



The Register of Copyrights of the United States of America
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

June 29, 2020

The Honorable Thom Tillis
United States Senate
113 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
United States Senate
437 Russell Senate Office Building
Washington, DC 20510

Dear Senator Tillis and Senator Leahy:

I am pleased to deliver the Copyright Office's responses to your letter dated May 29, 2020, which poses several questions regarding our recent report, *Section 512 of Title 17*.

The Office is pleased to hear that you have found our report a valuable resource. We appreciate your request for our continued advice and assistance on these important copyright matters. We look forward to continuing to work with you and your colleagues. Attached please find the Office's responses to your specific questions.

Respectfully,

A handwritten signature in black ink that reads "Maria Strong".

Maria Strong
Acting Register of Copyrights and Director
U.S. Copyright Office

U.S. Copyright Office Responses to Additional Questions Regarding Section 512
June 29, 2020

Question 1: The report identifies numerous provisions within section 512 that would benefit from clarification, possibly because courts have misapplied them, or revision, because they have not worked in practice as anticipated. Congress may not be able to address all of these provisions in DMCA reform. Based on the Copyright Office’s expert analysis and understanding of the issues, which clarifications or revisions would be the most beneficial for improving section 512?

Answer: The Copyright Office’s report, *Section 512 of Title 17 (Report)*,¹ ultimately concluded that the current operation of section 512 and the notice-and-takedown system differs in significant respects from the stated objectives and interpretations offered by Congress at the time the Digital Millennium Copyright Act (DMCA), of which section 512 was a part, was adopted. In the Office’s view, while Congress’s original intent in establishing safe harbors and the notice-and-takedown process was to strike a particular balance between the needs of online service providers (OSPs) and those of creators and rightsholders (while also providing certain safeguards for the speech interests of users), in practice this balance has shifted in ways Congress likely did not anticipate. There is a large disconnect between how OSPs, user groups, and rightsholders view the current system. OSPs and user groups, while critical of what they view as abusive practices of some takedown notice senders, generally assert that the system is working well and has enabled a flourishing online ecosystem that provides unprecedented opportunities for access to content and platforms for user speech. In contrast, many rightsholders argue that the burden placed upon them to enforce their rights has unfairly increased as OSPs continue to facilitate (deliberately or not) digital piracy. This disconnect has been exacerbated by the adoption and deployment by certain OSPs of technologies to manage infringement on their platforms outside of the traditional contours of the notice-and-takedown system, while making those technologies available to a limited set of rightsholders. In response to this imbalance, the Office made recommendations in twelve areas that could benefit from either statutory clarification by Congress or non-statutory fixes and voluntary initiatives, in order to recalibrate the balance to achieve Congress’s original intent in the 1998 DMCA. Acknowledging that an attempt to address all of these topics is likely to be outside the scope of what Congress can successfully tackle, the Office believes that the following changes would be especially beneficial.

¹ U.S. COPYRIGHT OFFICE, SECTION 512 OF TITLE 17 (2020), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

First, the Office recommends that Congress clarify the distinction between “actual knowledge” and “red flag knowledge.” Section 512 provides that, in order to qualify for a safe harbor under section 512(c) or (d), an OSP must act expeditiously to remove or disable access to infringing material when it has either actual knowledge that the material or activity on its service is infringing, or when the OSP becomes “aware of facts or circumstances from which infringing activity is apparent,” which is commonly referred to as red flag knowledge.² Based on the legislative history of section 512, Congress intended to create an obligation for OSPs to remove or disable access to infringing content when they obtain sufficient information to indicate a likelihood of infringement, even absent receipt of a compliant takedown notice that would provide actual knowledge of infringement.³ Court decisions interpreting the red flag knowledge provision, however, have often required a level of specificity regarding the types of information from which infringing activity is present as to blur the line between actual and red flag knowledge and conflate the existence of either knowledge type with receipt of a takedown notice from a rightsholder.⁴ The Office questions whether this standard—which creates a high bar for red flag knowledge, effectively removing it from the statute in some cases and creating an extremely narrow path to demonstrate it in others—fully comports with congressional intent. Relatedly, the Office notes that the knowledge requirements could benefit from additional statutory language that could incorporate a reasonableness standard to explicitly take into account differences among OSPs in terms of the sophistication of their operations and their technological capability to respond to red flag knowledge.

Second, the Office recommends that Congress clarify its intent regarding the content requirements for a valid takedown notice, specifically the provisions concerning the submission of a representative list of infringed *works* and adequate identification of the location of infringing *material*. In sending a compliant takedown notice, a rightsholder must identify the work allegedly infringed, “or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.”⁵ The rightsholder must also include “information reasonably sufficient to permit the service provider to locate” the infringing material on its system.⁶ The Office finds the current statutory language ambiguous and potentially contradictory, with the result that it is often

² 17 U.S.C. §§ 512(c)(1)(A), (d)(1). If an OSP has actual or red flag knowledge of infringing activity, it can preserve its safe harbor by acting “expeditiously to remove, or disable access to, the material.” *Id.*

³ S. REP. NO. 105-190, at 44 (1998); H.R. REP. NO. 105-551, pt. 2, at 53 (1998). *See also* S. REP. NO. 105-190, at 48 (1998); H.R. REP. NO. 105-551, pt. 2, at 57 (1998) (discussing section 512(d) and saying that a “service provider would have no obligation to seek out copyright infringement, but it would not qualify for the safe harbor if it had turned a blind eye to ‘red flags’ of obvious infringement”).

⁴ *See* SECTION 512 OF TITLE 17, 120–22.

⁵ 17 U.S.C. § 512(c)(3)(A)(ii).

