

2 DEFICIENCIES OF EXISTING SYSTEMS FOR THE TAKEDOWN OF COPYRIGHT INFRINGING CONTENT HOSTED ON THE INTERNET IN BOSNIA AND HERZEGOVINA AND PROPOSED SOLUTION

Haris Hasić*

ABSTRACT

The growth of the Internet increases the likelihood of copyright infringement online. Copyright holders need a quick and efficient mechanism for taking down infringing content. In Bosnia and Herzegovina (B&H) there is no such suitable mechanism. This article reviews and finds the existing B&H mechanisms deficient. The first method, petitioning the infringer, is based on voluntary cooperation by the infringer and is thus not practicable. Petitioning the courts is unsuitable because the B&H court system is complicated for the average person, overburdened with cases, unacceptably slow to process claims when time is essential, and the judges do not possess sufficient knowledge and experience in intellectual property cases. Petitioning the Internet Host Service Providers (IHSPs) is not suitable because, though ideally placed to help, the IHSPs are shielded by broad and confusing safe harbour provisions and, due to legal uncertainty, do little, which aids their customer (the infringer). This article also examines the EU and US takedown mechanisms and finds that, due to an inherent bias either toward the alleged infringer or toward the copyright holder, both are prone to uncertainty and widespread abuse. The article suggests that such abuse could be avoided by introducing a neutral intermediary. For B&H that intermediary should be the Institute for Intellectual Property of B&H. Some of the advantages of this proposed system are impartiality, legal certainty, advisory capacity and centralization, among others.

* **Mr Haris Hasić** (Bosnia and Herzegovina), LL.M, senior assistant, teaches civil law subjects at the University of Travnik Faculty of Law, specializing in intellectual property (IP). He is a third year PhD candidate in law, with a focus on civil law, in particular in the area of IP. Haris Hasić teaches IP the Civil Service Agency of Bosnia and Herzegovina; he is the focal point for B&H for the web portal for teaching IP with the support of WIPO, and has passed the official exam to be a representative for intellectual property rights at the Institute for Intellectual Property of Bosnia and Herzegovina. He is a co-author of two books in print with two more due to be published. Additionally, he has authored and co-authored a number of scientific papers and articles and has participated at several international IP-related conferences. He was a co-lecturer for the World Trade Organization's Regional Trade Policy Course in Istanbul, Turkey. He is the recipient of the 'Educator of the year award' (teaching assistant category) for the academic year 2013-14 from the University of Travnik Faculty of Law. Haris Hasić teaches several IP courses at various levels. He also delivers lectures on IP topics to a wide array of groups and is active in popularizing intellectual property in B&H, including community outreach and consultancy work.

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I. INTRODUCTION

The Internet is an ever more prominent medium of social exchange and social expression in B&H¹ and in the world.² The Internet is evolving such that posting content is easier for the average user.³ This facilitates the posting of copyright infringing content as well. At the same time, effective methods of removing infringing content from the Internet, as this article will demonstrate, do not exist, at least not in B&H.

It is incumbent on the developing nations to ensure that copyright is sufficiently protected on the Internet to stimulate the flourishing of creative expression on this medium, which can be an important part of prosperity.

One instance of copyright infringing content placed on the Internet can be accessed by countless users, who, in turn, can make countless reproductions of the work in any part of the world, significantly reducing the economic value of the existing right and work. Thus, from the perspective of the right holder, the first priority must be to remove the infringing content as expeditiously as possible. Once, and only once, the infringing content is removed from the Internet can the copyright holder pursue sanctions through the existing enforcement mechanisms.

As this article will demonstrate, a copyright holder in B&H does not have any such mechanism that will consistently ensure the timely taking down of copyright infringing content hosted on the Internet.

The first part of the article will review what options the copyright holder does have at his or her disposal in B&H. The second part will review existing notice and takedown mechanisms in the European Union and the United States. The third part will suggest a solution by using the Institute for Intellectual Property of B&H as an intermediary in the takedown process.

¹ In 2000 only 1.1 per cent of B&H's population had access to the Internet, while that number was 67.9 per cent in 2013. Source: World Bank <<http://data.worldbank.org/indicator/IT.NET.USER.P2>> accessed 29 October 2014.

² World growth of the number of Internet users from 2000 to 2014 was 676.3 per cent. Source: Internet World Stats, 'Internet Usage Statistics, The Internet Big Picture, World Internet Users and Population Stats' <<http://www.internetworldstats.com/stats.htm>> accessed 30 October 2014.

³ See Organization for Economic Cooperation and Development, Participative Web: User-Created Content (Directorate For Science, Technology and Industry Committee for Information, Computer and Communications Policy Working Party on the Information Economy DSTI/ICCP/IE(2006)7/FINAL 2007).

