure, recognizing the internet for its dynamism. They have achieved this to a certain extent; yet in certain instances they opted for traditional concepts where new structures were required and in certain instances created new structures where a resort to the traditional concepts would have sufficed.

The policy concerns related to the takedown procedure is just one of the reflections of this imbalance. The delicate poise of copyright and technology can be maintained only through cooperation. However, the leeway provided by legislation to the involved parties to maintain the balance has often been exploited advertently or inadvertently to achieve intentions other than those envisaged as the mainframe of copyright law.

Several of the substantive legal concerns are due to the application of legislative terms employed in the traditional arena to the digital arena. The process-related concerns and challenge to traditional rights on the other hand are posed largely due to the process being largely extra-judicial with the involved parties lacking or exploiting legal strictures.

A distinction needs to be made between the protection accorded to individual copyright holders and to large commercial enterprises. Individual copyright holders usually employ the takedown notice to safeguard private interests; on the other hand commercial houses use the takedown notice as an additional weapon in their armoury to achieve corporate interests.

Though serving its primary purpose of achieving inexpensive takedown of infringing content, the takedown procedure is constantly being used to serve purposes which are a blatant abuse of the procedure. This might lead to loss of user confidence in the internet. Despite abuses, it cannot be denied that the notice and takedown measure is quite beneficial especially to the individual copyright holders and

small businesses. However, a strengthening of the structure is certainly required to provide a balance in the protections available to all parties concerned. The initiatives within the takedown regime and branching off of alternate approaches are indicative of attempts to achieve a balance and ensure a measured approach of the procedure. They also showcase an understanding that internet is an evolving universe, which requires flexible procedures.

