

Client Alert

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Copyright Office Finds DCMA Tilts Away From Copyright Owners; Will Congress Act to Change That?

On May 21, the US Copyright Office published the findings of its study seeking to evaluate the impact and effectiveness of the Digital Millennium Copyright Act (DMCA). That report concludes that the DMCA has “tilted askew” in favor of service providers and away from copyright owners.

The DMCA was put in place to address the issue of copyright infringement on the internet and, more specifically, the potential for large volumes of contributory infringement by internet service providers stemming from content posted by users. The DMCA provides a safe harbor for these service providers if they comply with the takedown procedure detailed in the DMCA § 512. The procedure requires service providers to take down, or disable access to, infringing material when notified by a copyright owner or someone acting on the owner’s behalf. The goal of the DMCA was not only to limit indirect or contributory liability for otherwise innocent service providers, but also to provide an efficient tool for copyright owners to end ongoing infringement, without the need for costly litigation.

The US Copyright Office found that the application of the DMCA is unbalanced and out of sync with Congress’s original intent in a number of meaningful ways. For instance, eligibility for the safe harbor provided by the DMCA has expanded through court rulings to include “any activities remotely related to ‘storage’ of the [infringing] content, no matter how attenuated.”

The Copyright Office also took issue with “red flag knowledge” under the DMCA. In order for a service provider to qualify for safe harbor under § 512, the service provider must lack actual knowledge of infringing material as well as “not [be] aware of facts or circumstances from which infringing activity is apparent” (i.e., red flag knowledge). The purpose of red flag knowledge is so that service providers are not required to make judgments about what constitutes copyright infringement. The Copyright Office noted that if the red flag standard is too low, service providers may not need to remove infringing content short of actual knowledge, and if the standard is too high, service providers would need to respond “any time they develop even an inkling that content could be infringing.” Courts have increasingly blurred the lines between actual and red flag knowledge, often requiring specific knowledge of particular infringing activity for both, with the only difference being an objective or subjective standard applied to the analysis. The Copyright Office concluded that “current interpretations of red flag knowledge [] effectively remov[e] the standard from the statute in some cases, while carving an exceptionally narrow path in others that almost requires a user to ‘fess up’ before the OSP will have a duty to act.”

While the Copyright Office found the DMCA disproportionately favors service providers, it did not advocate broad changes to the DMCA.

Specifically, the Copyright Office did not endorse adoption of a notice-and-staydown provision or website blocking. A notice-and staydown provision would require a service provider to remove all instances of an infringing work once it is made aware of infringement, purportedly to address the “whack-a-mole” issue whereby content that is removed under a takedown notice is quickly reposted under a different user name, account or similar means.

Website blocking employs various technological means to prevent computers from displaying a given website. The goal here is to address the most egregious instances of copyright infringement, such as those websites specifically set up to reproduce or display infringing content.

In both instances the Copyright Office noted that implementation “would represent a fundamental shift of intermediary liability policy in the United States,” and that prior to any such implementation, “additional study, including of potential non-copyright impacts with public input, would be needed in order to explore the potential contours of any such future proposal.”

It is now in Congress’s hands to determine if re-balancing the DMCA is advisable or necessary.

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