II. MECHANISMS CURRENTLY AVAILABLE IN BOSNIA AND HERZEGOVINA FOR REMOVING COPYRIGHT INFRINGING CONTENT HOSTED ON THE INTERNET

When copyright infringing content is hosted on the Internet, the copyright holder can:

- (a) Petition the infringer;
- (b) petition the courts; or
- (c) petition the Internet host service provider (IHSP).

A. PETITIONING THE INFRINGER

A prudent first step for the copyright holder is to petition the infringer to remove copyright infringing content that he or she has placed on the Internet. While this is not mandated by any statute in B&H, it stands to reason that at least some of the copyright infringement might have been committed as an accident or out of ignorance. Lack of knowledge and understanding of copyright rules is a significant problem in B&H.⁴ In cases of accident or misunderstanding, a simple notice to the infringer would most likely result in the removal of infringing content without the need to involve any other, more formal takedown mechanisms.

However, as compliance is strictly voluntary, the infringer can refuse to cooperate or even ignore the petition altogether. Still, any takedown method should require the copyright holder to make a good faith⁵ effort to petition the infringer prior and as a precursor to taking any other steps.

⁴ This problem is pervasive in all segments of society. As this paper will show it is also present in the courts and also in other intellectual property enforcement institutions. It is probable that this lack of knowledge can be attributed to two primary causes: (1) intellectual property is not considered particularly valuable or important by the society as a whole due to cultural and pragmatic reasons; and (2) there is very little intellectual property education and awareness at the university level and almost no formal intellectual property education at elementary and high school levels. Piracy and counterfeiting are rampant and accepted. Further research into the causes of this problem is both beyond the purview of this paper and warranted on a much more extensive level.

⁵ The term 'good faith effort' is being used as a legal standard that would need to be ascertained in every particular case. It should, however, include an effort to contact the infringer and to offer a reasonable deadline to remove the content. Because of the frantic nature of the

B. PETITIONING THE COURTS

B&H does not have specialized intellectual property courts. In the Federation of Bosnia and Herzegovina⁶, all copyright claims are processed by the business law division of municipal courts of general jurisdiction. B&H courts are not well suited for removing copyright infringing content from the Internet expeditiously, for the following reasons:

- (a) The average person cannot understand or use the courts or legal system in general;
- (b) the courts are overburdened,
- (c) judicial relief is unacceptably slow; and
- (d) the judges lack knowledge and understanding of intellectual property law.

(i) DIFFICULTY IN USING THE COURTS FOR THE AVERAGE USER

Given its peculiar nature as the by-product of a peace agreement and its varied formative legal ideologies, the Bosnian legal system is difficult to understand and use, even for legal professionals. Furthermore, in order to petition the courts for judicial relief, the copyright holder must first discover the identity of the infringer. Because infringement takes place on the Internet, the identity of the infringer can be nearly impossible to ascertain for an average citizen. If the identity of the infringer is known, the suit must be filed in the court where the infringer has his or her permanent residence. The suit must fulfil certain formal requirements.⁷ The copyright holder must also indicate the value of the claim, which is particularly difficult for online copyright infringement cases. The copyright holder must then pay filing fees on the amount being sought upfront, at the time of filing. The processing of intellectual property cases can be very expensive and time intensive.⁸ Understandably, given the

Internet, a reasonable deadline would be, for example, one working day or even potentially shorter.

⁶ B&H consists of the Federation of Bosnia and Herzegovina, Republic Srpska and Brčko District. The Federation of Bosnia and Herzegovina only has courts of general jurisdiction. Republic Srpska has specialized business law courts but no intellectual property courts.

⁷ If a case does not fulfil these requirements, the suit will be returned to the petitioner, resulting in the loss of valuable time.

⁸ In one notable yet relatively straightforward copyright case (not involving online infringement) the ratio of reward to court costs was 1:13, and it took 3.5 years to resolve the case.

urgent nature of such lawsuits, it can be difficult for the average person to handle the claim properly.

(ii) THE OVERWHELMING BACKLOG OF CASES

At the end of 2013, there were 20,120 unresolved cases at the business law divisions of the courts of the Federation of Bosnia and Herzegovina.⁹ As of 30 September 2014, the Sarajevo Municipal Court¹⁰ business law division alone had 2,409 unresolved cases¹¹ involving business trespass, business property law, business contract law or intellectual property protection. There are ten judges in the business law division.¹² The average caseload for the business law division for 2013 was 289 cases per judge.¹³

(iii) THE TIME IT TAKES TO RECEIVE JUDICIAL RELIEF

For the Sarajevo Municipal Court the 'optimal'¹⁴ timeline for resolving intellectual property cases is 210 days.¹⁵ For the purposes of removing content from the Internet this time frame is unacceptable. The fastest a case can be resolved by law is 90 days.¹⁶ This too is problematic, and neither time frame is realistic. The more realistic 'predicted' timeline for resolving a case is 912 days.¹⁷ The

average age of such pending cases is 400 days.¹⁸ From January to September 2014, 176 cases took more than 912 days to resolve.¹⁹

Under Article 160 of the Copyright and Related Rights Law of B&H²⁰, the copyright holder can ask the courts to issue a provisional measure. For copyright holders to succeed, they must prove a series of claims, including that:

- They are the copyright holder;
- a danger exists that enforcing the claim could be made impossible;
- the provisional measure is necessary to prevent the occurrence of damage; and
- the copyright holder would recompense the alleged infringers if the claim is unfounded.

