



Perspectives from FSF Scholars
June 30, 2020
Vol. 15, No. 37

Copyright Office Report Should Spur Modernizing the DMCA

by

Randolph J. May and Seth L. Cooper *

Introduction and Summary

According to a U.S. Copyright Office report released on May 23, Section 512 of the Digital Millennium Copyright Act of 1998 (DMCA), the law Congress intended to stop online infringement, has been skewed against copyright owners. The report identifies numerous fixes to the DMCA that are needed to restore the balance that Congress envisioned between copyright protections and online innovation. Section 512 came under added scrutiny at a Senate hearing on June 2, and calls have been made to overhaul the law to better prevent mass online infringement.

The Copyright Office's report is a helpful starting point for legislative reforms needed to better protect movies, TV shows, sound recordings, and other content from infringements that cost U.S. copyright owners hundreds of millions of dollars each year. A series of amendments to Section 512 are needed to correct court decisions that have put undue burdens on copyright owners, departed from common law standards for secondary liability, and reduced accountability of online service providers for infringing content posted by users of their sites.

Section 512 of DMCA conditionally grants legal immunity from civil copyright infringement claims to online service providers when individual users of those services upload infringing

content to the Internet. But the "notice-and-takedown" system established in the DMCA reflects an increasingly outdated late-1990s' snapshot of the online services market, imposes significant hardship on copyright owners, and is overwhelmed by mass infringement on popular user-upload websites such as YouTube.

We addressed the importance of reforming Section 512 of the DMCA in our book *Modernizing Copyright Law – Constitutional Foundations for Reform*, published earlier this year. With regard to updating the DMCA to prevent, or at least reduce, mass online infringement, the new Copyright Office's report includes for Congress's consideration many of the recommendations contained in our book.

As the report observes: "Much of the story of how section 512 works today is a story of how relatively broad provisions have been interpreted and applied in a manner that broadens the protections for some stakeholders, while narrowing the benefits of the system for others." The report identifies several provisions in Section 512 that have been interpreted in ways that have reduced protections for copyright owners. Significantly, lower court decisions have interpreted some of those provisions in ways that are at odds with common law doctrines of secondary liability for copyright infringement.

Although federal copyright law is based on statutes, these statutory provisions incorporate common law principles of secondary liability – that is, for contributory and vicarious liability. Secondary liability principles formed a critical backdrop to Congress's passage of Section 512. Secondary liability provides a way for copyright owners to enforce their rights, especially when users responsible for direct infringements are outside the reach of civil justice. Secondary liability doctrines for copyright infringement fit with one of the hallmarks of the common law: protection of property rights.

But as recounted in the Copyright Office's report, lower court decisions have made it more burdensome for copyright owners to satisfy the elements for finding contributory liability for infringement than the common law requires. First, lower court decisions have made it more difficult to establish that online service providers have the requisite knowledge for imposing contributory liability – especially when it comes to "constructive" or so-called "red flag" knowledge of infringing activity on their sites. Wrongly, copyright owners have been required to show online service providers had knowledge of infringements on specific website URLs instead of knowledge of infringing activity taking place generally on their sites. Second, the report concludes that lower court decisions have made it more difficult for copyright owners to establish that online service providers are contributorily liable by having willfully blinded themselves to knowledge of the infringement. Here again, courts have improperly required copyright owners proffer URL-specific knowledge of willful blindness.

The report further concludes that lower court decisions have made it more difficult for copyright owners to establish that online service providers are vicariously liable for infringement than the common law requires. The report cites a court decision that departed from the common law by determining that the "financial benefit" prong for vicarious liability requires a direct link between the benefit received by the online service provider and the infringing content at issue in the case – rather than a generalized finding that infringing content is one of the site's primary draws.

Also, to satisfy the "right and ability to control" prong, courts have required copyright owners to show an online service was actively involved in the infringing activity – a requirement not found in the common law. As a result of these decisions, copyright protections have been unjustifiably reduced and Congress's intent has been thwarted.

