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FRIEND OR FOE: AMAZON AND THE ROLE IT PLAYS IN THE FIGHT AGAINST COPYRIGHT INFRINGEMENT OF BOOKS

EMILY RUZEVICH

ABSTRACT

Amazon has become the go to marketplace for everything from household appliances to clothes. You would be hard pressed to find an item that Amazon does *not* sell. One aspect of Amazon that is particularly interesting is its platforms that allow self-published books. There is an ongoing tug-of-war between Amazon and authors with the main point of tension being copyright infringement. The question is who should be held responsible when copyright infringement is conducted online? While the Digital Millennium Copyright Act attempted to solve this issue, there are numerous loopholes and lawsuits that highlight the statute's shortfalls. Ultimately, this article will explore how copyright infringement of books occurs on Amazon, allegations against Amazon, and the role the retail online powerhouse plays in helping or hindering authors. The question that must be answered is if Amazon is complicit in allowing copyright infringement of books on its platforms or if it has simply fallen on the outskirts of the DMCA's provisions.

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EMILY RUZEVICH*

I. INTRODUCTION

When you hear “Monopoly®,” you may think of a fun and ultra competitive game that involves moving pieces across a colorful board and purchasing property. The ultimate goal is to dominate and achieve absolute dominion over your competitors. Does this sound familiar? In the business realm, it may remind you of Amazon. Since 1994, Amazon has grown to be the largest dominating force in the Internet retail platform.¹ Before consumers could purchase virtually every good conceivable, Amazon began as a book selling website.² Today, Amazon sells books on its Amazon website as well as Kindle, Amazon’s Kindle Direct Publishing, and Audible.³ These platforms make reading and publishing books easier than ever before with options to publish in print, digital, or audio.⁴ Additionally, Amazon’s “self-publishing” adds a whole new twist to selling books.⁵ Amazon’s self-publishing process is simple and provides an accessible publication avenue for authors of all statures.⁶ Although, as an unfavorable biproduct, some publishers have seen their works misappropriated or plagiarized, while others have lost revenue and had their copyrights infringed on the platform.⁷

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¹ See generally Mark Hall, *Amazon.com*, ENCYCLOPAEDIA BRITANNICA (July 2019), <https://www.britannica.com/topic/Amazoncom> (stating that Amazon.com has become the epitome of electronic commerce, specifically in the realm of publishing, and is considered a major competitor rather than a bookselling platform).

² See Lydia DePillis & Ivory Sherman, *Amazon’s Extraordinary 25-Year Evolution*, CNN BUSINESS (Oct. 4, 2018), <https://www.cnn.com/interactive/2018/10/business/amazon-history-timeline/index.html> (stating that Amazon began in a garage to fill online book orders and after expanding to offering more products, has become one of only two companies to reach a worth of \$1 trillion).

³ *Audiobooks*, AMAZON EDUCATION-PUBLISHING, <https://www.amazon.com/gp/education-publishing/Audiobooks> (last visited Oct. 8, 2019).

⁴ *Take Control with Self-Publishing*, AMAZON, https://www.amazon.com/gp/seller-account/mm-summary-page.html/ref=footer_publishing?ld=AZFooterSelfPublish&topic=200260520&ie=UTF8 (last visited Oct. 8, 2019) [hereinafter *Take Control*].

⁵ *Id.*

⁶ See *Prepare, Publish, Promote: Getting Started*, KINDLE DIRECT PUBLISHING, https://kdp.amazon.com/en_US/help/topic/G200635650#faq (last visited Oct. 6, 2019) (explaining the simple seven steps of publishing on an Amazon platform include preparing a manuscript and cover, ensuring the book meets content guidelines, entering information regarding title, content, and pricing, and clicking the “publish” button).

⁷ See Concepción de León, *Nora Roberts Sues Brazilian Writer Who She Says Plagiarized Her Work*, N.Y. TIMES (Apr. 24, 2019), <https://www.nytimes.com/2019/04/24/books/nora-roberts-plagiarism.html> (stating that Nora Roberts is suing Brazilian author Cristiane Serruya for copying ten of her books and that dozens of other authors have alleged similar accusations); see also Adam Rowe, *Amazon’s New Rules Against Book Stuffing Scams Aren’t Satisfying Authors*, FORBES.COM

Copyright protection subsists in a self-published work the moment the author begins writing.⁸ Nonetheless, registration is recommended because it becomes helpful to prove exclusive rights when faced with litigation.⁹ Registering a copyright allows authors to make a public record of their original works and requires a short application to be submitted to the U.S. Copyright Office.¹⁰

Part I of this comment will analyze the presiding laws regarding this copyright issue: the Digital Millennium Copyright Act (“DMCA”) and Title II of the DMCA: Online Copyright Infringement Liability Limitation Act (“OCILLA”). This comment will discuss how each applies to publishing books on Amazon’s platforms and how each can be enforced. Part II will discuss the DMCA and Amazon’s obligations thereunder. Part II will then round out by analyzing several lawsuits against Amazon and how it has navigated the strictures of the DMCA. Part III proposes possible changes that could be made to improve the DMCA and rounds out with some suggestions for what Amazon can do to mitigate infringement on its platform. Part IV will conclude this comment by reiterating that the issues Amazon faces evinces that the DMCA is long overdue for an update.

II. BACKGROUND

A. *Digital Millennium Copyright Act (“DMCA”): Title I*

Congress passed the DMCA to respond to increasing copyright infringement concerns over the relationship between a growing internet and internet service providers (“ISP”).¹¹ It serves as a balancing act between the interests of both copyright holders and ISPs.¹² Generally speaking, the U.S. legislature recognized that U.S. copyright law had to be adapted to fit into the dawn of the digital age.¹³ It was obvious

(June 25, 2018, 07:45AM), <https://www.forbes.com/sites/adamrowe1/2018/06/25/new-amazon-book-stuffing-rules/#3bebf45b7c3f> (stating that Amazon has perpetuated an epidemic of copyright infringers by ignoring, if not promoting, scams such as “book stuffing” and “disruptive links” with published books on their platforms).