⁶ 17 U.S.C. § 512(c)(3)(A)(iii).

difficult for courts—as well as OSPs and rightsholders—to ascribe separate meaning to these two requirements.⁷ In practice, the line between identifying an infringed work and the material that infringes it can be blurry, and it is unclear how a rightsholder can specify every URL at which infringing material is located (as many courts have interpreted “information reasonably sufficient to permit the service provider to locate the [infringing] material”), while providing a representative, rather than full, list of copyright-protected works. For this reason, Congress may want to consider providing additional statutory clarity regarding what properly constitutes a representative list and what types of location information is sufficient under section 512(c)(3)(A)(iii). Specifically, Congress may wish to consider whether the “information reasonably sufficient . . . to locate” provision is appropriately interpreted as requiring that a rightsholder must submit a unique, file-specific URL for every instance of infringing material on an OSP’s service.

Third, the current functioning of section 512 may be improved by providing the Office with increased regulatory authority to set standards related to the manner in which compliant notifications may be submitted to designated DMCA agents. While the Office has existing authority to require OSPs to provide publicly additional contact information beyond those identified in section 512 both on their websites and to the Office for the Office’s maintenance of the directory of DMCA designated agents,⁸ it may be beneficial to extend this authority in two areas:

Congress could grant the Office additional authority to specify criteria related to the location, prominence, and content of the required public identification and contact information of an OSP’s designated DMCA agent on its website, to ensure that the public can easily locate this information. As noted in the Report, this information is sometimes buried on an OSP’s website, and a few OSPs do not provide all of the information currently required by section 512(c)(2).⁹ The difficulty of locating such information on an OSP’s website has been a long-standing issue; as the Office noted in 2016, review of the websites of a sample of OSPs with registered agents revealed that “it often takes a significant effort to even locate designated agent information on a service provider’s Web site, and in many cases the Office was unable to locate the information at all.”¹⁰ As part of this delegation of authority, Congress could consider other textual changes to section 512(c)(2) that allow regulatory flexibility to adjust what contact information is appropriate in response to

⁷ See SECTION 512 OF TITLE 17, 139–45.

⁸ 17 U.S.C. § 512(c)(2)(B).

⁹ See SECTION 512 OF TITLE 17, 156 n.837.

¹⁰ Designation of Agent to Receive Notification of Claimed Infringement, 81 Fed. Reg. 75695, 75696–97 (Nov. 1, 2016) (also noting that “a number of . . . service providers did not provide all three pieces of information contemplated by the statute—the telephone number, physical mail address, and email address for the designated agent—on their Web sites, instead providing only one or two”).

changing marketplace technologies. This may increase the ability to “future proof” the methods for submission of takedown notices to address changing communication technologies, such as sunseting obsolete communications methods while adding new communications methods as appropriate.

The other area for which it may be beneficial to grant the Office additional regulatory authority is acceptable formatting and content of the notice submission systems that some OSPs have implemented. As noted in the Report, some OSPs have required rightsholders to provide additional information not required under section 512(c)(3).¹¹ Some OSPs have similarly adopted webforms that require a notice sender to sequentially select a number of different radio buttons before being directed to the form that allows them to submit a takedown notice.¹² There is an opportunity for Congress to create a more standardized system that imposes fewer hurdles for small rightsholders by requiring any notice submission system to meet certain minimum regulatory standards.

Fourth, the Office notes that study participants raised many questions surrounding section 512(f)’s penalties for knowing misrepresentations in takedown notices and counter-notices, in particular, the submission of abusive notices.¹³ The Office recommends that Congress consider not only reforms to section 512(f), but also broader solutions outside of section 512 to address abuse practices generally, including the filing of abusive complaints in court or the sending of abusive cease and desist letters. The issue of abusive allegations of copyright infringement is serious, and congressional attention to the broader question of how to best discourage such uses of the copyright system could provide more effective mechanisms to address the problem.

Lastly, the Office has noted concerns about the ten to fourteen day window in which content remains down following receipt of a counter-notice.¹⁴ The timeframe is both too long for legitimate speech to be blocked and too short for a rightsholder to realistically prepare to file a federal lawsuit to prevent the return of infringing materials. While this time period was likely an attempt to accommodate concerns of both rightsholders and users, it does not sufficiently reflect the time-sensitive nature of content on the internet or comport with current business models. For this reason, Congress may wish to consider a more flexible approach that allows users to seek a faster evaluation of their counter-notice,

¹¹ SECTION 512 OF TITLE 17, 153–54.

¹² *See, e.g., id.* at 156–57 n.838 (detailing the process for submitting a takedown notice via Google’s webform, which required selection of six separate radio buttons before reaching the link that takes the rightsholder to the actual form he or she must fill out).

¹³ While rightsholders generally take the position that section 512(f) deters abusive takedown notices, OSPs and user advocacy groups argue that the provision inadequately safeguards against abusive takedown notices. *See* SECTION 512 OF TITLE 17, 145–150.

¹⁴ 17 U.S.C. § 512(g)(2)(C).

or rightsholders to seek an extension of the deadline for restoring the content. While it is possible to do both in federal court, the Office has noted on multiple occasions that federal litigation is expensive, complex, and often slow.¹⁵ Congress may want to look at an alternative dispute resolution model to address these issues, such as the creation of a small claims tribunal set up within the Copyright Office. This proposal is the subject of an extensive report issued by the Office in 2013,¹⁶ and the Office notes that a bill modeled on its 2013 recommendations that would allow for both users and rightsholders to seek a determination regarding claims of online infringement is currently pending before the U.S. Senate, as of the date of this letter.¹⁷ In the absence of such an alternative dispute resolution mechanism, Congress may want to consider some flexibility in the statute to allow the identification and expedited handling of counter-notices submitted in connection with material that implicates certain types of protected speech, while providing for a longer period for rightsholders to proceed with federal court litigation with respect to content that poses significant potential economic harm, such as full-length versions of pre-release or recently released content.

