VIA ELECTRONIC SUBMISSION: regulations.gov

March 29, 2016

Maria A. Pallante
Register of Copyrights and Director
U.S. Copyright Office, Library of Congress
101 Independence Avenue, SE
Washington, DC 20559-6000

Re: Comments in response to "Section 512 Study: Notice and Request for Public Comment" (80 FR 81862, Docket No. 2015-7; Regulations.gov Docket No. COLC-2015-0013)

Dear Ms. Pallante:

EDUCAUSE, the Association of American Universities (AAU), and the Association of Public and Land-grant Universities (APLU) respectfully submit these comments to the U.S. Copyright Office in response to the above-referenced notice of inquiry published in the *Federal Register* on December 31, 2015, at 80 FR 81862. (Please see the conclusion of this letter for more information about our associations and the higher education communities we serve.) Our comments primarily pertain to the questions raised in the notice of inquiry about "fraudulent, abusive, and unfounded notices" (questions 12 and 28).

Before delving into our core comments, we would like to raise a suggestion that addresses many questions in the "Notice-and-Takedown Process" section of the Office's notice of inquiry.[1] In the document, the Office makes reference to the Internet Policy Task Force's voluntary, multi-stakeholder effort on identifying improvements to the Digital Millennium Copyright Act (DMCA) notice-and-takedown process. The notice of inquiry highlights the initial product of the multi-stakeholder effort, *DMCA Notice-and-Takedown Processes: List of Good, Bad, and Situational Practices*, which provides numerous ideas for more effectively managing notice-and-takedown activities. The original aim of the effort's initial collaboration, though, was to develop a standardized format for DMCA notices. The stakeholders involved pursued this project with the thought that broad, voluntary adoption of a standardized format would greatly simplify both DMCA notice development and response.

While the multi-stakeholder project ultimately shifted to promoting general process best practices, our member institutions believe that the project's original aim was the correct one. To address the concerns about efficiency and fairness raised by the "Notice-and-Takedown Process" questions, the Office might consider reviving the effort to develop a standardized

[1] 80 FR 81868, Dec. 31, 2015.

format for DMCA notices. Establishing a standardized format would likely help rights holders and the enforcement agents working for them to generate more consistently complete and accurate notices. This, in turn, would likely improve the efficiency and effectiveness with which notice recipients could take action, especially when automated tools are deployed.

Regarding our concerns about fraudulent, abusive, and unfounded notices,[2] it is worth noting that our member institutions occupy a unique space when it comes to the issues raised in the notice of inquiry as a whole. In many cases, colleges and universities are major producers of content that benefit from copyright protection as well as significant consumers of such content through purchase, licensing, and equally important, fair use. They have reasonable concerns about online infringement of copyright as well as the potential for overreach in response to infringement to frustrate mission-critical learning, research, and service functions. They drive innovation in the development and deployment of online content and networks, and yet their IT environments must respond to the many risks and challenges that the larger online ecosystem imposes.

Given this diverse set of perspectives, higher education institutions take their responsibilities for compliance with the DMCA safe harbor provisions very seriously. This recognition of responsibility often takes the form of significant, ongoing educational efforts to help students develop as digital citizens who understand their personal responsibilities and risks in relation to respecting copyright online; conduct policies that hold members of the institutional community accountable for consistent, willful failure to refrain from infringing activities (as distinct from the appropriate exercise of fair use); and dedicated personnel and technological resources with which to field and respond to DMCA notices.

Unfortunately, our member institutions increasingly find that copyright holders, or more commonly, rights enforcement agents acting on their behalf, are not approaching their responsibility for the fair and effective functioning of the DMCA notice-and-takedown system with equal seriousness. Many colleges and universities report experiencing a doubling of notice volume over the last few years, with the increase bearing no apparent relation to observed activity in institutional IT environments. Major content releases and/or institution-specific developments can occasionally produce large, short-term increases in notice volume at a given institution. However, the sporadic timing and widespread nature of spikes in notice volume over this period give the appearance of organized efforts to overwhelm institutional capacity to respond.

