

May 22, 2020

U.S. COPYRIGHT OFFICE RELEASES REPORT ON RECOMMENDED CHANGES TO DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA)

To Our Clients and Friends:

On May 21, 2020, the U.S. Copyright Office (the “Office”) released a nearly 200-page report (the “Report”)[1] suggesting changes to the Digital Millennium Copyright Act (17 U.S.C. § 512) (“DMCA”), which governs how online service providers (OSPs) police potential online copyright infringement. The report was the result of a multi-year study of the DMCA—the first comprehensive study by the Office on the DMCA’s operation—and was prepared to analyze whether the DMCA’s safe harbor provisions are successfully balancing the needs of OSPs and copyright holders, “particularly in light of the enormous changes that the internet has undergone in the last twenty-plus years.”[2]

The report concludes that the DMCA does not need “wholesale changes,” but may benefit from fine-tuning to better “balance the rights and responsibilities of OSPs and rightsholders in the creative industries.”[3] In particular, the Office “concluded that Congress’ original intended balance has been tilted askew” and “the scale of online copyright infringement and the lack of effectiveness of section 512 notices to address that situation remain significant problems.”[4]

Among other things, the Office suggested that Congress consider legislation regarding:

- What qualifies as “temporary” for 512(c) safe harbor and what activities are appropriately shielded from liability for being “related to” storage;[5]
- Whether technology services beyond those providing internet infrastructure should be eligible for the safe harbor provisions;[6]
- Whether unwritten policies regarding the account termination of “repeat infringers” serve the intended deterrent purpose and what constitutes “appropriate circumstances” for a user’s termination for repeated infringement;[7]
- The distinction between “actual” and “red flag knowledge” and the intended scope of the “willful blindness” doctrine;[8]
- Whether rightsholders must submit a unique, file-specific URL for every instance of infringing material on an OSP’s service to properly provide “information reasonably sufficient . . . to locate [infringing material]”: [9]

GIBSON DUNN

- The impact of the Ninth Circuit’s decision in *Lenz v. Universal Music Corp.*,^[10] which held that copyright holders must consider fair use in good faith before issuing a takedown notice for content posted on the Internet. In particular, the Office recommended that Congress consider the “knowing misrepresentation” requirement for a lawsuit seeking redress for an improper infringement notification, and whether the *Lenz* decision reflects Congressional intent on this issue;^[11]
- Appropriate changes to section 512(c)’s notice requirements, given new web-based submission forms and the possibility that some of 512(c)’s current notification standards may become obsolete;^[12]
- Potential avenues to resolve disputes over whether material should be removed and reinstated that do not require a rightsholder to prepare and file a federal lawsuit in the current statutory timeframe of 10–14 days;^[13]
- The parameters of a rightsholder’s ability to subpoena an OSP to identify an alleged infringer under section 512(h);^[14] and
- The possibility and range of injunctive relief available to rightsholders after a takedown;^[15]

At present, these remain just proposals for legislative action. And in its report, the Office does not provide non-statutory approaches to alter DMCA provisions or developments involving online intermediary liability in other countries, finding that both issues require further exploration. The Office expressed its intent to explore additional voluntary initiatives to address online infringement and help identify standard technical measures that can be adopted in certain sectors.^[16] Additionally, the Senate Judiciary intellectual property subcommittee has announced plans to draft changes to the DMCA by the end of 2020.^[17] Whether and to what extent the subcommittee follows the recommendations of this report bears watching for both OSPs and rightsholders.

[1] United States Copyright Office, Section 512 of Title 17: A Report on the Register of Copyrights (May 2020), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf> (the “Report”).

[2] Copyright Office Releases Report on Section 512, Issue No. 824, May 21, 2020, <https://www.copyright.gov/newsnet/2020/824.html>.

[3] Report at 7.

[4] *Id.* at 197.

[5] *Id.* at 84–99.

[6] *Id.*

GIBSON DUNN

[7] *Id.* at 95–110.

[8] *Id.* at 110–28.

[9] *Id.* at 138–44.

[10] 801 F.3d 1126, 1154 (9th Cir. 2015).

[11] Section 512 of Title 17 at 145–49.

[12] *Id.* at 152–59.

[13] *Id.* at 159–62.

[14] *Id.* at 163–66

[15] *Id.* at 167–170.

[16] *Id.* at 6.

[17] Margaret Harding McGill, *Copyright Office: System for pulling content offline isn't working*, Axios (May 21, 2020), <https://www.axios.com/copyright-office-system-for-pulling-content-offline-isnt-working-ed78fe62-eec4-44dc-bcdd-1c593e888fb8.html>.



Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please feel free to contact the Gibson Dunn lawyer with whom you usually work in the firm's Intellectual Property or Media, Entertainment and Technology practice groups, or the following authors:

Howard S. Hogan - Washington, D.C. (+1 202.887.3640, hhogan@gibsondunn.com)

Nathaniel L. Bach - Los Angeles (+1 213-229-7241, nbach@gibsondunn.com)

Ciara M. Davis - Washington, D.C. (+1 202-887-3783, cmdavis@gibsondunn.com)

Please also feel free to contact the following practice leaders:

Intellectual Property Group:

Wayne Barsky - Los Angeles (+1 310-552-8500, wbarsky@gibsondunn.com)

Josh Krevitt - New York (+1 212-351-4000, jkrevitt@gibsondunn.com)

Mark Reiter - Dallas (+1 214-698-3100, mreiter@gibsondunn.com)

Media, Entertainment and Technology Group:

Scott A. Edelman - Los Angeles (+1 310-557-8061, sedelman@gibsondunn.com)

Kevin Masuda - Los Angeles (+1 213-229-7872, kmasuda@gibsondunn.com)

Orin Snyder - New York (+1 212-351-2400, osnyder@gibsondunn.com)

GIBSON DUNN

© 2020 Gibson, Dunn & Crutcher LLP

Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.