It is a very legally technical rule. However, no court has issued this provisional remedy in the four years it has been available to the courts.²¹

(iv) LACK OF KNOWLEDGE AND UNDERSTANDING OF INTELLECTUAL PROPERTY CASES BY THE JUDGES

It is difficult to measure actual knowledge and understanding of the principles of intellectual property of judges. However, circumstantial evidence shows that the lack of knowledge and understanding of intellectual property on the part of judges is a real problem. In 2010 B&H adopted a set of eight new laws protecting intellectual property, notably different from the previous laws. Their understanding requires careful study. It is doubtful that given the caseloads, such careful study is being carried out by the judges. Especially as intellectual property cases are not that prominent or frequent in Bosnian courts.²² For that purpose, the Centres for

of optimal and predictable deadlines) issued by the Court Case Management System on 20 October 2014 at 14:57:36.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Zakon o autorskim i srodnim pravima Bosne i Hercegovine (Službeni glasnik Bosne i Hercegovine 63/10).

²¹ Proving status as the copyright holder requires the issuance of a certificate by the Institute for Intellectual Property of Bosnia and Herzegovina, which can take up to 30 days. An additional 30 days must be given for processing the claim, according to private conversations with some of the judges.

²² In private conversations with the authors, judges admit that they see on average one intellectual property case a year. Only one judge admitted to seeing several intellectual

⁹ High Judicial and Prosecutorial Council of B&H, 'Visoko sudsko i tužilačko vijeće za Bosnu i Hercegovinu Godišnji izvještaj za 2013. Godinu' (Yearly report for the year 2013) <http://www.hjpc.ba/intro/gizvjestaj/pdf/VSTV_GI_2013_3_0042014.pdf> accessed 27 October 2014.

¹⁰ This is the largest municipal court in the Federation of B&H (FB&H). It is indicative of all the courts in FB&H.

¹¹ Sarajevo Municipal Court, 'Izvještaj o poštivanju optimalnih i predvidivih rokova' (Report on the Application of Optimal and Predictable deadlines) issued by the Court Case Management System on 20 October 2014.

¹² Sarajevo Municipal Court, 'Bulletin of the Sarajevo Municipal Court' (March 2014 Issue n 25) 32.

¹³ Ibid.

¹⁴ The courts of B&H have a two-tier system for deadlines to resolve pending cases. The first tier is the optimal deadline. This represents the number of days the law says this case must be resolved in. There are no sanctions for breaching this deadline. The second tier is the expected deadline. This is a more realistic expectation for how many days it actually will take to resolve the case, as calculated by the Court itself on the basis of the current caseload and on several other factors including past performance.

¹⁵ Sarajevo Municipal Court, 'Izvještaj o poštivanju optimalnih i predvidivih rokova' (Report on the application of optimal and predictable deadlines) issued by the Court Case Management System on 20 October 2014 at 14:57:36.

¹⁶ Zakon o parničnom postupku Federacije Bosne i Hercegovine (Law of Civil Procedure) (Službene novine Federacije Bosne i Hercegovine 53/03, 73/05, 19/06).

¹⁷ Sarajevo Municipal Court, 'Izvještaj o poštivanju optimalnih i predvidivih rokova' (Report on the application

Education of Judges and Prosecutors of both the Federation of Bosnia and Herzegovina and the Republic Srpska commissioned a guide for judges on intellectual property.²³ Yet, the guide is rife with errors, omissions, and misunderstandings.

One such error is demonstrative. On pages 21, 286, and 289, it is stated that Articles 120, 121, 122, 123, and 124 of the Copyright and Related Rights Law relate to criminal sanctions for copyright infringement. Articles 120, 121, 122, 123, and 124 of the Copyright and Related Rights Law instead relate to the related rights of the performer.²⁴ The courts in B&H are not an effective means of removing copyright infringing content from the Internet, at least not in a timely manner.

C. PETITIONING THE IHSP

In order for content to be hosted on the Internet, the infringer will most likely²⁵ use the services of a third party - an Internet hosting service provider (IHSP).²⁶ While the identity of the infringer can be hard, if not impossible, to ascertain in most cases, that is not the case with an IHSP. They are required by law²⁷ to make their contact information easily available. Its role as an intermediary in the infringement of copyright and this ease in

property cases a year. Additionally an examination of the Court Case Management System has revealed that currently there is less than a dozen pending intellectual property cases.