⁸ *Copyright In General*, COPYRIGHT.GOV, <https://www.copyright.gov/help/faq/faq-general.html> (last visited March 27, 2020).

⁹ WIPO, MANAGING INTELLECTUAL PROPERTY IN THE BOOK PUBLISHING INDUSTRY: A BUSINESS-ORIENTED INFORMATION BOOKLET NO. 1 14 (2008), https://www.wipo.int/edocs/pubdocs/en/copyright/868/wipo_pub_868.pdf.

¹⁰ See U.S. COPY. OFF., REGISTERING A COPYRIGHT WITH THE U.S. COPYRIGHT OFFICE 1 (2016), <https://www.copyright.gov/fls/sl35.pdf> (stating that the application for registration has three requirements: an application form, a filing fee, and a deposit).

¹¹ *Digital Millennium Copyright Act: Overview*, HARV. UNIV., <https://dmca.harvard.edu/pages/overview> (last visited Oct. 6, 2019) (explaining that the DMCA protects internet service providers from unwarranted liability when their users commit copyright infringement, provided the internet service providers meet the statutory requirements set forth in 17 U.S.C. § 512. For purposes of this comment, liability in regards to the DMCA should not be exchanged synonymously with immunity because internet service providers may be held accountable if certain DMCA requirements are not met.).

¹² *Id.*

¹³ *Executive Summary Digital Millennium Copyright Act Section 104 Report*, COPYRIGHT.GOV, https://www.copyright.gov/reports/studies/dmca/dmca_executive.html (last visited Oct. 6, 2019)

that with growing internet capabilities, there would be more and more electronic commerce occurring.¹⁴ To address these growing concerns, there are five separate titles to the DMCA: World Intellectual Property Organization (“WIPO”) Treaties Implementation, Online Copyright Infringement Liability, Computer Maintenance or Repair Copyright Exemption, Miscellaneous Provisions, and Protection of Vessel Hulls/Certain Original Designs.¹⁵

The most important aspect of Title I for purposes of this paper is the anti-circumvention provision.¹⁶ This provision states that it is illegal to ‘circumvent,’ or evade any technological measure that protects copyrighted works.¹⁷ The DMCA states that the definition of circumvent is to “decrypt an encrypted work without the authority of the copyright owner.”¹⁸ The circumvention provision prohibits users from bypassing access controls used to protect online items like DVDs and eBooks from infringement.¹⁹

The second provision that is most relevant to the issue at hand is Provision 4: Removing Copyright Management Information (“CMI”).²⁰ Section 1202(b) provides that without permission from the copyright owner, no one may remove, alter, distribute, or import for distribution another’s copyright management information.²¹ Section 1202(c) of the DMCA specifically prohibits either altering copyright management information or providing completely fictitious copyright management information.²² The DMCA defines copyright management information (“CMI”) as the

(stating that Congress recognized that the DMCA was only the beginning of changing the relationship between technology and U.S. copyright law and that it would be a constant, evolving process. Congress realized it had to both promote electronic commerce while providing tools to copyright owners to prevent copyright infringement.) [hereinafter *Executive Summary*].

¹⁴ *Id.*

¹⁵ U.S. COPY. OFF., THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 1 (Dec. 1998), <https://www.copyright.gov/legislation/dmca.pdf> (explaining that Title I incorporates the WIPO treaties, Title II limits the liability of ISPs when users engage in illegal activities such as copyright infringement, Title III discusses the exemption that exists for copying a program for maintenance purposes, and Title IV contains miscellaneous provisions that include exceptions for libraries and obligations for transferring rights, and Title V creates protection of original designs).

¹⁶ 17 U.S.C. § 1201(a)(1)(A) (2020) (for purposes of this comment, circumvention is defined as removing, altering, or bypassing technological measures that are put in place in order to protect copyrighted work. The analysis section will elaborate on how copyright infringers remove and alter protections that are created to ensure copyright holders are the only ones to benefit from their work.).

¹⁷ *Id.* § 1201(a)(1)(A).

¹⁸ *Id.*

¹⁹ *Circumventing Copyright Controls*, DIGITAL MEDIA LAW PROJECT, (Oct. 7, 2019), <http://www.dmlp.org/legal-guide/circumventing-copyright-controls> (explaining digital works often have copyright controls or software protection that if circumvented, may lead to civil and criminal penalties pursuant to the DMCA provision 17 U.S.C. § 1201(a)(1)(A). It distinguishes between access control and copy control measures in that there is a ban on the former and not on the latter.).

²⁰ *Provisions of the DMCA*, UNIV. OF WIS. COPY. CONNECTION (2019), http://depts.washington.edu/uwcopy/Copyright_Law/DMCA/Provisions.php (explaining that copyright management information is information that is in place to identify the copyright’s origin and examples include author’s name, title of the work and terms and conditions associated with the work. Copyright management information is akin to serial numbers on commercial products.) [hereinafter *Provisions of the DMCA*].

²¹ 17 U.S.C. § 1202(b) (2020).

²² *Id.*

information on a copyright that identifies the rightful owner as well as the nature of the copyright, which may be included in a digital format.²³

In the early years after the DMCA, courts typically only protected CMI that had been altered or removed through technological or digital measures.²⁴ Recent decisions, including *Murphy*, have become the norm in that many courts interpret section 1202's plain language to conclude CMI is not restricted to technological or digital measures.²⁵ In order to be protected by the DMCA, there are requirements and steps expected of service providers.²⁶

B. Title II: Liability Limitation Act ("OCILLA") Section 512

Title II of the DMCA specifies what protections exist for service providers and how to fight copyright infringement.²⁷ Title II is considered the "Safe Harbor Provision" because it limits liability of internet service providers when users abuse copyrights.²⁸ The issue arises when transmission of copyrighted works appear on ISPs.²⁹ Are ISPs supposed to bear liability for committing infringement? The DMCA states that if ISPs take certain steps to combat infringement,³⁰ their liability is limited.³¹ The statute cites five instances in which ISPs will not be liable even if infringement occurs in its transitory digital network communications.³² First, if the transmission of the material

²³ 17 U.S.C. § 1202(c) (2020) (stating that there are eight categories specifically named that serve as examples of copyright management information: the title of the work, the name of the author, information in the copyright notice, identifying information about a performer if applicable, the name of the writer/performer/director if applicable, terms and conditions for using the work, identifying numbers or symbols, and other information that the Register of Copyrights may impose).