Additionally, the Copyright Office's report identifies lower court interpretations of other Section 512 provisions that have unduly expanded burdens on copyright owners and reduced responsibility for online services for infringements by their users. For example, activities such as providing a marketplace for sales of physical goods and financial services offered by third-party payment processors have been deemed eligible for safe harbor even though they don't involve actually storing or providing access to online content.

Lower courts decisions have loosely applied Section 512's "repeat infringer" provision that Congress intended to stop serial infringing users. Online service providers have been given leeway to self-define what constitutes a repeat infringer. And providers have been absolved of having to make available *ex ante* policy criteria for conduct that constitutes repeat infringement. And lower court decisions have all but rendered inert the "representative list" provision for formal takedown notices for multiple infringing works on a single site. Contrary to Congress' intent, lower courts have rejected the use of lists with respect to infringing content that is not enumerated and located by URL.

In view of the skewed state of current law, we believe that congressional reform of the DMCA should include consideration of the following important fixes:

- Congress should restore common law standards for contributory liability and constructive knowledge. It should clarify that red flag knowledge applies to knowledge of infringing activity generally and it is not limited to specific and identifiable instances of infringement. Also, an online service provider's red flag knowledge should create a limited duty to inquire into objectively obvious infringement. And Congress should identify types of red flag knowledge, including users' promotion of content as illegal.
- Congress should restore the common law definition of willful blindness. It should clarify that willful blindness involves avoidance of general awareness of infringing activity – and is not limited to specific and identifiable instances of infringement.
- Congress should restore the common law standard for vicarious liability. It should clarify that the "financial benefit" prong is met if infringing content is one of the primary draws for users of the site and the copyright owner's works were infringed through the site. Also, Congress should clarify that the "right and ability to control" prong does not require that an online service provider was actively involved in the infringing activity.
- Congress should specify online service functions that qualify for safe harbor and those that do not. Legal immunity should not extend to "related" third-party services that do not actually store or provide access to online content.

- Congress should provide clarifications to strengthen its provision against repeat infringers. It should require that an online service provider's policy be put in writing and made publicly available. Online service providers should be required to keep records of formal and informal claims about infringement by users. Online service providers should be responsible for terminating accounts or access for repeat *alleged* infringers and not repeat *adjudicated* infringers. Ignoring internal red flags and other indicia of infringing activity not provided in formal takedown notices should be evidence of unreasonable implementation.
- Congress should restore the representative list provision for formal takedown notices identifying multiple infringing copies on an online providers website by clarifying that such a list applies to all unauthorized copies of the specific content named in the list that are posted on the provider's site – even if the specific URLs are not in the list. Also, a copyright owner's furnishing of a representative list establishes a limited duty to inquire into and expeditiously remove future infringing copies of the specified copyrighted contents from their sites.

The sweeping number of changes that ought to be considered to modernize Section 512 makes a strong case for a legislative overhaul of the DMCA. Congress should exercise its prerogative to explore reforms beyond those contained in the report, consistent with the Constitution's entrusting Congress with the power to secure copyrights. Such reforms should include, for instance, a more widespread "notice and stay down" requirement when copyright owners submit formal takedown notices and future postings of that same infringing content are posted on the same sites.

Regardless of whether reform involves a series of fixes and updates to the law's existing framework or an entirely new framework that incorporates the substances of those fixes, Congress needs to make DMCA reform a reality. That means Congress should live up to its constitutional responsibility to secure copyrights, restoring common law principles of secondary liability, and modernizing the law to more effectively combat mass online infringements.

The DMCA's Purpose in Protecting Copyrighted Works From Online Infringement Has Been Thwarted by Technological Changes and Court Interpretations of Its Terms

Section 512 of DMCA conditionally grants legal immunity from civil copyright infringement claims to online service providers when individual users of those online services upload infringing content to the Internet. By offering safe harbor from liability to online service providers that meet certain requirements, such as expeditiously removing infringing content identified in formal takedown notices submitted by copyright owners, Congress intended Section 512 to provide a fast-track way to prevent or curtail online copyright infringement and promote online innovation and speech. Importantly, an online service provider's failure to comply with the conditions for safe harbor does not, by itself, make the provider liable for its user's infringing activity.¹ Absent legal immunity under Section 512, a copyright holder must still file a copyright

¹ See 17 U.S.C. 512(l) (providing that failure to obtain safe harbor has no bearing on an online service provider's liability for copyright).

infringement action in federal court and bear the burden of proving that the online service provider is secondarily liable for its user's infringing activity.