²³ Centres for Education of Judges and Prosecutors of the Federation of Bosnia and Herzegovina and Republic Srpska, 'Priručnik iz oblasti intelektualnog vlasništva za sudije' Bosnia and Herzegovina 2013

<http://www.fbih.cest.gov.ba/images/stories/dokcentra/prirucnik_iv.pdf> accessed 27 October 2014.

²⁴ The right of Remuneration for Private Use, Remuneration for Public Communication and Rental of the Fixation of Performance, Presumed Transfer to a Film Producer, Use of Performance for the Completion of an Audiovisual Work and Performance Given within the Scope of Employment respectively.

²⁵ It is possible that the infringer will use his or her own server to host content on the Internet. In those instances, the infringer will not be using the services of an IHSP for hosting, but will be using mere conduit and caching services from an IHSP, both of which do not fall under the purview of this paper.

²⁶ An Internet Hosting Service Provider for the purposes of this work will be defined as any entity that offers services directly resulting in a copyright infringing work being hosted on the Internet. For purposes of clarification, hosting is essentially providing space to store content on the Internet that can then be accessed by others.

²⁷ Article 15 of the Zakon o elektronskom pravnom i poslovnom prometu (Law on the Electronic Legal and Business Transactions) (Službeni glasnik Bosne i Hercegovine 88/07).

identification make the IHSP ideal for removing infringing content from the Internet. This was recognized by both governments²⁸ and researchers.²⁹

In B&H, IHSPs are shielded from liability for, among other things, copyright infringement for hosting infringing content. Pursuant to the provisions of Article 26 of the Law on the Electronic Legal and Business Transactions, no liability exists provided that five conditions are met:

- (a) That the IHSP itself did not post the infringing material;³⁰
- (b) that the IHSP does not have reliable cognition of the infringement;
- (c) that the IHSP is not familiar with any facts or circumstances from which the infringement is obvious;
- (d) that the IHSP begins the process of removing or disabling access to the infringing material in question as soon as the IHSP is informed or receives cognition of infringement; and
- (e) that the service user is not subordinated or under the supervision of the IHSP.

Article 26 does not provide, *per se*, a concrete set of steps that must be followed in order for the copyright holder to petition the IHSP to take down copyright infringing content. Rather, it provides the IHSP with a safe harbour from prosecution for hosting infringing content if it removes such content upon learning of its infringing nature. If the IHSP does not act to remove content upon gaining reliable cognition or upon being presented with facts or circumstances from which infringement is obvious, the IHSP becomes liable for copyright infringement.

²⁸ Recital 59 of the Directive (EC) 29/2001 on the harmonization of certain aspects of copyright and related rights in the information society (Infosoc directive) [2001] OJ L167/10: In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end.

²⁹ For one such example see J de Beer and CD Clemmer, 'Global Trends in Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?' (2009) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1529722> accessed 28 October 2014.

³⁰ This eliminates all those possible instances where the infringer is itself the IHSP.

It is uncertain what exactly constitutes reliable cognition or what is to be taken as facts or circumstances from which the infringement is obvious. No case has addressed this issue. Additionally, no legislative or administrative guidance on interpreting these provisions exists. This results in a high degree of legal uncertainty, which favours the infringer.

In straightforward cases³¹, a petition to the IHSP will most likely result in the removal of the content. If the slightest doubt exists, however, the IHSP can always claim that it did not have reliable cognition, or that there was uncertainty, which made infringement non-obvious. With that, it can be assumed that the IHSP will be biased in favour of the service user. Unless it is compelled, the IHSP will most likely err in favour of its user and direct the copyright holder to seek judicial relief. It seems clear that the IHSP, and not the infringer, should remove the infringing content from the Internet. However, the existing rules are biased in favour of the IHSP and the infringer.

III. COMPARATIVE LAW APPROACHES FOR TAKING DOWN COPYRIGHT INFRINGING CONTENT HOSTED ON THE INTERNET

In B&H the copyright holder does not have an effective method available to remove infringing content from the Internet in a timely manner. A working system must be implemented if B&H wants to reap the benefits of creative endeavours.

In order to determine what system B&H should implement, this article examines two of the most prominent approaches, the EU and the US takedown mechanisms.

A. EU TAKEDOWN MECHANISM

Acquis communautaire³² does not have a specific takedown mechanism for removing copyright infringing content from the Internet. It has a 'horizontal approach to Internet service liability'³³, as found in the EU Electronic Commerce Directive.³⁴

³¹ If, for example it is blatantly obvious from the work itself who the author is or if the infringer makes it obvious that the right holder is someone else.

³² The combined body of European Union Law.

³³ P Baistrocchi, Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce, 19 Santa Clara High Tech LJ 111 (2002) available at: <http://digitalcommons.law.scu.edu/chtli/vol19/iss1/3> accessed 29 October 2014 117.

³⁴ Directive (EC) 31/2001 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L 178/1.