²⁴ See *Textile Secrets Intern., Inc. v. Ya-Ya Brand Inc.*, 524 F.Supp. 2d 1184, 1196 (C.D. Cal. 2007); *IQ Group Ltd. v. Wiesner Publ'g Inc., LLC* 409 F. Supp. 2d 587, 597 (D.N.J. 2006).

²⁵ *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 303, 305 (3d Cir. 2011) (holding that the definition of copyright management information is not limited to those in the form of automated or management systems and that § 1202 should be interpreted to include any CMI as information that conveys the identification of the rightful copyright owner. The court concluded the legislative purpose of the DMCA was to "significantly expand" the rights of copyright owners.).

²⁶ 17 U.S.C. § 512(a)(1-5) (2020) (for purposes of this comment, liability in the context of internet service providers and the DMCA is defined as the legal responsibilities that internet service providers would otherwise have to bear may be lessened if internet service providers abide by the proactive and reactive policies set forth by this section to combat copyright infringement).

²⁷ *Online Copyright Infringement Liability Limitation Act*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/online_copyright_infringement_liability_limitation_act (last visited May 22, 2020).

²⁸ 17 U.S.C. § 512(a)(1-5) (2020).

²⁹ *Id.*

³⁰ See *Schrock v. Learning Curve Int'l, Inc.*, 586 F.3d 513, 517 (2009); *Dun & Bradstreet Software Servs. v. Grace Consulting, Inc.*, 307 F.3d 197, 206 (2002) (stating that in order to prove copyright infringement, a plaintiff must prove two things: that he actually possesses a valid copyright and that a copying of the protected elements of his work occurred. Both prongs of this test must be met to have a sufficient claim of copyright infringement.).

³¹ See 17 U.S.C. § 512(a)(1-5) (2020); see also 17 U.S.C. § 512(b)(2)(A)-(E) (2020) (stating that the conditions ISPs must fulfill include complying with rules that mandate keeping materials current with industry standards. Section 512(b)(2)(E) requires ISPs to remove infringing material and tell infringers that their work has been removed.).

³² 17 U.S.C. § 512(a)(1-5) (2020).

is initiated by or at the direction of a person that is not the ISP.³³ Second, if the transmission, routing, or storage, is enabled through an automatic process and not a direct selection of original works by ISPs.³⁴ Third, if it is the automated process that chooses recipients and not the intentional act of the ISP.³⁵ Fourth, the ISPs do not store a copy of the infringed material.³⁶ Lastly, the copyrighted work is transferred through the system without modification.³⁷ Essentially, this provision states that if ISPs did not know or could not have reasonably known of infringement, they escape liability.³⁸

C. Key Lawsuits Against Amazon Involving Title II of the DMCA

There have been numerous court decisions involving Amazon as a defendant that are critical in our analysis of our current issue with Amazon and online books.³⁹ The Third Circuit in *Okocha* ruled that a man could not sustain a copyright infringement claim against Amazon after he discovered that unauthorized third party sellers were distributing his self-published book on Amazon.⁴⁰ The court said Amazon did not interfere with the author's exclusive right to distribute because reselling a purchased book does not infringe on his distribution right.⁴¹

Author Tabitha Tower sued Amazon for negligence and copyright infringement, alleging that Amazon allowed third party sellers to sell her copyrighted work while improperly paying the infringers instead of her.⁴² Despite her allegations that Amazon's fulfillment contract meant that it was printing books for third-party sellers and therefore infringing her copyright, the case was dismissed.⁴³

There have also been cases where published books have been listed for sale on Amazon without the author's knowledge or intent.⁴⁴ Upon finding out from a family member that his published book was being sold on Amazon, a plaintiff sent the company two letters and submitted a "Report Infringement" complaint to Amazon.⁴⁵

³³ *Id.* § 512(a)(1).

³⁴ *Id.* § 512(a)(2).

³⁵ *Id.* § 512(a)(3).

³⁶ *Id.* § 512(a)(4).

³⁷ 17 U.S.C. § 512(a)(5) (2020).

³⁸ *Provisions of the DMCA, supra* note 20 (stating that § 512(a)(1-5) prevents ISPs from facing unwarranted liability when users infringe copyrights so long as the ISPs could not have known that its users were violating the rights of copyright holders).

³⁹ *Hart v. Amazon.com*, 191 F. Supp. 3d 809, 814 (N.D. Ill. 2016); *see also Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp 2d 1090, 1099 (W.D. Wash. 2004) (stating that the proper question to determine internet service provider liability is whether the provider knowingly allowed infringement to occur after recognizing the signs of such infringement. This case establishes a two-prong test to determine when internet service providers will not be protected by the Safe Harbor Provision. The first part of the test is if the service provider had the ability to control the infringing activity and the second part is if the service provider benefitted financially from the infringement.).

⁴⁰ *Okocha v. Amazon.com*, 153 F. App'x 849, 851 (3d Cir. 2005).

⁴¹ *Id.*

⁴² *Tower v. Amazon.com, Inc.*, No. 15-CV-2405, 2018 U.S. LEXIS 30043, at *3 (S.D. Ohio Feb. 26, 2018).

⁴³ *Id.*

⁴⁴ *Hart*, 191 F.3d at 814.