Question 2: The report identifies several guiding principles; one is that twenty-first century internet policy cannot be one-size-fits-all, and that revisions to section 512 should take into account differences within and among stakeholder classes. With respect to what provisions of section 512 is it most important that Congress recognize these differences? Does the Copyright

¹⁵ See, e.g., U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS 24–26 (2013), www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf; Letter from Karyn A. Temple, Acting Register of Copyrights & Dir., U.S. Copyright Office, to Lindsey Graham, Chairman, S. Comm. on the Judiciary, and Dianne Feinstein, Ranking Member, S. Comm. on the Judiciary, 19–21 (Jan. 18, 2019), <https://www.copyright.gov/policy/visualworks/senate-letter.pdf>; Letter from Karyn A. Temple, Acting Register of Copyrights & Dir., U.S. Copyright Office, to Jerrold Nadler, Chairman, H. Comm. on the Judiciary, and Doug Collins, Ranking Member, H. Comm. on the Judiciary, 19–21 (Jan. 18, 2019), <https://www.copyright.gov/policy/visualworks/house-letter.pdf>; *Oversight of the United States Copyright Office: Hearing Before the Subcomm. on Intellectual Prop. of the S. Comm. on the Judiciary*, 116th Cong. __ (2019) (written statement of Karyn A. Temple, Register of Copyrights), reproduced at Written Statement of Karyn A. Temple, Register of Copyrights, Before the Subcomm. on Intellectual Prop. of the S. Comm. on the Judiciary at 6–9 (July 30, 2019), <https://www.copyright.gov/laws/hearings/testimony-of-karyn-temple-for-july-30-oversight-hearing.pdf>; *Oversight of the U.S. Copyright Office: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. __ (2019) (written statement of Karyn A. Temple, Register of Copyrights), reproduced at Written Statement of Karyn A. Temple, Register of Copyrights, Before the H. Comm. on the Judiciary at 13–14 (June 26, 2019), <https://www.copyright.gov/laws/hearings/testimony-of-karyn-temple-for-june-26-oversight-hearing.pdf>.

¹⁶ See generally COPYRIGHT SMALL CLAIMS.

¹⁷ See Copyright Alternative in Small-Claims Enforcement Act of 2019, S. 1273, 116th Cong. (2019). The companion bill, H.R. 2426, passed the House of Representatives by a 410-6 vote in October, 2019.

Office have examples of how Congress has handled this in other areas of copyright law and legislative text? Is it something that the Copyright Office think should be handled by regulations?

Answer: As noted in the Report, stakeholders currently experience the burdens and benefits of the notice-and-takedown system in significantly different ways. These differences exist not only between stakeholder categories, but within them as well. Requirements that pose a relatively minimal burden for large, established OSPs could be crippling for a small startup that lacks access to enterprise-level technology. Larger rightsholders with in-house enforcement teams may have more resources to monitor online infringement than small rightsholders that must face a choice between devoting their time to creative endeavors or to enforcing their rights. And individual users whose use of online platforms is primarily passive may not experience the same impact from an improper takedown notice as users who utilize such platforms to make a living. With this in mind, there are few areas of section 512 that would benefit from approaches that can be better tailored to the needs and concerns of different size stakeholders.¹⁸

The Office has identified three areas which would benefit from flexibility that takes into account for the need for solutions that are not one-size-fits-all: (i) flexibility with regards to the adoption and reasonable implementation of repeat infringer policies; (ii) certain aspects of the notice-and-takedown process itself; and (iii) the timeframes during which content remains down following receipt of a counter-notice.

Flexibility in Adoption and Reasonable Implementation of Repeat Infringer Policies.

For an OSP to avail itself of a section 512 safe harbor, it must adopt and reasonably implement a repeat infringer policy.¹⁹ In its report, the Copyright Office noted that section 512 does not provide much guidance about what constitutes a “reasonably implemented” repeat infringer policy.²⁰ While clearer guidance could therefore be beneficial, the Office believes that any legislative changes must include flexibility to address differences between

¹⁸ A number of existing provisions in Title 17 and related case law factor in characteristics of the parties or some aspect of the material, among other factors, when balancing the interests of rightsholders and users. For example, among the criteria the Office is instructed to take into consideration when evaluating a request for an anti-circumvention exemption, section 1201(a)(1)(C)(ii) directs the Office to take into consideration whether a potential user is seeking access for nonprofit archival, preservation, or educational purposes. Section 1201(a)(2)(A) looks to characteristics of the technology or service, such as whether it is “*primarily* designed or produced for the purpose of circumventing” a technological protection measure, when determining whether its manufacture or import should be prohibited. Similarly, as part of the larger section 107 fair use analysis, courts typically provide greater protections for an author’s expression if it is primarily creative nature, as opposed to factual.

¹⁹ 17 U.S.C. § 512(i).

²⁰ SECTION 512 OF TITLE 17, 99.

OSPs. Specifically, the manner or type of implementation required may differ with respect to the size and nature of an OSP, and what constitutes “reasonable grounds” for termination of a repeat infringer may differ among OSPs, depending on the type of service they provide and whether there are comparable market substitutes for those services.