Article 26 of the Law on Electronic Legal and Business Transactions of B&H adopts³⁵ Article 14 of the EU Directive on electronic commerce. B&H essentially copied the EU rules, but poorly.³⁶

Though there is some guidance for the interpretation of Article 14 by the European Court of Justice³⁷, the EU model encourages self-regulation on the part of the IHSPs.³⁸ This self-regulation to date has failed to produce an effective system. It introduces uncertainty on the part of all actors, and, as was seen in Bosnia, uncertainty tends to favour the infringer. In practice a multitude of often vary different procedures exist and it is not easy, either for intermediary service providers or for victims of illegal content, to determine which one applies and in what way.³⁹ Problems with the Article 14 mechanism were evident in the results of the public consultation that was conducted in 2010.⁴⁰ This was echoed by the researchers⁴¹ and by judges.⁴²

³⁵ B&H is not a member of the European Union and thus does not have the obligation to adopt EU directives, but it does so with the aim of joining the European Union.

³⁶ There is a tendency in B&H to adopt legislation without understanding it or without adapting it, where possible, to the needs and peculiarities of the Bosnian legal system. There is also a tendency to create translation errors in the adoptions. In this instance, where Article 14 of the Directive uses the standard of 'actual knowledge' which should have been translated as 'stvarno znanje' the translated term used is 'pouzdana saznanje' which translates as 'reliable cognition', thus potentially making the *acquis* incompatible with B&H law and hence defeating the purpose of the transposition and depriving itself of EU legal experience on this matter.

³⁷ See for instance Case C-324/09 *L'Oréal v eBay* [2011] 2011 I-0601; recital 49 of the Directive on electronic commerce; recital 29 of the Directive (EC) 48/2004 on the enforcement of intellectual property rights [2004] OJ L 195/16; recital 52 of the Infoc directive.

³⁸ See recital 49 of the Directive on electronic commerce.

³⁹ European Commission, Online Services, Including e-Commerce in the Single Market (Commission staff working document SEC (2011) 1641 final 2012) 25.

⁴⁰ European Commission, Summary of the results of the Public Consultation on the future of electronic commerce in the Internal Market and the implementation of the Directive on electronic commerce (2000/31/EC) available at http://ec.europa.eu/internal_market/consultations/docs/2010/e-commerce/summary_report_en.pdf accessed 29 October 2014 ch 5; European Commission, *E-commerce Action Plan 2012-2015 State of play 2013* (Commission staff working document SWD (2013) 153 final) 17: 'In particular they considered that there is too much regulatory fragmentation and legal uncertainty, growing costs due to inefficiencies, too many instances of too slow action against illegal content and instances of action against legal content.'

⁴¹ For one example see T Verbiest and others, 'Study on the Liability of Internet Intermediaries' (European Commission

As a result, the European Commission has decided to work on improving the Article 15 takedown mechanism.⁴³ The EU system for taking down infringing content is itself deeply flawed and in need of an overhaul.

B. US TAKEDOWN MECHANISM

Unlike the European Union, the United States has opted for a vertical approach⁴⁴ to IHSP liability and adopted a separate and special notice and takedown regime in Section 512⁴⁵ of the United States Copyright Act of 1976.⁴⁶ It sets out a clear notice and takedown procedure for the copyright holder to use upon discovery of infringing content being hosted on

the Internet, that if followed by the IHSP, creates a safe harbour from secondary liability for the IHSP.⁴⁷

Some have credited Section 512 as making the modern Internet possible.⁴⁸ In October 2014 Google alone received requests for the removal of 35,436,492 URLs.⁴⁹ For Google, use of notice and takedown requests has been on a constant and sometimes exponential rise.⁵⁰ However, the US Section 512 system is flawed in that copyright holders⁵¹ can exploit it for non-valid copyright reasons and for reasons other than copyright protection.⁵² This trend is expected to continue as

Markt/2006/09/E Service Contract ETD/2006/IM/EZ/69) [2007] available at http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf 14,15; See, in particular:

Providers as technical intermediaries, cannot always handle and assess complex legal matters. Whilst in some cases it might be easy to assess the illegality of contents or activities, such as those dealing with pedophilia, it is quite hard, even for lawyers, to tell if a trademark or a copyright has been infringed.' (p 14)

And also see: '... if providers are to act upon mere notifications there could be potential abuse by fictitious 'victims' seeking to hamper competitor or adversary.' (p 15).

⁴² *Cartier v B Sky B* [2014] EWHC 3354 (Ch) [199] – [204].

⁴³ European Commission, E-commerce Action Plan 2012-2015 State of Play 2013 (Commission staff working document SWD (2013) 153 final) ch 3.1.

⁴⁴ P Baistrocchi, Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce, 19 Santa Clara High Tech LJ 111 (2002) available at: <http://digitalcommons.law.scu.edu/chtli/vol19/iss1/3> accessed 29 October 2014 117.