⁴⁵ *Id.*

Despite this, the author claimed that Amazon continued to allow third-party sellers to sell his work.⁴⁶ The court held that because the plaintiff's copyright infringement claim against Amazon consisted of only his books' titles being listed on Amazon.com, plaintiff lacked factual content to prove Amazon illegally copied his work.⁴⁷ The court recognized that Amazon should have removed the listing quicker than it did.⁴⁸

In *Clark v. Amazon.com*, another author alleged that Amazon was selling his copyrighted book without his permission.⁴⁹ Here, Amazon argued that although the first prong of copyright infringement was met, plaintiff offered no proof that Amazon copied his protected work.⁵⁰ Amazon raised the first sale doctrine⁵¹ and the DMCA as defenses.⁵² Amazon asserted the latter defense for three reasons: it was an internet service provider, it had a reasonable policy adapted to combat repeat infringers, and it did not interfere with the copyright holder's opportunity to protect their original works.⁵³

Time and time again, Amazon continues to play the role of defendant. In the spring of 2019, best-selling romance author Nora Roberts sued a Brazilian author for selling her copyrighted works on Amazon.⁵⁴ Roberts places much of the blame on Amazon on its operation of the Kindle Unlimited platform.⁵⁵ Amazon responded to the lawsuit by stating that the alleged infringing novels had been removed from Amazon.⁵⁶ Major powerhouses such as HarperCollins Publishers and Penguin Random House are two of seven publishers who have filed a lawsuit against Amazon for its Amazon Audible platform.⁵⁷ Their claim is based on Amazon's intention to add text to its audio books.⁵⁸ The publishers argued that Amazon will commit copyright infringement if Amazon provides the text to audio books without authorization from copyright holders.⁵⁹

Additionally, authors have accused Amazon of perpetuating unethical and illegal practices like "book-stuffing," which occurs when one artificially inflates a book's page

⁴⁶ *Id.*

⁴⁷ *Id.* at 826.

⁴⁸ *Id.*

⁴⁹ *Clark v. Amazon.com*, No. CIV-S-05-2187, 2007 U.S. LEXIS 34314, at *2 (E.D. Cal. May 10, 2007).

⁵⁰ *Id.* at *2.

⁵¹ *See id.* at *7 (citing the first sale doctrine, under which "the sale of a lawfully made copy of a book terminates the copyright holder's authority to interfere with subsequent sales of a lawfully made copy that sold or given away by the copyright holder").

⁵² *Id.* at *8.

⁵³ *Id.*

⁵⁴ de León, *supra* note 7.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Top U.S. Publishers Sue Amazon's Audible For Copyright Infringement To Block New Caption Feature*, CNBC (Aug. 23, 2019), <https://www.cnbc.com/2019/08/23/top-us-publishers-sue-amazons-audible-for-copyright-infringement.html> (stating that the feature of 'Audible Captions' that consists of text that appears as the user is listening to the book infringes copyright protections. The publishers that filed the lawsuit include seven members of the Association of American Publishers ("AAP") such as: HarperCollins Publishers, Penguin Random House, Hachette Book Group, Simon & Schuster, and Macmillan Publishers.) [hereinafter *Top U.S. Publishers*].

⁵⁸ *Id.*

⁵⁹ *Id.*

count.⁶⁰ In 2018, Amazon updated its guidelines to ban practices such as “book-stuffing”⁶¹ on the Kindle Direct Publishing platform.⁶² Despite Amazon claiming it had cracked down on such practices, publishers maintained that enforcement is nearly nonexistent and unacceptable under the DMCA.⁶³ Authors that rightfully sell their books on Amazon argue that their work is violated while infringers are rewarded.⁶⁴

This comment will determine whether Amazon should still be classified as an online marketplace or if it has transformed into a legitimate retailer. This comment will then examine if the Safe Harbor Act of the DMCA will continue to limit Amazon’s copyright infringement liability.

III. ANALYSIS

This section will begin with an analysis about how the DMCA specifically applies to the problems facing Amazon. Then it will discuss the former and pending lawsuits and allegations facing Amazon. It will then discuss the difficulties that authors and copyright holders face as a result of Amazon’s practices as well as the actions of infringers. Finally, this section will discuss the extent to which the criticism of Amazon is warranted.

⁶⁰ Rowe, *supra* note 7.

⁶¹ *Id.* (explaining the concept of book stuffing as artificially increasing the number of pages in their books and thus substantially increasing their payout as well. There have been allegations that these scammers take copyrighted works that have already been published and use them as fillers within their own books, thereby decreasing the amount of royalties that copyright holders should receive.)

⁶² *Id.* (clarifying that although book-stuffing has been occurring for the entirety of Amazon’s existence, platforms such as Kindle have made doing so easier and much more lucrative. Amazon maintains that it has adequately responded to this issue via their 2018 updates that bans more than ten percent of “fillers” in eBooks, prohibiting disruptive links that attempt to get readers to reach the end of the book and therefore the scammer receives more money, and prohibited rewards for reading a book. Published authors that hold copyrights, however, are not convinced that the existence of these prohibitions will necessarily be successful if Amazon continues to not enforce its rules.)

⁶³ *Id.*

⁶⁴ David Gaughran, *Kindle Unlimited - A Cheater Magnet*, DAVID GAUGHRAN (Oct.9, 2018), <https://davidgaughran.com/2018/10/09/kindle-unlimited-scamming-cheater-magnet/> (explaining that scammers that engage in practices designed to deceive readers and authors participate in actions such as book-stuffing, mass gifting, fake reviews, etc have created an elaborate scheme in which millions of dollars are not being distributed to rightful copyright owners. The author believes Amazon only makes futile attempts to combat the major problem of infringement.)

A. *The DMCA*

If an owner of a copyright believes their work has been infringed they can notify the internet service provider⁶⁵ and request a DMCA Takedown Notice.⁶⁶ The purpose of this notice must include elements that alert an internet service provider as to the copyrighted work that is being infringed and where the infringement is occurring.⁶⁷ A DMCA takedown notice requires an identification of the alleged copyright work, a statement under the penalty of perjury that the information is correct, and a “good faith belief” that the copyrighted work is not being used properly.⁶⁸ The theory is that it is in the internet service provider’s best interest to maintain their immunity⁶⁹ and therefore will react swiftly.⁷⁰ The Digital Millennium Copyright Act shields internet service providers from liability only if they pursue the necessary remedies.⁷¹ The most important condition for eligibility includes implementing a policy for termination of users who are repeat offenders of copyright infringement.⁷² The DMCA requires internet service providers to act quickly to disable or remove access to the infringed work.⁷³ Amazon makes reporting infringement seemingly very easy by having a detailed customer service page in which it lays out multiple ways to reach Amazon regarding cases of infringement.⁷⁴

⁶⁵ *Digital Millennium Copyright Act: DMCA*, COPYRIGHT ALLIANCE https://copyrightalliance.org/ca_faq_post/dmca-notice-and-takedown-process/ (Last visited Oct. 26, 2019) (explaining that examples of internet service providers are providers, such as Comcast, operators, such as eBay, or web hosts like Go Daddy).