While there should be some minimum standards with respect to the adoption and implementation of a repeat infringer policy (*e.g.*, requiring a written policy and a good faith attempt to actually follow through with the policy terms), the Copyright Offices suggests there may be appropriate differences regarding how a repeat infringer policy is implemented that take into consideration an OSP’s size and the overall nature of the OSP’s conduct. For instance, larger OSPs are likely to have more resources and a better infrastructure to track and block particular users from re-uploading content that has been the subject of a takedown notice, or to prevent reregistration of users that have been terminated for repeated acts of infringement. Thus, revisions that apply a more stringent standard for determination of what constitutes a reasonable implementation of a repeat infringer policy may be more appropriate for a large, established OSP, whereas a more lenient standard may be appropriate for a smaller OSP with fewer resources. Again, while minimum standards should be applied to all OSPs requiring good faith efforts to enforce their repeat infringer policies, what constitutes reasonableness and good faith efforts will likely differ between OSPs.

Similarly, as Congress noted at the time section 512 was adopted, “there are different degrees of online copyright infringement, from the inadvertent to the noncommercial, to the willful and commercial.”²¹ Thus, it may be appropriate to consider the nature of the infringement when evaluating whether an OSP has reasonably implemented its repeat infringer policy in a given case. By way of example, file sharing of full-length content can be expected to create a different level of economic harm for rightsholders than the use of a part of a song in the background of a homemade video, and is more likely to be an intentional act of infringement. Therefore, the number of notices in any particular repeat infringer policy that should reasonably result in account termination or other adverse action will likely be lower in the former case than in the latter. Thus, while there should be certain minimum standards addressing repeated acts of infringement, an evaluation of the reasonableness of those standards may vary depending upon individual factors in the case, including the OSP’s size and resources, the nature of the service, and the nature of the infringement itself.

Another aspect for which it would be important to provide flexibility for different types of OSPs is defining the circumstances under which termination of a user’s account is appropriate. As noted in the Report, “[t]he standard for when ‘appropriate circumstances’

²¹ S. REP. NO. 105-190, at 52 (1998); SECTION 512 OF TITLE 17, 99.

exist for termination of subscribers or account holders remains unclear.”²² But the Office does not believe that it would be workable or appropriate to adopt a universal standard for “appropriate circumstances” that should result in the termination of a repeat infringer’s account. Rather, it may be appropriate for Congress to first consider an OSP’s nature and the potential ramifications of account termination. For example, the negative consequences that are likely to result from termination of a user’s internet service if there is only one local broadband provider is likely to be greater than the negative consequences that flow from having an account terminated on a social media site for which there are other ready substitutions. As the Office noted in the Report, the potential impact of internet service termination is likely to be further magnified in situations where the user cannot readily switch to a different internet service provider, such as dorm residents on a university campus or residents of a rural community that has only a single broadband provider.²³ Similarly, termination of internet service is likely to have greater negative externalities for the user’s family and other household members than termination of a social media account. Thus, Congress may want to consider the adoption of penalties short of account termination, such as limiting bandwidth or slowing service speed, to address repeat infringers for certain users of section 512(a) services.

Additionally, it may be advisable to provide additional flexibility in the statute to aid in determining what constitutes “reasonable grounds” for account termination with respect to 512(b) services providers (*i.e.*, caching service providers), especially those that cache as part of content delivery network services. While account termination after only a handful of infringement notices may be appropriate for file sharing networks or other websites aimed at facilitating infringement, the threshold should likely be higher for termination of the account of a good-faith OSP that occasionally has users upload infringing content but otherwise complies with the requirements of section 512.

Improving the Notice-and-Takedown Process.

Another area that could benefit from greater attention to the differences within stakeholder classes is potential changes to the notice-and-takedown process itself. As the Office noted, the notice-and-takedown system currently imposes a greater burden on small rightsholders: these stakeholders often do not have access to the technologies that larger OSPs make available to larger rightsholders, such as filtering systems that can identify infringing content and alert the rightsholder.²⁴ Instead, the webforms adopted by certain OSPs, which are primarily used by smaller rightsholders, sometimes have the effect of increasing the friction inherent in the notice-sending process. Such forms can require a

²² SECTION 512 OF TITLE 17, 104.

²³ *See id.* at 109–110.

²⁴ *Id.* at 42–43.

rightsholder to individually click on dozens of radio buttons across multiple screens before being able to begin typing in the information necessary to submit a takedown notice, and the forms often contain questions that require the rightsholder to provide information not required by section 512, such as identification of a location at which the OSP can see an authorized example of the work that is alleged to have been infringed.²⁵ While this practice is meant to cut down on the number of bad notices received by the OSP, it has the effect of imposing additional burdens on small rightsholders even in the absence of factors indicating that the particular rightsholder presents a heightened risk of inaccuracy.

The Copyright Office thus recommends adjustments to the current system to achieve a more equitable balance between deterring bad notices and requiring too much time and effort by a small rightsholder to submit a takedown notice. Efforts to reduce bad notices should not have the effect of significantly increasing the burden of notice sending for smaller rightsholders absent a demonstrable particularized pattern of inaccurate or inappropriate takedowns. OSPs' concern regarding bad-faith notice senders could potentially be addressed by implementing some mechanism for identifying and tracking bad-faith notice or counter-notice senders, with tailored punishments to discourage further engagement in these activities. For example, a notice sender with a demonstrated pattern of sending bad-faith notices could be prevented from sending additional notices until it completes an educational module that is intended to help the sender better understand why their notices were flagged and to discourage it from sending similar bad-faith notices in the future. Implementation of any such measures should be subject to transparency requirements, including clear, public criteria for identifying bad-faith notices.