⁴⁵ Adopted as Online Copyright Infringement Liability Limitation Act (Official title: To amend title 17, United States Code, to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, and for other purposes, as part of the Digital Millennium Copyright Act), came into force on 28 October 1998, part of the Digital Millennium Copyright Act (Official title: To amend title 17, United States Code, to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, and for other purposes) or Digital Millennium Copyright Act, 17 U.S.C. § 512.

⁴⁶ Official title: An Act for the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes, effective as of 1 January 1978.

⁴⁷ For more see CR Gellis, *Navigating the DMCA* 1 August 2012) Internet Law for the Business Lawyer 2nd Ed ABA Publishing 2012 available at SSRN <http://ssrn.com/abstract=2191013> accessed 29 October 2014 and CR Gellis, *2013 State of the Law Regarding Internet Intermediary Liability for User-Generated Content* (1 November 2013) available at SSRN <http://ssrn.com/abstract=2388943> or <http://dx.doi.org/10.2139/ssrn.2388943> accessed 29 October 2014; See also E Lee, *Decoding the DMCA Safe Harbours* (27 January 2009) Columbia Journal of Law and the Arts Forthcoming available at SSRN <http://ssrn.com/abstract=1333709> or <http://dx.doi.org/10.2139/ssrn.1333709> accessed 29 October 2014.

⁴⁸ David Kravets, '10 Years Later, Misunderstood DMCA is the Law That Saved the Web' (Wired, 27 October 2008) <http://www.wired.com/2008/10/ten-years-later/> accessed 29 October 2014, in particular 'Blogs, search engines, e-commerce sites, video and social-networking portals are thriving today thanks in large part to the notice-and-takedown regime ushered in by the much-maligned copyright overhaul.'

⁴⁹ Google, 'Transparency Report' http://www.google.com/transparencyreport/removals/copyright/?hl=en_US accessed 29 October 2014.

⁵⁰ Google, 'How Google Fights Piracy' (September 2013) <https://docs.google.com/a/pfk.edu.ba/file/d/0BwxyRPFduTN2dVFqYml5UeUeUE/edit> accessed 29 October 2014.

⁵¹ JM Urban L Quilter, 'Efficient Process or Chilling Effects'? Takedown Notices under Section 512 of the Digital Millennium Copyright Act Summary Report' <https://images.chillingeffects.org/Urban-Quilter-512-summary.pdf> accessed 29 October 2014. For full report see JM Urban and L Quilter, 'Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act' (23 May 2006) Santa Clara Computer and High Technology Law Journal Vol 22 p 621, 2006 available at SSRN <http://ssrn.com/abstract=2210935> accessed 29 October 2014.

⁵² Some of these abuses are so egregious that some websites have Takedown Notice Hall of Shames, such as Electronic Frontier Foundation, 'Takedown Hall of Shame' <https://www.eff.org/takedowns> accessed 29 October 2014 and Wordpress, 'Hall of Shame' <http://transparency.automattic.com/tag/hall-of-shame/> accessed 29 October 2014; Ernesto, 'Google Discarded 21,000,000 Takedown Requests in 2013' (Torrentfreak 27

some copyright holders admit to using automated systems to send notice and takedown requests.⁵³ Widespread abuse of the Section 512 mechanism has led to the formation of the Chilling Effects website for the monitoring of notice and takedown requests.⁵⁴ Copyright holders are not fully satisfied with the existing system either.⁵⁵ Both the EU and US systems have significant problems. Thus they cannot be recommended for use, as in B&H.

IV. INSTITUTE FOR INTELLECTUAL PROPERTY OF BOSNIA AND HERZEGOVINA AS INTERMEDIARY

The EU system creates uncertainty and favours the infringer, while the US system favours the copyright holder. Both are open to abuse due to a distinct lack of review and oversight by a neutral third party. For B&H that intermediary could and should be the Institute for Intellectual Property of Bosnia and Herzegovina (The Institute). The Institute⁵⁶ is a special industrial property service within the

December 2013) <<https://torrentfreak.com/google-discarded-21000000-takedown-requests-in-2013-131227/>> accessed 29 October 2014; Google, 'Transparency Report: Government removal requests continue to rise' (Official Blog, 19 December 2014)

<<http://googleblog.blogspot.com/2013/12/transparency-report-government-removal.html>> accessed 29 October 2014 'Over the past four years, one worrying trend has remained consistent: governments continue to ask us to remove political content.'

⁵³ Mitch Stoltz, 'In Hotfile Docs, Warner Hid References to "Robots" And Its Deliberate Abuse of Takedowns' (Electronic Frontiers Foundation Deeplinks Blog 9 October 2014) <<https://www.eff.org/deeplinks/2014/10/hotfile-docs-warner-hid-references-robots-and-its-deliberate-abuse-takedowns>> accessed 29 October 2014.

⁵⁴ Berkman Centre for Internet and Society at Harvard, 'About Us' <<https://www.chillingeffects.org/pages/about/>> accessed 29 October 2014.