⁶⁶ See Gene Quinn, *Sample DMCA Take Down Letter*, IPWATCHDOG (July 6, 2009), <https://www.ipwatchdog.com/2009/07/06/sample-dmca-take-down-letter/id=4501/> (stating that a takedown notice serves the purpose of notifying an ISP that a work is being infringed on the ISP’s platform.).

⁶⁷ Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512(c)(3)(A) (2020).

⁶⁸ *Id.* (stating that this section of the statute has six requirements for DMCA takedown notices: signature of the person with the copyright, the copyright that has allegedly been infringed, identification of the work that is committing the infringement, the copyright holder’s information for the service provider to contact them, statement asserting there is a good faith belief that the infringement has not been authorized by the rightful owner, and a statement that, under penalty of perjury, the information contained in the notice is accurate and the complaining party is authorized by the copyright holder).

⁶⁹ *Id.* (for purposes of this comment, liability in regards to the DMCA is not synonymous with immunity because internet service providers may be held accountable if certain DMCA requirements are not met).

⁷⁰ *Id.*

⁷¹ 17 U.S.C. § 512(a)(1-5) (2020).

⁷² *Id.* § 512(i)(1)(A).

⁷³ *When Is an ISP Liable for the Acts of Its Subscribers?*, NOLO, <https://www.nolo.com/legal-encyclopedia/isp-liability-subscriber-acts-29564.html> (last visited Oct. 27, 2019) (explaining that rather than copyright holders distinguishing between contributory infringement and vicarious infringement by internet service providers, the providers urged Congress to limit their liability if takedown provisions were pursued. However, if an internet service provider fails to quickly respond to copyright infringement allegations, copyright holders may sue internet service providers for infringement).

⁷⁴ *Claim Copyright Infringement*, AMAZON, https://www.amazon.com/gp/help/customer/display.html/ref=hp_14061711_claimcopyright?nodeId=201140760 (last visited Oct. 30, 2019) (explaining that Amazon offers over five methods to contact it, six pieces of information about the copyright that must be provided, and is easily found under the “Claim Copyright Infringement” page within its Customer Service section).

Nonetheless, the major criticism is not that Amazon is inaccessible, but rather that once Amazon receives notice, nothing is done.⁷⁵ The allegations against Amazon not abiding by these requirements are plentiful, diverse, and unrelenting.⁷⁶ This begs the question of whether the criticism is legitimate or meritless.⁷⁷

For example, take the pending lawsuits of Nora Roberts and the major publishing powerhouses.⁷⁸ The DMCA has many requirements for internet service providers when it comes to alleged infringement.⁷⁹ The DMCA requires notice of the alleged infringement via a DMCA takedown notice.⁸⁰ If the person who files a takedown notice receives a counter-notification, he must file a lawsuit within 14 days.⁸¹ Roberts alleges that part of the reason these problems persist is because many authors do not take the necessary steps against Amazon, partly because many cannot afford litigation.⁸²

The DMCA provision that discusses CMI protections against infringement is especially relevant to the accusations and lawsuits facing Amazon.⁸³ Section 1202(b) provides that without permission from the copyright owner, no one may remove, alter, distribute, or import for distribution another's copyright management information.⁸⁴ Section 1202(c) of the DMCA specifically prohibits either altering copyright management information or providing completely fictitious copyright information.⁸⁵ This sounds eerily similar to the allegations made by authors that copyright infringers are incorporating their works within their own books as book stuffers.⁸⁶ Infringers are removing CMI information from copyrighted, published books in order to lengthen their book and thus increase their payout.⁸⁷

The major problem arises when internet service providers fail to react swiftly to copyright infringement allegations and takedown notices. This is precisely at the core of the allegations facing Amazon today.⁸⁸ Copyrighted authors, especially self-published authors, are accusing Amazon of not abiding by DMCA requirements.⁸⁹

⁷⁵ Rowe, *supra* note 7 (explaining that authors allege that although Amazon has rules in place to prevent infringement, there is little to no enforcement. Some authors insist that although Amazon has sufficient rules, it enforces them selectively.).

⁷⁶ *Id.*

⁷⁷ Steve Brachmann, *Amazon's Counterfeit Problem is a Big One-for Shareholders, Brand Owners and Consumers Alike*, IPWATCHDOG (Feb. 27, 2019), <https://www.ipwatchdog.com/2019/02/27/amazons-counterfeit-problem-big-one-for-everyone/id=106710/> (explaining that books are not the only item that experiences high rates of infringement and authors are not the only parties complaining, with well known companies such as Apple claiming that ninety percent of its items on Amazon are counterfeit).

⁷⁸ de León, *supra* note 7.

⁷⁹ 17 U.S.C. § 512(a)(1-5) (2020).

⁸⁰ *Id.*

⁸¹ *The Ultimate Guide to Digital Millennium Copyright Act*, COPYRIGHTED, <https://www.copyrighted.com/blog/dmca-guide> (last visited Oct. 28, 2019) (defining a counter-notification as a rebuttal to the takedown notice allegation that there has been copyright infringement).

⁸² *Id.*

⁸³ *Provisions of the DMCA*, *supra* note 20.

⁸⁴ 17 U.S.C. § 1202(b) (2020).