One suggestion offered by smaller rightsholders for addressing the current imbalance is a requirement that the OSPs that have adopted DMCA+ systems provide broader access to those technologies for smaller rightsholders. OSPs have noted that some of these DMCA+ systems have a level of complexity to them that may make them inappropriate for use by individual creators. Increased access to these technologies is not likely to be a silver bullet, however. Even the most advanced filtering systems result in a non-negligible number of false positives and cannot identify whether content is protected by fair use.²⁶ User advocacy groups have raised concerns that such inaccuracies may impact important free speech concerns.²⁷

Timeframes for Compliance with Put-Back Requests.

Another area where differences between stakeholders could appropriately be taken into consideration is in the speed in which an OSP processes and complies with a put-back

²⁵ *Id.* at 153–56.

²⁶ *Id.* at 44.

²⁷ *Id.* at 148.

request.²⁸ All put-back requests are subject to a mandatory ten-to-fourteen day waiting period before access to the content can be restored. As the Office has noted, this time period can be both too long to have legitimate speech blocked, and too short to provide rightsholders with sufficient time to take additional action against the user in cases where the content poses a heightened risk of market substitution for the owner’s work.²⁹ The impact of having material remain inaccessible for ten to fourteen days differs greatly depending upon the nature of the material. For example, expeditious replacement of material that contains political speech or makes a fair use of a limited amount of copyrighted material is likely to benefit from a prompt put-back, compared to replacement of material that includes full-length commercial content without additional content or commentary. In the latter case, rightsholders would benefit from a longer period of time in which to prepare and file a court case to prevent its re-upload. The Copyright Office would support giving additional thought to an approach for restoration of access to material in response to a counter-notice in a manner that could consider such differences.

Finally, individual users and small rightsholders in particular could benefit from the availability of a quick, relatively inexpensive alternative dispute mechanism to resolve conflicts related to the replacement of material. One option for such a mechanism that the Office has previously recommend is the establishment of a small claims tribunal for addressing such cases.³⁰

Question 3: The report discusses non-statutory approaches that could improve the effectiveness and operation of section 512 without legislative amendment. Some of these would involve the Copyright Office facilitating additional voluntary initiatives between copyright owners and online service providers, as well as helping to identify standard technical measures that can be adopted in certain sectors. As we look toward introducing legislation, we are particularly interested in whether the Copyright Office can help stakeholders identify and adopt standard technical measures without congressional action. What is the Copyright Office’s timeframe for engaging

²⁸ Currently, a user may respond to a takedown request by filing a counter-notice asking for the material to be “put back.” See 17 U.S.C. § 512(g).

²⁹ SECTION 512 OF TITLE 17, 162–63.

³⁰ See generally U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS (2013), www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf; Copyright Alternative in Small-Claims Enforcement Act of 2019, H.R. 2426, 116th Cong. (2019).

on these matters, and would the Copyright Office’s effort benefit from designated funding or additional regulatory authority?

Answer: As noted in the Report, the Office believes that the identification and adoption of standard technical measures (“STMs”) may provide an opportunity to improve the overall functioning of the notice-and-takedown system through relatively small, incremental changes that nonetheless could have a large impact on the ability of all rightsholders to protect their rights online. The voluntary adoption of STMs, as well as other possible voluntary initiatives the Office would seek to facilitate, may represent the most achievable, effective, and flexible approach to addressing some of the concerns that stakeholders have identified with the current system. The Office notes, however, that the success of this process will depend on the collaboration and cooperation of all stakeholders involved in the online ecosystem.

The Copyright Office plans to build upon the recommendations in the Report by facilitating discussions among a wide range of stakeholders, with a particular focus on ensuring that those who have not traditionally participated in the development of prior voluntary measures—such as small creators and individual users—have a meaningful opportunity to participate. The Office is cognizant of the current challenges posed by COVID-19 for large stakeholder gatherings, and for this reason proposes a multi-stage engagement with stakeholders on STMs.

In particular, the Office is currently evaluating the feasibility of convening a virtual kick-off meeting in late summer or early fall, in order to begin laying the groundwork for sustained engagement into 2021. This kick-off meeting would be focused on identifying any potential obstacles to the identification of potential STMs, as well as the requirements that must be met in order to adopt and implement an STM. Because the current wording of the statute offers only minimal guidance on the types of technologies that *could* qualify as an STM, a second objective of the kick-off discussion would be to begin identifying the kinds of technologies that may meet the statutory definition. Once the bounds of potential qualifying technologies have been identified, the Office would then convene further discussions to evaluate whether individual technologies meet the other requirements of section 512(i), including discussions to learn more about the terms upon which the technologies are offered in the marketplace.

In convening these discussions, the Office will need to balance the competing interests of having broad representation from all impacted groups—large and small rightsholders; users, including individuals and larger groups; and online service providers of all sizes—with ensuring that the meetings allow for productive discussions. For example, while convening all stakeholders may be appropriate with respect to certain potential STMs, some technologies may be applicable to only a smaller subset of stakeholders. In such case, the Office would seek to convene a smaller, more focused group of stakeholders, while

remaining cognizant of including representation from all constituencies that could be impacted by the technology. In addition, the Office believes that a successful discussion must include representatives from the stakeholders groups that perform a variety of roles with regard to the identification and implementation of any technical measures. To this point, the Office believes it would be essential for technologists from the relevant industries to participate in the discussions to evaluate the effectiveness and feasibility of adopting certain measures as STMs.

The Office does not currently anticipate that the initial stages of convening stakeholders to discuss STMs would require additional funding.