⁵⁵ See S Aistars, 'Statement for the Record of Sandra Aistars, Chief Executive Officer, Copyright Alliance, Section 512 of Title 17 before the Judiciary Committee's Subcommittee on Courts, Intellectual Property and the Internet' (Copyright Alliance 13 March 2014)

<https://copyrightalliance.org/2014/03/statement_copyright_alliance_ceo_sandra_aistars_committee_judiciary_subcommittee_courts> accessed 29 October 2014, in particular: 'It is incontrovertible that roughly fifteen years after its passage, the DMCA is not working as intended either for the authors and owners of copyrighted works who rely on its notice and takedown and repeat infringer provisions to reduce infringement of their works, nor for the website operators who must respond to the notices sent. When authors are forced to send upwards of 20 million notices a month to a single company— often concerning the same works and the same infringers—something is amiss.'

⁵⁶ Founded by the Zakon o osnivanju Instituta za intelektualno vlasništvo Bosne i Hercegovine (Službeni glasnik BiH 43/04) (Law Establishing the Institute for Intellectual Property of Bosnia and Herzegovina).

meaning of Article 12 of the Paris Convention⁵⁷ for B&H and the central B&H administrative institution for intellectual property.⁵⁸

A. REASONS FOR USING THE INSTITUTE AS AN INTERMEDIARY

As a government institution, the Institute would be neither prejudiced toward the interests of the copyright holder, nor have a particular reason to favour the alleged infringer. Furthermore the Institute would consider the interests of the IHSP, the interests of legitimate users and the society as a whole. The Institute is tasked with observing and ensuring the balance of rights and interests inherent in intellectual property law. Thus the Institute would be a neutral filter, allowing only those notices based on law, while at the same time bringing certainty to the proceedings.

Lack of knowledge and understanding of copyright law is a significant problem in the process of removing infringing material.⁵⁹ The Institute, on the other hand, understands copyright law. It drafted the Copyright and Related Rights Law of B&H⁶⁰ and has direct jurisdiction in matters of copyright.

The Institute centralizes and focusses the activity of taking down copyright infringing content from the Internet. This centralization brings several benefits to the process: increased coordination with IHSPs, other enforcement bodies, right holder associations, user associations, the judiciary and other significant entities in various activities; and the ability to maintain a database of repeat offenders and all notices and takedowns, akin to the Chilling Effects website, but potentially with a fuller dataset⁶¹, open to research and analysis, with appropriate safeguards.⁶²

⁵⁷ Paris Convention for the Protection of Industrial Property (as amended in 1979).

⁵⁸ Institute for Intellectual property of Bosnia and Herzegovina, 'Jurisdiction' (14 June 2011) <<http://www.ipr.gov.ba/en/o-nama-en/nadleznost-en.html>> accessed 30 October 2014 based on Article 7 of BH Institute Law.

⁵⁹ See Section 2.1.

⁶⁰ Ibid.

⁶¹ Chilling Effects does not receive all notice and takedown requests and participation is voluntary.

⁶² One of the criticisms of Chilling Effects is that it could potentially be used to find and use infringing content. See S Aistars, 'Statement for the Record of Sandra Aistars, Chief Executive Officer, Copyright Alliance, Section 512 of Title 17 Before the Judiciary Committee's Subcommittee on Courts, Intellectual Property and the Internet' (Copyright Alliance 13 March 2014)

The Institute's official governmental role benefits the process. It is staffed by highly qualified government officials who are well versed in the nuances of the legal system of B&H. All actions of the Institute are transparent because citizens have a guaranteed freedom to access information about it. Additionally, the Institute is subject to constitutional checks and balances, making abuse of the process unlikely. A mechanism exists to address such abuse as well.

The Institute could advise the copyright holder prior to filing the takedown notice about his or her rights, the limitation of such rights, and what steps to take. After filing, the Institute can advise IHSPs and alleged infringers of their rights and any possible defences. If the copyright infringing content is hosted in a different country, the Institute would be ideally suited to understand that country's takedown procedures and navigate intergovernmental cooperation. The Institute could also advise the copyright holder on issues pertaining to the lawsuit and subsequent trial, and advise⁶³ the IHSP on what evidence to preserve and in what way.

Being an intermediary would be a potential source of revenue for the Institute and the budget of B&H in the form of fees paid for services rendered.

B. THE PROPOSED TAKEDOWN PROCEDURE WITH THE INSTITUTE AS INTERMEDIARY

Bosnia and Herzegovina should introduce a concrete takedown procedure⁶⁴ for removing copyright infringing content from the Internet with the option⁶⁵ for the copyright holder to use the Institute as an intermediary.

The copyright holder should always initiate the procedure.⁶⁶ Upon discovering infringement of copyright protected material hosted on the Internet, the copyright holder should make a good faith effort to petition the infringer and, in straightforward cases

where there is no likelihood of confusion⁶⁷, the IHSP.⁶⁸ If the petition does not work, the copyright holder should submit the takedown notice to the Institute. It would be the duty of the copyright holder to present all the procedurally mandated information for the processing of the notice and to pay a reasonably small fee.