⁸⁵ *Id.*

⁸⁶ Rowe, *supra* note 7.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

B. Allegations Against Amazon

Prominent romance author Nora Roberts has made herself the surrogate representative of other authors whose works are being infringed and lack the funds or fame to bring this issue to light.⁹⁰ She, along with dozens of self-published authors, claim that Amazon's Kindle Unlimited platform has created a system in which it "incentivizes the fast and more."⁹¹ It must be recognized that Amazon did indeed remove the work of alleged infringer, Cristiane Serruya, and has removed hundreds of scammers and infringers.⁹² Nonetheless, the aforementioned practices like book stuffing and other scams are plaguing Amazon platforms, most notably Kindle Unlimited.⁹³ Fraudulent practices such as infringers incorporating fully copyrighted books into the middle of their own books, thereby increasing the amount of pages that are available to be read, are alleged to be commonplace on Kindle Unlimited.⁹⁴

Book stuffing is by no means a newly developed practice.⁹⁵ However, since Amazon changed its payout from a flat fee for every book downloaded to payment per page read, book stuffing has become an enormous problem for copyright owners.⁹⁶ Nora Roberts is not the only well known name alleging that Amazon has not stepped up to the requirements of the law.⁹⁷ Amazon's Audible platform had planned for a September 2019 release of its new Captions feature on their audio books in which its listeners could simultaneously read the words being heard.⁹⁸ There is one problem: Amazon does not own the text rights of books, only the audio rights.⁹⁹ Interestingly enough, Amazon offered a stipulation that is excluding the works of the publisher plaintiffs until the

⁹⁰ See de León, *supra* note 7 (stating that Roberts recognizes that despite the widespread issues of authors alleging copyright infringement on Amazon, many authors cannot afford litigation).

⁹¹ *Id.* (explaining that Kindle Unlimited is a self-publishing platform in which an author's pay is based on how many pages of their books are read on the site).

⁹² *Id.*

⁹³ See Rowe, *supra* note 7 (defining "book stuffing" as a way self-publishers fraudulently increase the number of pages read by urging readers to skip to the end of the book, inserting prizes for reaching the end of the book, or inserting complete versions of copyrighted works not written by the author, therefore significantly increasing their royalty payouts).

⁹⁴ *Id.*

⁹⁵ Minda Zetlin, *Kindle Unlimited Book Stuffing Scam Earns Millions and Amazon Isn't Stopping It*, INC (June 13, 2018), <https://www.inc.com/minda-zetlin/amazon-book-stuffing-authors-scam-chance-carter-romance-kindle-unlimited.html> (explaining that these practices have been occurring since the beginning of Kindle Unlimited and that Amazon has been inconsistent in enforcing its rules. One of its new rules against book stuffing in 2018 encouraged authors to "consider creating a collection of works.").

⁹⁶ *Id.*

⁹⁷ *Top U.S. Publishers*, *supra* note 57.

⁹⁸ Caroline Crampton, *Book publishers are suing Amazon over text captions for audiobooks. What might that mean for podcasts?*, NIEMANLAB (Sept. 3, 2019, 9:00AM), <https://www.niemanlab.org/2019/09/book-publishers-are-suing-amazon-over-text-captions-for-audiobooks-what-might-that-mean-for-podcasts/> (explaining that Amazon's intent for Captions was to provide read-along text that would appear on screens as users read the books. Publishers argue this is copyright infringement and that allowing the Captions program would violate existing licensing contracts. Audible tried a similar approach in 2009 to implement a "text to speech" option on Kindle that would allow readers the same "things" as Captions attempts.).

⁹⁹ *Id.*

litigation is completed.¹⁰⁰ This issue is bigger than an argument over words flowing over a screen. The publishers argue that Amazon’s Audible Captions will significantly hurt book profits, weaken licensing abilities, and overall “devalue” their rights.¹⁰¹ Amazon has vehemently denied any copyright infringement and maintains that despite being able to read words on a screen, Captions does not turn e-books into books because the text cannot be stored or shared.¹⁰² Essentially, the publishers believe Amazon’s true intent is not the “public benefit” it attempts to promote, but rather to gain an advantage over its competitors.¹⁰³ This is similar to another debate between Amazon and authors that occurred nearly a decade ago involving Amazon’s attempt to introduce a “text to speech” feature on its e-books.¹⁰⁴ Amazon eventually allowed authors to disable this feature after the US Authors Guild insisted it was willful copyright infringement.¹⁰⁵

C. Amazon: Implicit to Infringement or Shrewd Business Practices?

Despite the ongoing copyright tumult, Amazon continues to come out ahead because the corporation benefits financially regardless of whether the books being sold on its platforms are legitimate or not.¹⁰⁶ However, it would be remiss to not recognize Amazon’s efforts to address infringement. For example, it has implemented a Transparency program.¹⁰⁷ Transparency allows companies to put scan codes on its products that will alert Amazon to possible infringement if products lack the code.¹⁰⁸ Amazon has also gone after infringers and scammers that employ illicit profit-steering tactics, such as creating fake product reviews that artificially inflate page numbers.¹⁰⁹ In fact, less than two years ago Amazon won in an arbitration against an infringer partaking in book-stuffing.¹¹⁰

¹⁰⁰ *Id.* (explaining that the publishers resisted this stipulation by insisting that even the impending uncertainty of Captions was negatively affecting them, likening the stipulation to a “get out of jail free card”).

¹⁰¹ Andrew Albanese, *What’s Next for Audible Captions?* PUB.’S WKLY (Sept. 27, 2019), <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/81325-what-s-next-for-audible-captions.html> (explaining that the publishers’ main argument consists of concerns that additional licensing and royalties are required before Amazon can add Captions. However, Amazon continues to maintain a fair use argument.).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Nick Statt, *Major book publishers sue Amazon’s Audible over new speech-to-text feature*, THE VERGE (Aug. 23, 2019, 1:58 PM), <https://www.theverge.com/2019/8/23/20830057/amazon-audible-speech-to-text-feature-lawsuit-major-book-publishers> (explaining that Amazon was attempting to trample on book licensing rights and violated copyright infringement because Audible only has audio rights).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Jami Deloe, *What is Amazon’s Transparency Program?* ECOMDASH (Apr. 25, 2019), <https://www.ecomdash.com/what-is-amazons-transparency-program/>.

¹⁰⁸ *Id.*

¹⁰⁹ Ben Fox Rubin, *Amazon tries to snuff out a bunch of Kindle publishing scams*, CNET (Sept. 7, 2017, 6:01 AM), <https://www.cnet.com/news/amazon-tries-to-snuff-out-a-bunch-of-kindle-publishing-scams/>.

