A2P2 ISSUE BRIEF: US COPYRIGHT OFFICE REPORT ON SECTION 512

MAY 2020

WHAT IS NOTICE AND TAKEDOWN UNDER SECTION 512?

Section 512 is a part of the Digital Millennium Copyright Act ("DMCA"), enacted in 1998 to provide a framework for copyright owners and online service providers ("OSPs") to address copyright infringement online. It was designed to balance the interests of copyright owners, who feared large-scale infringement, and OSPs, which were seeking legal certainty for their role in growing the internet's ecosystem. Section 512 embodied a compromise giving OSPs a "safe harbor" from secondary liability for their users' copyright infringement. In return, OSPs were required to implement certain features to protect copyright holders, most notably so-called "notice and takedown" procedures.

Under these procedures, copyright owners can get infringing material removed from online sites by sending brief "takedown notices" to OSPs, without the expense and hassle of filing a lawsuit. To be eligible for the safe harbor, upon receiving a takedown notice with the statutorily-required information, the OSP must remove the allegedly infringing material and notify the user that posted the material. To protect the expression interests of users, Section 512 gives the user an opportunity to send a counter-notice demanding that the material be re-posted. If the user requests that the material be reinstated, the OSP must notify the complaining copyright owner that it will be reposted unless the copyright owner files a lawsuit against the user within 14 days.

Read More: Title 17 United States Code Section 512

WHAT DOES THE COPYRIGHT OFFICE'S SECTION 512 REPORT SAY?

In May 2020, the United States Copyright Office released a Report on the operation of Section 512, the culmination of a five-year study of whether Section 512 is working as originally intended to balance the interests of OSPs and copyright owners. In gathering data to inform the Report, the Copyright Office sought input from stakeholders. OSPs generally praised Section 512 for allowing them to grow their services and serve the public without facing debilitating lawsuits. Copyright owners generally expressed concern that they couldn't utilize Section 512 in a meaningful way to combat copyright infringement because infringing material reappears across the internet even after it is removed in response to takedown notices. User groups critiqued the notice and takedown regime in a different way, contending users' interests are not being adequately protected when their content is mistakenly targeted and removed.

The Report concludes that the balance has tilted askew, failing to meet the concerns of copyright owners. However, the Copyright Office generally recommends that Congress clarify and revise some of the language of Section 512, rather than make any large changes that would go beyond the original construct of the DMCA. The Copyright Office outlines areas for potential revision, including:

- Clarifying what exactly constitutes a "repeat infringer," and whether allowing OSPs to have *un*written policies for termination of repeat infringers' access to OSP platforms has Section 512's desired deterrent effect.
- Clarifying the proper knowledge requirements for an OSP to receive safe harbor protection, including delineating a lack of "actual knowledge" of infringing activities from a lack of "red flag knowledge," which is when an OSP is aware of facts and circumstances that make infringing activity apparent.
- Clarifying whether a copyright owner, when submitting a takedown notice, must include a unique URL for every instance of infringement on an OSP's service.
- Considering an alternative dispute resolution model for whether material should be removed and reinstated, instead of requiring that a copyright owner must file a federal lawsuit.
- Monitoring the impact of the Ninth Circuit's decision in *Lenz v. Universal Music Corp.*, and whether it is appropriate for Congress to clarify whether copyright owners who send takedown notices should have to meet an implied good faith requirement that they assessed whether the potentially-infringing use was actually fair use.

Read More: Section 512 of Title 17: A Report of the Register of Copyrights

SUPPORT FOR THE SECTION 512 REPORT

Advocacy groups for large content creators, such as the Association of American Publishers ("AAP") and the Motion Picture Association ("MPAA"), issued statements that commend the Copyright Office's report, agreeing with the Report's conclusion that the DMCA fails to adequately protect creators' rights. The AAP emphasized that bad actors create platforms that encourage infringement, while taking advantage of the DMCA's safe harbors, and the burden of the "whack-a-mole" nature of the notice and takedown procedures placed on copyright owners.

The Recording Industry Association of America and several other music organizations generally came out in favor of the Report's conclusion, but emphasized that big tech companies should do more to be accountable for infringement on their platforms, such as by implementing notice-and-staydown processes (whereby once a copyright owner identifies infringing content, the OSP is required to prevent that material being reuploaded on the site).

Read More: AAP CEO Maria Pallante Comments on U.S. Copyright Office's Extensive DMCA Report
Motion Picture Association Statement on U.S. Copyright Office's Report on Section 512 of the DMCA

Big Tech Platforms Can Do Better, Address Copyright Problems Identified by New Government Study, The Recording Industry Association of America

CRITIQUES OF THE SECTION 512 REPORT

Academics and organizations critical of the Report argue that it favors the copyright industry in almost every respect, potentially placing new burdens on OSPs and allowing notice senders to abuse Section 512 by using notice and takedown to censor content they do not own or control. Critics expressed concern that the Report supports terminating internet access for users on the basis of allegations of infringing activity. Some also expressed criticism of the Report's stance on the *Lenz* decision and for chiding OSPs for failing to remove content that the OSPs believed was fair use. Critics expressed relief, at least, that the Report did not go as far as suggesting site-blocking or notice-and-staydown (areas where the Copyright Office instead suggested that additional study was needed).

Read More: The US Copyright Office Section 512 Study: Why the Entertainment Industry Is Claiming Victory, Pamela Samuelson
Public Knowledge Warns New Copyright Office Study Risks Free Speech, Online Marketplace, Shiva Stella

WHAT'S NEXT?

Whether to make any of the changes suggested in the Report is a legislative decision for Congress. The Senate Judiciary Subcommittee on Intellectual Property has begun examining the DMCA and has announced plans to draft changes to the law as early as this year. The Copyright Office, in its Report, stated its intention to prepare education materials for copyright owners and OSPs on their rights and obligations under Section 512, including rolling out a new website, copyright.gov/DMCA, for that purpose.