A special department would be created within the Institute to deal with the takedown requests. Upon receipt of the takedown request, the Institute would review the notice. Only those notices with an actual basis in the rules of Copyright law would be allowed to proceed to the next stage. By reviewing the notice, the Institute would be able to filter abuses and bad faith notices. A system would need to be in place to sanction bad faith abuses.⁶⁹

If the takedown notice is warranted, the Institute would notify the IHSP and request removal. This notification would, beyond a doubt, represent reasonable cognition under Article 26 of the Law on Electronic Legal and Business Transactions. Depending on the review and the nature of the problem, the Institute would give a short, reasonable deadline for compliance.⁷⁰ The Institute would instruct the IHSP to preserve certain evidence for use in a court of law. If the IHSP fails to comply, the Institute would advise the copyright holder on further legal remedies against the infringer and, due to its secondary liability, the IHSP. The Institute could also notify relevant regulatory bodies of the lack of cooperation on the part of the IHSP. If the IHSP complies, the infringing content is taken down and the Institute would advise the copyright holder on potential legal remedies against the infringer.

The Institute is not usurping the courts here, but its actions might actually reduce the burden on the courts. Any and all pre-existing legal measures are still available to their respective parties. Additionally there exists further judicial and administrative oversight of the work of the Institute.

<https://copyrightalliance.org/2014/03/statement_copyrig ht_alliance_ceo_sandra_aistars_committee_judiciary_sub committee_courts> accessed 29 October 2014.

⁶³ Such as advising the copyright holder on the nuances of the law and on best practices.

⁶⁴ With elements similar to the 17 U.S.C. § 512.

⁶⁵ The copyright holder would not be mandated to use the Institute as an intermediary. The copyright holder merely would have the option of either using the existing systems or asking the Institute to be the intermediary in the takedown process.

⁶⁶ The Institute should never have to be tasked with monitoring for copyright infringement. This is not in line with the private civil right nature of copyright. It is a task much better suited for commercial ventures.

⁶⁷ For instance if the name of the author is visible in the work, pursuant to Article 10 of the Copyright and Related Rights Law, or if it is abundantly and undoubtedly clear from the circumstances that the content being hosted is infringing material.

⁶⁸ In those cases, the IHSP would have to report the takedown request to the Institute for reasons of inclusion in the official database.

⁶⁹ Perhaps a register similar to the one of the infringers, a monetary fee, automatic dismissal of takedown notices for a period of time, or a combination of all of these.

⁷⁰ One business day seems reasonable, though it could be shorter.

C. SCALABILITY PROBLEM WITH USING THE INSTITUTE AS AN INTERMEDIARY

The biggest potential problem with using the Institute as an intermediary may be the issue of scaling. Could the system process ever increasing numbers of takedown requests?

The true scope of the need for a takedown procedure in B&H is not known as of yet.⁷¹ It is reasonable to conclude that the number of the requests will grow. This system might not be ideal for large countries or for developed nations. It would be worth researching if some parts of the system might be used to augment and improve existing systems and in what ways. It might be worth researching whether private venture intermediaries could be used to augment takedown mechanisms, but the focus would have to be on mechanisms for ensuring impartiality and transparency.

V. CONCLUSION

When a copyright holder discovers copyright protected content hosted on the Internet without his or her approval, the primary concern is to remove such infringing content as quickly as possible. If copyright law is to remain relevant in the digital age, it must provide the copyright holder with an effective and expeditious mechanism for taking down all infringing instances of copyright protected works.

Bosnia and Herzegovina does not have such mechanisms. Petitioning the infringer is not likely to bring about the desired outcome. The courts are particularly complicated to use, overburdened with cases, take far too long, and are inadequately knowledgeable of intellectual property matters to be of use. The IHSPs are ideally suited, being the intermediaries between the infringer and the rest of the world and technical enablers of the infringement itself, but the current system does not compel them to act and so the system and the IHSP conspire to aid the infringers through inaction or inadequate action.

Both the EU and US takedown systems have deep flaws related to their bias in favour of either the infringer or the copyright holder. One method to remove bias is to introduce an impartial third party to mediate the takedown process. For B&H such an intermediary should be the Institute. It would be

impartial, knowledgeable, centralized, and governmentally sectioned, as well as a source of revenue. The potential problem with using the Institute is the issue of scalability and lack of experience with such a practice.

Even if the proposed solution proves to be unworkable, one thing remains certain, that is, if copyright is to remain relevant in the digital age it must adapt and find ways to protect the inherent balance of the interests of all parties involved.

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⁷¹ Research has failed to yield one such example of a request for removal under the current regime. This however cannot be taken as indicative. The author has had need of such a system several times already this year as have friends and acquaintances, who all find the current system unusable.

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