A2P2 ISSUE BRIEF: CONGRESS CONSIDERS UPDATING DMCA SECTION 512

OCTOBER 2020

ABOUT DMCA SECTION 512

Section 512 of the Digital Millennium Copyright Act ("DMCA")—a law passed in 1998 which made reforms to U.S. Copyright Law—provides for, among other things, a so-called "safe harbor" from copyright liability for online service providers ("OSPs") that host user-generated content, provided those OSPs implement certain features to protect copyright holders, most notably "notice and takedown" procedures. Under notice and takedown 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.

In May of this year, the Copyright Office released a report five years in the making, evaluating the effectiveness of Section 512. In the report, the Copyright Office concluded that the balance Congress sought to achieve in Section 512 is, in its view, "askew," arguing that many creators are struggling to earn a livelihood in light of the pervasiveness of online infringement and the practical difficulties of having infringing content removed. The Copyright Office recommended that Congress update Section 512 and outlined areas for potential revision in its report.

Read More:
U.S. Copyright Office, *Section 512 of Title 17: A Report of the Register of Copyrights*, May 2020
Authors Alliance, *U.S. Copyright Office Issues Report on Section 512*, June 3, 2020
House Judiciary Committee, *Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the efficacy of 17 U.S.C. 512 After Two Decades*, Sept. 30, 2020
Senate Judiciary Committee, *Is the DMCA's Notice-and-Takedown System Working in the 21st Century?*, June 2, 2020

STAKEHOLDER TESTIMONY ON POTENTIAL REFORMS TO NOTICE AND TAKEDOWN

Following the release of the Copyright Office's report, the Senate and House Judiciary Committees are holding hearings to evaluate the efficacy of Section 512 and to consider potential reforms to the statute. The hearings have been polarizing, with two distinct ideological camps emerging, disagreeing on what reforms would address the various problems posed by the provision.

On the one side, witnesses expressed doubt about the Copyright Office's conclusion that the "balance" Section 512 sought to achieve between facilitating free speech online and protecting copyrights is askew, tilting too far in favor of speech at copyright holders' expense. These witnesses were generally in favor of reforms that provide more safeguards for users before allegedly infringing content is removed, due to the current notice and takedown regime being over-broad as well as posing a threat to free speech online and the lawful fair use of others' work. They expressed skepticism that automatic filtering technology is capable of accurately answering fact-specific questions about infringement, like fair use, licensing, and the exclusion of unprotectable ideas. They also expressed concerns about "missing stakeholders" at the hearing: internet users whose access to non-infringing content is disrupted when it is removed due to overzealous takedown notices as well as add-on creators whose speech is suppressed.

On the opposing side, witnesses argued that the current notice and takedown system hurts creators, who must vigilantly search for infringement online and request removal of infringing content through what they described as a highly burdensome "constant whack-a-mole" process, which can require consulting legal counsel and incurring associated costs. They argued that this can result in less time for artistic endeavors and can compromise an already fragile income stream for content creators. This side generally supports a "notice and stay down" framework, which would require OSPs to use automatic filtering technology to prevent allegedly infringing content from being reposted to the platform once a notice is received.

Members of the committees seemed similarly divided in their sympathies to the two camps. Some representatives expressed concern for the dampening effect that infringement could have on content creators' income, and others focused on overzealous takedown notices and the negative impact they might have on add-on creators—such as YouTube personalities that rely on fair use to comment on culture—and internet users at large.

Read More: Meredith Rose, *Statement to the U.S. House Judiciary Committee*, Sept. 30, 2020
Terrica Carrington, *Statement to the U.S. House Judiciary Committee*, Sept. 30, 2020
Douglas Preston, *Statement to U.S. Senate Committee on the Judiciary, Subcommittee on Intellectual Property*, June 2, 2020
David Hansen, *Statement to the U.S. Senate Committee on the Judiciary, Subcommittee on Intellectual Property*, June 2, 2020
Authors Alliance, *The Missing Stakeholders of DMCA 512: Non-Infringing Users*, June 30, 2020

WHATS NEXT FOR SECTION 512?

The Senate and House Committees are continuing to review the provisions of the DMCA—including Section 512—with an eye towards proposing reforms in the future. Recently, the Copyright Office also launched a new website dedicated to the DMCA and its key provisions, including Section 512, to inform and update the public about potential DMCA revision processes.

Read More: U.S. Copyright Office, *The Digital Millennium Copyright Act*