Our members find this particularly troubling given that enforcement agent notices frequently contain inaccurate information, such as citing instances of alleged infringement at IP addresses that were not in use at the time a notice specifies. Likewise, even though rights holders and their agents should consider fair use before asserting infringement, institutions regularly see a high degree of notices requesting takedown of content that any good-faith determination would

[2] 80 FR 81868, Dec. 31, 2015; see "Notice-and -Takedown Process," questions 12 and 28.

identify as fair use. In addition, institutions are seeing a growing tendency for rights enforcement agents to include settlement offers to alleged infringers in their notices. This distorts the notice-and-takedown process from an operational perspective while giving the impression that generating revenue, and not mitigating infringement, is the enforcement agent's underlying objective.

These factors separately and collectively indicate that the remedies for misrepresentation under 17 U.S.C. 512 are not sufficient to deter fraudulent and abusive notices as question 28 asks. Rights enforcement agents know that the potential cost of legal action to resolve a dispute in this area serves as a significant deterrent to effective counter-notification by resource-constrained institutional stakeholders, such as students. The enforcement agent actions specified above, including the incorporation of settlement offers into takedown notices, seem in fact to rely on that deterrent.

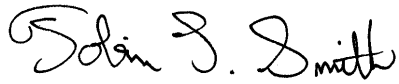
With this in mind, our member institutions urge the Office to advance measures that would raise the level of accountability for misuse of the notice-and-takedown system to align with the level of burden such misuse imposes on organizations such as colleges and universities. Just as a pattern of repeat infringement is supposed to impact the way in which an institution handles the community member involved, a documented pattern of inaccurate, inappropriate notices should have negative implications for the rights holder and/or enforcement agent involved. The shape that potential enforcement should take – such as audits, fines, suspension of the ability to function as a rights enforcement agent, or other administrative action – requires careful consultation with affected communities on both sides, given the legislative and regulatory considerations it would entail. There is little doubt from our members' perspective, though, that the existing accountability measures for abusing the notice-and-takedown system are inadequate.

Willful distortion of the process has real-world effects – in the case of colleges and universities, it is diverting resources from learning and research at an unsustainable pace. The threat to an enforcement agent of potentially having to pay damages, including costs and attorney's fees, is no threat when the enforcement agent knows that those subject to a misrepresentative notice lack the resources to sustain legal action. Thus, there truly is no bar on a rights enforcement agent knowingly issuing inaccurate notices at volume, and there is no true recourse for institutions to relieve the resource burden associated with that volume. This ultimately serves neither copyright holders nor our member institutions, who are themselves copyright holders as well as purchasers of billions of dollars of copyrighted works each year. Thus, the Office should work with stakeholders such as our members as well as Congress to achieve balanced accountability across the DMCA spectrum as soon as reasonably possible.

Thank you for your consideration of our response to the Office's section 512 notice of inquiry. Please contact Jarret Cummings at EDUCAUSE (jcummings@educause.edu) if we may provide further information or perspective that could assist the Office's study or subsequent efforts to improve the DMCA notice-and-takedown process.

Sincerely,

Jarret S. Cummings
Director of Policy and Government Relations
EDUCAUSE



Tobin L. Smith
Vice President for Policy
Association of American Universities

Alan R. Mabe, Ph.D.
Vice President for Academic Affairs and Chief Academic Officer
Association of Public and Land-grant Universities

Association Descriptions

EDUCAUSE is a non-profit association and the foremost community of information technology (IT) leaders and professionals committed to advancing higher education. Our membership includes over 2,000 colleges and universities, over 350 corporations serving higher education IT, and dozens of other associations, state and federal agencies, system offices, and not-for-profit organizations. EDUCAUSE strives to support IT professionals and the further advancement of IT in higher education through analysis, advocacy, community/network-building, professional development, and knowledge creation.

The Association of American Universities (AAU) is a non-profit association of 60 U.S. and two Canadian public and private research universities. Founded to advance the international standing of U.S. research universities, AAU today focuses on issues that are important to

research-intensive universities, such as funding for research, research regulations, and graduate and undergraduate education.

The Association of Public and Land-grant Universities (APLU) is a non-profit research, policy, and advocacy organization representing 235 public research universities, land-grant institutions, state university systems, and affiliated organizations. Founded in 1887, APLU is North America's oldest higher education association with member institutions in all 50 states, the District of Columbia, four U.S. territories, Canada, and Mexico.