

ALERT

U.S. Copyright Office Issues Long-Awaited Report on the DMCA Safe Harbors

May 22, 2020

On May 21, 2020, the United States Copyright Office released its Report on the Digital Millennium Copyright Act (DMCA) safe harbors (codified at 17 U.S.C. § 512). The Report is the culmination of years of effort by the Copyright Office to evaluate current application of the DMCA safe harbors, first put in place in 1998, and to advise Congress on ways they may need to be updated for the 21st Century. The Report does not recommend “any wholesale changes to section 512, instead electing to point out where Congress may wish to fine-tune section 512’s current operation in order to better balance the rights and responsibilities of internet service providers (ISPs) and rightsholders in the creative industries.” Report at 7. After reviewing the many submissions by ISPs and rightsholders, the Copyright Office reached the general conclusion “that Congress’ original intended balance has been tilted askew,” to the advantage of ISPs and the disadvantage of rightsholders. Report at 1.

The Report reaches conclusions and makes recommendations in twelve areas, each of which is addressed briefly below. This client alert assumes familiarity with the DMCA safe harbors, their requirements, and how they operate in practice.

- Eligible Types of ISPs. With regard to the Section 512(c) safe harbor for hosted content, the Report suggests that the courts have interpreted the term “by reason of the storage at the direction of a user” to cover many activities related to hosting that “Congress did not likely anticipate.” The Report also suggests that Congress clarify the scope of the Section 512(a) and 512(b) safe harbors. Report at 2, 87-95.

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- Repeat Infringer Policies. The Report suggests that Congress may want to monitor and potentially address: (1) whether “repeat infringer” means *alleged* infringer or *adjudicated* infringer; (2) whether adopting and reasonably implementing a repeat infringer policy means, as “the appropriate minimum requirement,” that ISPs have “a clear, documented, and publicly available repeat infringer policy”; and (3) whether Congress should provide further guidance on what constitutes “appropriate circumstances” for terminating accounts of repeat infringers. Report at 2-3, 95-110.
- Knowledge Requirements for ISPs. The Report identifies three areas where current interpretations of the section 512 knowledge requirements for ISPs “may be narrower than Congress initially intended”: (1) the distinction between “actual knowledge” and “red flag knowledge,” and how those terms interact with Section 512(m); (2) whether the willful blindness doctrine applies only to deliberate avoidance of *specific* instances of infringement or to deliberate avoidance of acts of infringement generally; and (3) whether courts have correctly interpreted the vicarious liability standard in Section 512(c)(1)(B) to require something more than the ability to remove or block access to infringing materials. Report at 3-4, 111-36.
- Representative List and Identification of Location. The Report finds ambiguous the DMCA language that governs the information a rightsholder must submit in a DMCA notice and recommends that Congress provide additional statutory clarity. In particular, the report recommends that Congress consider whether the statutory language has been “appropriately interpreted as requiring that a rightsholder must submit a unique, file-specific URL for every instance of infringing material on an [ISPs] service.” Report at 4-5, 136-45.
- Knowing Misrepresentation and Abusive Notices or Counter-Notices. The Report concludes that courts have appropriately interpreted the DMCA’s knowing misrepresentation provision to require “actual knowledge or willful blindness of falsity, not merely negligent or unreasonable misrepresentation.” The Report notes, however, that many stakeholders called for increased penalties for misrepresentations to serve as a deterrent. Report at 5, 145-50.
- Knowing Misrepresentation and Fair Use Issues with DMCA Notices. The Report questions the Ninth Circuit’s decision in *Lenz*, in which the court imputed a good faith requirement in sending DMCA takedown notices, “placing potential liability on rightsholders who fail to undertake a fair use inquiry before sending a takedown notice, without regard to whether or not the material is actually infringing.” The Report recommends that Congress monitor the impact of *Lenz* and consider any clarifying language that may be needed. Report at 5, 150-52.
- Standard and Non-standard Notice Requirements. The Report finds that mechanisms for submission of takedown notices used by some ISPs, particularly web-based submission forms and other multi-step verification processes, “are no longer in sync” with the DMCA’s notice requirements and increase the “time and effort that smaller rightsholders must expend to send takedown notices.” The Report recommends that “Congress consider shifting the required minimum notice standards for a takedown notice to a regulatory process, enabling the Copyright Office to set more flexible rules and ‘future-proof’ the statute against changing communications methods.” Report at 5, 152-59.

- Time Frames Under Section 512. The Report largely agrees with courts' flexible approach to interpreting the statutory requirement that ISPs "expeditiously" remove or disable access to infringing material once ISPs become aware of it. The Report, however, finds that the current statutory timeframe—10 to 14 business days—to resume providing access to content following receipt of a counternotice, "ill serves both users and rightsholders given current business models and the realities of federal litigation." The Report recommends that Congress consider an alternative dispute resolution model. Report at 6, 159-63.
- Subpoenas. The Report recommends that Congress consider clarifying the language of Section 512(h), noting that "this provision has proven to be little-used by rightsholders, in part because of how restrictively courts have interpreted it and in part because the information gleaned from such subpoenas is often of little use." Report at 6, 163-67.
- Injunctions Against Service Providers. The Copyright Office does not believe that the courts' interpretation of Section 512(j) requires Congressional intervention. Report at 6, 167-71.
- Non-statutory Approaches. The Report notes that there are additional approaches that would not require Congressional intervention, such as (1) providing educational materials to inform all participants in the section 512 system of their rights and responsibilities; (2) facilitating additional voluntary initiatives to address online infringement; and (3) identifying standard technical measures that can be adopted. Report at 6, 171-80.
- Alternative Stakeholder Proposals. Finally, the Report provides information on how other countries approach ISP liability, and identifies proposals submitted by commenters on new approaches, such as notice-and-staydown and website blocking, that go "beyond the original construct of the DMCA." Regarding these proposals, the Report recommends further study. Report at 7, 180-97.

Except for the last two topics, the Copyright Office's conclusions and recommendations are directed at Congress. Of course, it remains to be seen whether Congress will adopt any of the Copyright Office's recommended changes to the DMCA safe harbors. These changes, if adopted, could have wide ranging effects on how ISPs and rightsholders address online infringement.

For additional discussion of recent copyright developments, please consider attending Wiley's upcoming June 10, 2020 webinar "Recent Developments and Ongoing Trends in Copyright Law."

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