At this point, the Copyright Office can assist only by facilitating public discussion. The Office anticipates two potential hurdles that could ultimately impact the success of these discussions: (1) without regulatory authority, the Copyright Office's ability to facilitate the adoption of STMs is limited to its ability to secure the cooperation of relevant parties, and (2) the current wording of the statute contains certain ambiguities that may limit the universe of potential qualifying technologies.

Regulatory Authority

In the Report, the Copyright Office suggested that Congress may wish to consider providing the Office with regulatory authority to facilitate the identification and adoption of STMs. Delegating such regulatory authority to the Office would lessen the likelihood that the identification of STMs could be blocked by a small minority of stakeholders.

In connection with its existing regulatory authority provided in section 702 and other provisions of title 17, the Office has a long track record of successfully administering rulemakings in connection with a wide range of nuanced copyright issues. If the Office's existing authority was expanded in this respect, the Office would administer an open and fair public process to obtain input from a wide range of stakeholders before promulgating any rule related to the identification of specific STMs. Such a grant of regulatory authority could be designed to ensure that any regulatory identification of STMs would supplement, not supplant, the identification of STMs generated as the result of a voluntary multi-industry standards process as the statute currently envisions.

Statutory Ambiguities

Without legislative change or regulatory authority, the current wording of section 512(i) contains ambiguities that could impede the identification and adoption of STMs. The Office anticipates that these ambiguities would be the subject of discussion during the kick-off meeting, in an effort to reach consensus on the scope of potential STMs. Some of the questions raised by the current statute include the following:

- Under section 512(i)(2)(A), a measure can qualify as an STM if it has been “developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process.” It is unclear what level of agreement among stakeholders is sufficient to constitute a “broad consensus.”
- Under section 512(i)(2)(B), a qualifying measure must also be “available to any person on reasonable and nondiscriminatory terms.” It is unclear whether this language is merely intended to serve as a threshold requirement for a technology to be defined as an STM, or whether it may carry an obligation, once a technology has been defined as an STM, to continue to make it available on reasonable and nondiscriminatory grounds.
- Under section 512(i)(2)(C), an STM must not “impose substantial costs on service providers or substantial burdens on their systems or networks.” However, given the variation in size among OSPs and their associated ability to carry any costs associated with implementation of a particular STM, some smaller OSPs may be negatively impacted more significantly than others. Some stakeholders have raised the concern that a requirement to implement such technologies could thus result in further entrenchment of incumbent stakeholders. It is unclear, then, whether the substantiality of costs and burdens on an OSP should be evaluated by an objective standard that looks at the average OSP, or a subjective standard that evaluates the costs and burdens on each specific OSP.
- Section 512(i)(1)(B) states that an OSP must “accommodate[] and [] not interfere” with STMs. To the extent that a technology is defined as an STM, it would seem clear from this language that an OSP cannot block a rightsholder from using that technology on its own systems to identify and protect their works. However, the statute does not provide clarity as to an OSP’s obligation with respect to technologies that must run on the OSP’s system. Does 512(i)(2)(C) imply that an OSP must deploy such an STM on its system at its own cost? Does accommodation require that an OSP provide access to its system (including, potentially, its back-end) to allow a rightsholder to deploy an STM directly?

Absent changes to the statutory language, resolution of these questions will be a necessary output of the stakeholder meetings and may impact the breadth of what technologies may be eligible for adoption as an STM.

Question 4: The Copyright Office was clear in its report that its primary charge was to evaluate the operation and effectiveness of section 512 in light of Congress’s goals with the DMCA. The Copyright Office also made clear that its recommendations assumed maintaining section 512’s notice-and-takedown framework. But if Congress were starting from scratch, is this the approach

that the Copyright Office would recommend? What type of system does the Copyright Office think best balances the interests of curbing online infringement while also providing certainty to service providers? In particular, what does the Copyright Office think of “notice and staydown”? And, significantly, if Congress were redesigning section 512 today, should the interests being balanced be the same ones as those in 1998 when the internet was in its infancy?

Answer: The Copyright Office will address these questions separately.

What approach would the Copyright Office recommend if Congress were to start from scratch, and what type of system would best balance the interests of curbing online infringement while also providing certainty to service providers?

Today’s internet ecosystem (including the experiences of OSPs, content creators, and the public) does not resemble the nascent internet of 1998. While this may belabor the obvious, the Office feels an obligation to point out that, if Congress were to create a new system from scratch today, the result, for better or worse, would be a very different internet ecosystem than what we have currently. A system different than the current one of conditioned, limited liability for OSPs resulting from acts of copyright infringement committed by their users would likely have significant impacts on the operations and business models of both current and future OSPs, and these impacts would likely disproportionately affect smaller OSPs and new start-ups. This fact may caution in favor of refining the current system, rather than starting from scratch. There may also be practical reasons to refine the current system rather than scrap notice-and-takedown entirely, including international obligations and the adoption of similar systems by a number of our trading partners.

The end result of starting from scratch now would necessarily depend upon the policy choices that Congress made in shaping the new system. Such policy choices would of course include the underlying aims of copyright, but would likely involve other considerations and interests beyond that, such as competition, consumer protection, and other public policies. Instead, the Office will here endeavor to identify some of the copyright-related policy choices that Congress would face, as well as how resolution of those choices could impact the design of a new system.

One of the primary policy choices facing Congress would be to identify the interests it seeks to promote or balance under a new system. The answer to this question would then guide numerous statutory choices. To the extent that various potential interests may be in conflict with one another, Congress would need to provide guidance on which interests it wishes to optimize, consistent with the current balance of rights and exceptions contained in the broader copyright system. Should primacy be given to the effective protection of the intellectual property interests of rightsholders of all sizes and sectors? Or to maximizing

the diversity of, and innovation within, the internet ecosystem? Or, instead, to maximize the ability of individual citizens to speak to a broad audience and disseminate that speech?