¹¹⁰ Rowe, *supra* note 7.

Cases such as *Okocha* and *Hart*, and other pending lawsuits by major authors and publishers, illustrates that Amazon sees its fair share of lawsuits.¹¹¹ The purpose of citing this case law, despite the consistent losses for publishers and copyright holders, is to highlight the crux of this comment's argument: Amazon is seemingly untouchable because technology has developed so quickly that the DMCA cannot possibly continue to fully protect against copyright infringement. Based on analysis of case law, pending lawsuits, and the Digital Millennium Copyright Act, it is clear that Amazon can only take so many actions to combat copyright infringement.

Amazon's efforts to fight back against copyright infringement can be likened to the 1920's Prohibition era where the distribution of alcohol was prohibited.¹¹² People did not stop drinking alcohol. Rather, they simply found new ways to drink it via underground bars and Speakeasies.¹¹³ Likewise, copyright infringement will likely never cease to exist, as infringers will continue to adapt. However, the fact that infringers continue to use Amazon as a vehicle for their infringing actions does not automatically entail that Amazon knowingly violates the DMCA when said infringement is found on Amazon's platforms.

Despite the widespread copyright problem, Amazon has maintained its status as an overwhelmingly reliable and trustworthy company for its customers.¹¹⁴ This leaves authors in an interesting predicament: Is the risk of having your work infringed on Amazon worth the ease and vast exposure the platform provides for books and other works?¹¹⁵

IV. PROPOSAL

Perhaps it would be helpful to examine the definition of a monopoly after hearing the allegations and lawsuits facing Amazon and its platforms. For purposes of this comment, a monopoly is an entity with so much control in the marketplace that it has

¹¹¹ *Hart v. Amazon.com*, 191 F. Supp. 3d 809, 814 (N.D. Ill. 2016); *see also Okocha v. Amazon.com*, 153 F. App'x 850, 850-51 (3d Cir. 2005).

¹¹² *Prohibitions: Speakeasies, Loopholes and Politics*, NPR (June 10, 2011), <https://www.npr.org/2011/06/10/137077599/prohibition-speakeasies-loopholes-and-politics> (explaining that although it was illegal to sell, transport, or manufacture alcohol in the United States between 1920 and 1933, there were thousands of speakeasies and bootlegging operations in New York alone that either found loopholes around the law or overtly ignored it. This can be appropriately compared to Amazon's underworld of copyright infringement because the argument is even if Amazon does its absolute best to prevent or fight back against infringement, it will nonetheless persist.) [hereinafter *Prohibitions*].

¹¹³ *Id.*

¹¹⁴ Jeff Bercovici, *Small Businesses Say Amazon Has a Huge Counterfeiting Problem. This 'Shark Tank' Company is Fighting Back*, INC (Mar.-Apr. 2019), <https://www.inc.com/magazine/201904/jeff-bercovici/amazon-fake-copycat-knockoff-products-small-business.html> (explaining that Amazon's return policy of issuing refunds without a return is among the most generous of all online shopping sites. This is referred to as its "A to Z Guarantee.").

¹¹⁵ *Id.* (explaining that consumer surveys reflect that Amazon is one of this country's most trusted companies and had a worth of 800 billion dollars in April of 2019. Amazon has never answered the question of what percentage of its products are counterfeit, it only insists that ninety nine percent of their pages do not have copyright infringement notices against them.).

the power to control prices or block competition from other entities.¹¹⁶ Many authors and publishers involved in this controversy would argue that the Safe Harbors of the DMCA favor the ISPs and create a legal privilege against infringement.¹¹⁷ In the eyes of these parties, Amazon has created legal loopholes for scammers and copyright infringers.¹¹⁸ There is a multitude of allegations and lawsuits based on Amazon's alleged failure to conform with DMCA requirements, thus allowing copyright infringers to run rampant on its platforms.¹¹⁹ One of the most prevalent criticisms made against Amazon is that it consistently takes a reactive approach rather than a proactive approach when comes to combating copyright infringement on its platforms.¹²⁰

There is no doubt that authors' livelihoods are at stake when their copyrights are infringed and profits are lost. Both copyright holders and consumers suffer when copyright infringement goes unchecked.¹²¹ Although, the real controversy revolves around whether Amazon is abiding by DMCA rules. If not, the next question is to determine if it is an Amazon problem or a DMCA problem.

It is rather naïve to place the majority of the blame on Amazon. While it may seem that making a multi-billion dollar corporation a scapegoat is easy, it may not be entirely justified. Amazon epitomizes the cliché phrase, "with great power comes great responsibility." Much of the criticism around Amazon is solely because of its sheer size and force in the marketplace. Amazon is a monolith; it stands amongst the global leaders in ecommerce, where it not only meets the demands of the market, but surpasses them.¹²² This comment has made the argument that Amazon has amassed such great stature in the marketplace that it now falls within the strictures set forth by the DMCA. For example, less than a year ago Amazon admitted that it may not be

¹¹⁶ Joe Kaziukenas, *Amazon is a Monopoly, an Interview with Sally Hubbard*, MARKETPLACE PULSE (Aug. 6, 2019), <https://www.marketplacepulse.com/articles/amazon-is-a-monopoly-an-interview-with-sally-hubbard>.

¹¹⁷ 17 U.S.C. § 512(a)(1-5) (2020).

¹¹⁸ See de León, *supra* note 7 (stating that many authors believe Amazon is prioritizing profits over the law and copyright holders by allowing infringers to profit off of their work with little to no consequences).

¹¹⁹ Rowe, *supra* note 7 (explaining that many independent authors believe Amazon is selective in its decisions to approach copyright infringement. Authors have accused Kindle Unlimited of directly assisting scammers whenever Amazon updates its rules.).

