

**The Faculty of Management
The Department of Knowledge and Information Management
Invites you to attend a seminar**

Beyond Copyright Enforcement: The Misuse of the Notice & Takedown Regime

**Dr. Sharon Bar-Ziv
Faculty of Law, University of Haifa**

**Monday, March 6th at 12:00 pm
Jacobs Building, room no. 506**

Abstract

Alongside its far-reaching benefits, the digital age has created complex challenges in various aspects of our life. One prominent challenge in recent years relates to the management of online identity, including reputation, based on the notion that one's digital activity in fact reflects one's personality in more ways than one.

The fact that content posted online remains available beyond the limits of human memory, combined with the dramatically increased amount of information accessible online, has revolutionized the creation and management of online identity. Despite the controversy regarding the length of time information is available online, the prevailing view is that "[We] are what Google says [we] are". Thus, not surprisingly, people attribute the utmost importance to their online representation.

Online identity can be managed through a wide-range of online tools and techniques used to continuously monitor and analyze web and social media for myriad purposes. This Article demonstrates the extent to which online copyright enforcement mechanisms, operating by virtue of the law, are being used for online reputation management purposes. I will argue that this activity has significant implications for access to knowledge, freedom of speech and achieving the mechanisms' original goal - enforcing online copyrights. In fact, I will show that the online enforcement mechanisms can easily be manipulated, and that even a single individual can have a wide-ranging impact by using, or abusing, a powerful mechanism that operates automatically, with no judicial oversight.

The Notice & Takedown (N&TD) regime, enacted in the US Digital Millennium Copyright Act (DMCA) in 1998, has become a global standard of online copyright enforcement. This legal regime offers online intermediaries immunity from liability in exchange for removing allegedly infringing materials upon receiving a notice from rights holders. This statutory immunity sought to address the growing difficulty to enforce copyright online, and to "provide strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements".

In practice however, the unequivocal power of rights holders to request removal, and the strong incentives of online intermediaries to remove content upon receiving a removal request, has turned the N&TD regime into a robust clean-up mechanism for removing any unwarranted content. Moreover, the N&TD regime has now become a global standard. It has been adopted in many places outside the United States in online disputes concerning intellectual

property rights, disputed content and implementation of the controversial right to be forgotten. This right, which was recently upheld by the European Court of Justice, enables EU citizens and residents to request search engines to remove search result links to webpages related to their name. It is important to note that the right to be forgotten has never been recognized in the US.

More importantly, the DMCA operates as de facto international law, since the majority of removal requests are sent by global platforms that are US-based companies subject to the DMCA.

Alongside the great importance of the N&TD mechanism for enforcing copyright infringement, there is growing concern that the N&TD regime is becoming fertile ground for illegitimate use owing to a system that is easy to abuse. Many scholars in recent years have voiced their concern that the N&TD procedures will be misused to chill free speech. This Article offers empirical evidence of such misuse based on the systematic coding and analysis of a large-scale random sample of 10,000 removal requests sent to Google Search regarding allegedly infringing materials on .il websites.

Supporting concerns of abuse the study results indicate that the majority (66%) of removal requests examined were filed in an attempt to change search results, independent of any copyright enforcement claim. Even more troubling is the fact that these requests were submitted by a single entity seeking to change search results related to its name - in effect taking advantage of the regulatory enforcement system for purposes other than that intended. These removal requests resemble requests filed under the newly recognized Right to be Forgotten.

The potential for misuse will continue as long as the automatic enforcement system does not distinguish between removal requests for copyright infringement and requests for other reasons. Moreover, in the absence of a restraining mechanism, or an improved system, strategic utilization of the system may distort the purpose and outcome of online copyright enforcement and result in unintended consequences. The findings demonstrate some of the risks involved in potential misuse of this system, which also lacks sufficient oversight. More specifically, the findings underscore the vulnerability of this non-transparent automated enforcement system to fraud and misuse.

The empirical research discussed in this Article is innovative as it offers a rare glimpse into misuse of the N&TD regime, usually concealed behind a veil of code.¹⁶ Moreover, while most studies examined the significance of misrepresentation claims through the prism of litigation in the courts, which is a rare occurrence, this study examines the removal notices themselves.

This vulnerability may carry significant implications for emerging enforcement strategies involving online intermediaries, and underscores the need to develop oversight measures or impose a transparency requirement with regard to online enforcement mechanisms.

The Article proceeds as follows: the introduction is followed by Part II that introduces the legal doctrine governing the N&TD procedures. Part III presents the research findings on actual misuse of the N&TD procedures. Beginning with a brief description of the methodology this part describes the scope of enforcement activity using the N&TD procedures, with a specific focus on misuse of the N&TD regime as reflected in requests filed to remove content that does not infringe on copyrights and is not suspected as such. Part IV analyzes the study findings, shedding light on wide-ranging misuse of the N&TD procedures and its implications. By exposing the invisible dynamics at work this analysis can contribute to refining the challenges facing policymakers in regulating online enforcement mechanisms.

All Are Welcome

Contact Email:
aweber@univ.haifa.ac.il