A decision to optimize for either intellectual property interests or speech interests may weigh in favor of a system that encourages licensing of rightsholders' works for use on the different internet platforms. A licensing-first regime could be either voluntary or compulsory. A voluntary licensing model, while it has the benefit of maximizing the operation of the free market, would likely retain many of the differentials in bargaining power between certain OSPs and rightsholders, which in turn have been identified by many rightsholders as a problem with the current system. Compulsory licenses, on the other hand, could help alleviate any built-in advantage accruing from size or market power, but would require additional government resources to administer.

Similarly, a system optimized specifically to maximize the protection of intellectual property interests may weigh in favor of stricter qualification criteria for the safe harbor, in order to more easily weed out bad actors (like filesharing platforms dedicated to large-scale infringement) without protracted litigation. Prioritization of the diversity of the internet ecosystem, in contrast, would argue in favor of looser qualification criteria so as to not threaten the viability of innovations that Congress may want to encourage. Finally, prioritization of speech interests would likely argue for greater transparency within the system and against an unmediated, private, extra-judicial system, potentially favoring the adoption of a governmental or other third-party clearinghouse to evaluate takedown notices and counter-notices.

Congress would also need to determine how best to allocate the burden of identifying and addressing online infringement. There are a number of ways to approach answering this question. First, Congress could approach the question with an exclusive focus on the policy goals identified above—*i.e.*, placing an obligation on OSPs to more actively police their platforms if the goal is to maximize intellectual property protection, or retaining a system that largely places the burden on rightsholders to identify and locate infringing material online if the goal is to maximize the diversity and growth of the internet ecosystem or user privacy interests.

A second approach could be to evaluate the resources available to the different parties (such as technological capacity or economic strength), and shift more of the burden for identifying content to the party that has the greatest capacity to bear it.

A third option could be to evaluate which stakeholders receive the greatest benefit from the system when compared to a system without notice-and-takedown or safe harbors. If the net benefit to the parties were the guidepost that Congress chose, it would be necessary to compare the benefits provided to OSPs and rightsholders under the system. First, it would be necessary to assess the actual scope of the benefit received by OSPs from a safe

harbor, by determining what the OSP's potential liability would be for the actions of its users in the absence of a safe harbor (keeping in mind that the development of secondary liability theories in the online space was largely arrested by passage of section 512). As a counterbalance, it would be necessary to assess the likely cost and difficulty rightsholders of all sizes would face to protect their works online in the absence of an expeditious, extra-judicial takedown process.

While these policy decisions should be driven by Congress, the Office does offer a recommendation that any changes to the current system or the development of a new system should meet certain criteria:

1. The rules and requirements, as well as the manner in which the system is implemented by the parties, should be open and transparent.
2. Copyright protection online should be meaningful and effective. A system that requires a rightsholder to pursue thousands of expensive lawsuits to protect its content would be inefficient and unadvisable.
3. There should be legal certainty and room for innovation by OSPs that are acting in good faith. While bad actors are a real factor in the online space, the benefit of diverse platforms for the creation and dissemination of speech extends to many parties beyond the OSPs themselves.
4. There should be a mechanism for protecting users' valid speech interests and to address mistaken or bad-faith takedown notices.
5. There should be built-in deterrents for misuse of the system by all parties. Courts should have clear guidance for identifying bad-faith OSPs and stripping them of the protections of the safe harbor. Sending takedown notices or counter-notices for inappropriate reasons, such as to harm competitors or because the user is gambling that the rightsholder does not have the resources to pursue federal court litigation, should be both identifiable and subject to sanction. The nature of the user's activities should play a role in determining the penalty that results from repeat infringements (be it account termination, monetary damages, or something else)—a user's ineffective attempt to make fair use of content should be subject to lighter sanctions (such as mandatory copyright education before reinstatement of their account) as compared to the actions of a user who is knowingly and intentionally sharing thousands of infringing files. The system ultimately could be set up to address such misuse either *ex ante* (for example, by adopting a clearinghouse model for notices and counter-notices), or *ex post* through the effective imposition of sanctions for misuse. In the latter case, it would be necessary to determine which institution should properly impose such sanctions—the OSP, by deprioritizing notices sent by those who frequently send bad-faith notices or counter-notices; the courts, through a beefed up section 512(f); or a third party or government entity, such as through enforcement actions against those who engage in a pattern of misuse.

6. There should be robust educational materials regarding copyright law and the safe harbor system aimed at all parties, including users, notice-senders, and OSPs.
7. The benefit of the system should not accrue primarily to large players, nor should it place undue burdens on smaller players—be they small OSPs, individual users, or individual rightsholders.
8. There should be additional built-in incentives for cooperation between OSPs and rightsholders beyond the high-stakes risk of an OSP being found to fall outside of the safe harbor. The magnitude of potential liability that would result from a finding that an OSP's conduct placed it outside of the safe harbor may caution against sanctioning conduct that is borderline rather than egregious. For this reason, rather than building a system with only one severe stick, it may be better to introduce carrots that could improve the likelihood of cooperation. Of course, the development of any solution as the result of such cooperation should reflect the inputs of all stakeholders impacted by the solution.
9. Any new system would need sufficient flexibility to address future technological and legal developments. While one way to accomplish this is to adopt very broad wording for qualification of the safe harbors, under the current system that approach has resulted in a good deal of litigation between large economic interests. There may be additional ways to build in flexibility without courting yet more economically-draining litigation, such as a regulatory scheme or encouragement of a multi-stakeholder standards setting process.