¹²⁰ Kaitlyn Tiffany, *How Amazon benefits from counterfeit books*, VOX (June 24, 2019, 12:00 PM), <https://www.vox.com/the-goods/2019/6/24/18715584/amazon-counterfeit-book-problem-nyt-project-zero> (explaining that many copyright holders believe that when Amazon is not reacting to infringement allegations, it chooses to put the burden on the holders to police infringement through methods such as Project Zero anti-counterfeit program, rather than taking proactive steps).

¹²¹ Jonathan Bailey, *The Difference Between Copyright Infringement and Plagiarism*, PLAGIARISMTODAY (Oct. 7, 2013), <https://www.plagiarismtoday.com/2013/10/07/difference-copyright-infringement-plagiarism/> (explaining that copyright infringement victims are copyright holders while acts of plagiarism are both copyright holders and misled consumers. The infringement in this comment is both plagiarism and copyright infringement because actions like book-stuffing involve the actor taking copyrighted works without citing to the authors; in turn, taking credit for the original another's work.).

¹²² Lauren Debter, *Amazon Surpasses Walmart As The World's Largest Retailer*, FORBES (May 15, 2019, 5:50 PM), <https://www.forbes.com/sites/laurendebter/2019/05/15/worlds-largest-retailers-2019-amazon-walmart-alibaba/#316b07a4171c> (explaining that Amazon surpassed Walmart on Forbes' Global list of the largest companies in 2019. In 2018 Amazon had a profit of ten billion dollars while Walmart's profit for the same year was seven billion dollars.).

able to fully prevent merchants from selling “unlawful, counterfeit, pirated, or stolen goods” or selling goods in an unlawful or unethical manner.”¹²³ This is just one example of the first step in finding a resolution: Amazon admits it has a problem. Further support of the claim that Amazon is not nor should be completely liable is the fact that this sort of copyright infringement problem is not unique to the book world.¹²⁴ It is a matter of opinion as to whether Amazon acts “expeditiously” to take down infringing works, as required by the DMCA.¹²⁵ However, there is a difference between outwardly disobeying the requirements of the DMCA and operating slower than authors would like.

Amazon is never going to completely end copyright infringement on its platform. Just like any other major platform like YouTube or eBay, copyright infringers do not discriminate.¹²⁶ Amazon does not deserve the majority of the blame because of one simple reason: it is a business, not a legislative body. One solution is to institute changes at the legislative level to place more liability on platforms such as Amazon and less on struggling publishers and authors.¹²⁷ If authors, publishers, and copyright holders are tired of seeing their works misappropriated and copyrights infringed, perhaps lobbying for stricter laws or an update to the DMCA would be fruitful. Changing the DMCA to contain more concise and easy to understand language could better reflect the seemingly endless technological changes the internet has experienced since the DMCA. In addition, updating the DMCA to communicate more clearly who is responsible would go a long way towards solving or mitigating this issue. Essentially, updating the DMCA to make it more “user friendly” would be beneficial to sellers and consumers alike. Until then, much of the criticism against Amazon is unwarranted.

V. CONCLUSION

It is often said that imitation is the sincerest form of flattery. It is safe to say that authors and publishers that have been dealing with copyright infringement on Amazon platforms would beg to differ. Yet the problem of copyright infringement and misappropriation of books on Amazon platforms does not seem to be disappearing

¹²³ David Streitfeld, *What Happens After Amazon’s Domination Is Complete? It’s Bookstore Offers Clues*, N.Y. TIMES (June 23, 2019), <https://www.nytimes.com/2019/06/23/technology/amazon-domination-bookstore-books.html>.

¹²⁴ Eric Goldman, *Is Amazon Liable For IP Violations By Its Marketplace Vendors?* FORBES (July 23, 2015, 04:36 PM), <https://www.forbes.com/sites/ericgoldman/2015/07/23/is-amazon-liable-for-ip-violations-by-its-marketplace-vendors/#f3b784d508ad> (explaining that a company sued Amazon for copyright infringement because its photos were used on Amazon in an advertisement for a knockoff version of its product. The judge determined the infringed image was uploaded by a third party’s file upload system, so Amazon lacked “practical control” and did not violate the DMCA.).

¹²⁵ Johnathan Bailey, *Amazon Has A Serious Copyright Problem*, PLAGIARISMTODAY (June 16, 2016), <https://www.plagiarismtoday.com/2016/06/16/amazon-serious-copyright-problem/>.

¹²⁶ Alana Semuels, *Amazon May Have a Counterfeit Problem*, THE ATLANTIC (Apr. 20, 2018), <https://www.theatlantic.com/technology/archive/2018/04/amazon-may-have-a-counterfeit-problem/558482/>.

¹²⁷ Douglas Preston, *Op-Ed: Online book-selling scams steal a living from writers*, L.A. TIMES (July 26, 2019), <https://www.latimes.com/opinion/story/2019-07-25/amazon-books-counterfeit-authors-copyright>.

anytime soon.¹²⁸ Should copyright infringement be chalked up to the cost of doing business? That would be a rather tough pill to swallow for many of the authors that rely on Amazon platforms for their livelihoods.¹²⁹

Could Amazon do a better job at combating copyright infringement? Yes, definitely. Nonetheless, until legislative changes are made to better communicate the rights of both sellers and selling platforms, we will most likely continue to see the same issues. Although it can be argued that the DMCA shields Amazon from liability, this shield is surely not impenetrable. Is it unreasonable to ask a company to do more investigating into copyright infringement and subsequently create more effective policies to prevent it in the first place? No, although the issue is rather complex and it is easier said than done. A combination of both legislative changes and criminal sanctions could show copyright infringers and scammers that intellectual property rights and creative writings are valuable and that their actions are intolerable.

Authors and publishers may have no choice but to pursue litigation over copyright infringement, even if it is a last resort. Litigation, akin to Nora Roberts' case and the lawsuits involving major publishing companies, institutes lasting change in the quest for authors to combat copyright infringement. It is these lawsuits that, if decided favorably to the authors, could prevent Amazon from overstepping its boundaries.

¹²⁸ Brachmann, *supra* note 77 (explaining that while corporations typically include liability risks in its SEC filing, 2019 was the first year Amazon included the word "counterfeit" in an annual report).

¹²⁹ Rowe, *supra* note 7.