What does the Copyright Office think of “notice and staydown”?

As noted in the Report, there currently is no extant model for successfully mandating universal stay-down. Even in the month since publication of the Report, we have seen countries in the European Union take different approaches to implement the requirements of Article 17 of the EU Digital Single Market Copyright Directive.³¹ Given the international nature of the internet, there is a risk associated with being the “first mover” for adoption

³¹ For example, the implementing legislation in the Netherlands appears to require the use of filtering technology and the availability of a third-party dispute-resolution procedure. See Remy Chavannes, *The Dutch DSM Copyright Transposition Bill: Safety First (Up to a Point)—Part 3*, KLUWER COPYRIGHT BLOG (June 12, 2020), <http://copyrightblog.kluweriplaw.com/2020/06/12/the-dutch-dsm-copyright-transposition-bill-safety-first-up-to-a-point-part-3>. In contrast, Germany has proposed a “pre-flagging” system that would require an OSP to provide a user with information about the acceptable legal grounds for use of third party content at the time the material is uploaded and allow the user to flag the material as legally authorized to ensure that upload of the material is not blocked by filtering technology. See *Discussion Draft of the Federal Ministry of Justice and Consumer Protection—Working Translation of the Draft Act on the Copyright Liability of Service Providers for Sharing Online Content (Article 3 of the Discussion Draft, Transposing Article 17 DSM Directive)* at § 8 (June 24, 2020),

<https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/>

[DiskE_II_Anpassung%20Urheberrecht_digitaler_Binnenmarkt_englischeInfo.html?nn=6705022](https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_II_Anpassung%20Urheberrecht_digitaler_Binnenmarkt_englischeInfo.html?nn=6705022).

and implementation of such a requirement. Were the United States to adopt its own implementation method and requirements at the same time as, and without reference to, those adopted by the EU, it would risk placing requirements on OSPs that are either incompatible or otherwise in tension with the EU's requirements. Incompatible obligations could pose a significant adverse economic impact for U.S.-based OSPs attempting to serve both the domestic and the foreign market. It may, therefore, be prudent to wait and see whether the EU ultimately coalesces around one or two models, and then evaluate the relative success or failure of those models against the current notice-and-takedown system in the United States.

Even absent these considerations, as noted in the Report, there are significant questions that would need to be answered before adoption of a stay-down regime:

1. Is it feasible using current technologies? Are there particular types of content or works that OSPs would be unable to adequately identify in order to comply with a staydown requirement? One empirical study submitted during the course of the Study asserts that there are currently “many types of media content for which no filtering tools currently exist.”³²
2. What level of “match” is required to invoke the staydown requirement? Must it be a file that is virtually identical to the file for which the takedown notice was sent? Or is a staydown obligation triggered simply by the fact that the same work appears in future uploads, even if subsequent uploads otherwise differ in significant respects from the material that was the subject of the takedown notice. (For example, would a takedown notice for infringing copies of the music video for “Purple Rain” likewise require removal and staydown of videos where the song is used as background music for different content? Is a takedown notice directed at material that includes a full-length copy of the work sufficient to require takedown of a 1 minute sample of the song?)
3. Is staydown more appropriate with regards to certain types of materials, such as full-length recordings of a movie, than others, such as a song incorporated into a political ad?
4. What would be the actual cost of such a requirement, and what would the effect of those costs be on development and competition in the online space? Would those costs present an economic barrier to potential new entrants, or otherwise overly benefit existing, established OSPs?
5. To the extent that a staydown requirement would extend to non-full-length uses of a work, including where portions of the work are incorporated into a new work, how

³² Evan Engstrom & Nick Feamster, “The Limits of Filtering: A Look at the Functionality & Shortcomings of Content Detection Tools,” Empirical Study Submitted in Response to U.S. Copyright Office’s Nov. 8, 2016, Notice of Inquiry at 12 (Mar. 22, 2017).

do you comply with staydown requirements while also protecting legitimate speech? Should there be different standards for derivative works than for full-length copies of copyright-protected content?

The Copyright Office lacks information with respect to many of these questions, including the technical feasibility of filtering systems for various types of content and the potential economic and competitive impacts of such a requirement. For this reason, the Office cannot currently provide an empirically sound response to this question, which may benefit from further analysis both within and outside of government.

If Congress were redesigning section 512 today, should the interests being balanced be the same ones as those in 1998 when the internet was in its infancy?

Overall, the interests among stakeholders today have not changed significantly since 1998. Copyright owners today value an efficient means for enforcing their rights online, while OSPs prefer legal certainty in order to quantify the risks inherent in adopting new business models. Similarly, users continue to value the availability of new ways to access content and engage in speech of their own. All of these interests remain as important today as they were in 1998, although the benefits of the current system accrue to rightsholders of all sizes to a smaller degree than OSPs.

It is particularly worth recalling, however, that negotiation of section 512 was largely led by companies and organizations representing the interests of large rightsholders and OSPs. Since 1998, stakeholder groups that were not represented in those negotiations have organized around shared interests in the online space. At a minimum, then, the Office believes that any new system should explicitly factor in the interests of these other stakeholders—smaller OSPs, small rightsholders, and different types of users.

Further, as was noted above, account termination for the user of a section 512(a) service would likely have a greater impact on the user's ability to participate as a full citizen in the public discourse of the country today than it would have in 1998. Government information and mechanisms to request government services have increasingly migrated online, and thus loss of internet access would impose significant hardship on not just on the user, but on the entire household. Thus, consideration of other possible deterrents to repeat infringement by users of a section 512(a) service may better balance the interests of rightsholders and users.