However, as Free State Foundation President Randolph May and I explained in our newest book, *Modernizing Copyright Law – Constitutional Foundations for Reform*,² the "notice-and-takedown" system established in the DMCA reflects a 1990s' snapshot of Internet technology and the online service market, imposes significant hardship on copyright owners, and is overwhelmed by mass infringement on popular user-upload websites such as YouTube. In our book we also identified ways that lower court interpretations of Section 512 have made it extra difficult to hold online Internet service providers accountable for mass infringement caused by their users.

The U.S. Copyright Office's report on Section 512 identifies many of the same problems we address in our book. In its examination of whether Section 512 is working effectively in achieving the balance Congress sought between promoting innovation in online services and protections for copyright owners, the Copyright Office concludes that "Congress' original intended balance has been tilted askew."³ As the report recognizes, "there have been significant changes to the technical landscape since the DMCA passed that have increased the potential economic impact of online infringements" and "these changes have been compounded by developments with respect to judicial interpretations of existing provisions."⁴ As a result, many copyright owners "have seen their livelihoods impacted drastically by ongoing infringement of their works online and for which they can achieve no relief."⁵

Importantly, the report observes that "[m]uch of the story of how section 512 works today is a story of how relatively broad provisions have been interpreted and applied in a manner that broadens the protections for some stakeholders, while narrowing the benefits of the system for others."⁶ On the one hand, lower court decisions have expansively interpreted provisions in Section 512 that grant legal immunity to online platform services. And on the other hand, lower court decisions have narrowly interpreted provisions in Section 512 that place responsibility on online platform services for addressing infringement taking place on their websites. The report specifically identified several provisions in Section 512 that have been interpreted in ways that have reduced the law's effectiveness in protecting copyright holders.

Court Interpretations of Section 512 Have Undermined Copyright Protections by Deviating From Common Law Standards

A strong indicator that Section 512 has been unreasonably skewed against copyright owners is the lower courts' deviation from common law doctrines. Court decisions have made it more burdensome for copyright owners to satisfy elements for secondary liability for infringement

² See Randolph J. May and Seth L. Cooper, *Modernizing Copyright Law for the Digital Age – Constitutional Foundations for Reform* (Carolina Academic Press, 2020), especially Chapter 8.

³ U.S. Copyright Office, "Section 512 of Title 17: A Report of the Register of Copyrights" ("Report") (May 21, 2020), at 1.

⁴ Report, at 84.

⁵ Report, at 197.

⁶ Report, at 1.

than the common law requires. As a result of those decisions, copyright protections have been undermined.

Copyright Protections and Common Law Principles

Although copyright protections are based on federal statutes, those statutory provisions are also informed by common law principles. Section 512 was passed by Congress against the backdrop of legal doctrines of contributory liability and vicarious liability for copyright infringement. As observed by the U.S. Supreme Court in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* (2005): "[T]hese doctrines of secondary liability emerged from common law principles and are well established in the law."⁷ According to the Court's opinion in *Grokster*: "One infringes contributorily by intentionally inducing or encouraging direct infringement... and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it."⁸ A significant difference between them is that contributory liability includes a knowledge element, whereas vicarious liability does not.

In the copyright context, common law principles of secondary liability provide a basis for enforcing the exclusive rights of copyright owners – particularly when the individuals or entities responsible for direct infringement are unreachable for the civil justice process. As the Court explained in *Grokster*: "When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor... for secondary liability on a theory of contributory or vicarious infringement."⁹

Secondary liability doctrines regarding copyright infringement are consonant with one of the hallmarks of common law principles: protection of property rights. Court decisions interpreting Section 512 in ways that deviate from common law principles therefore reduce the protections provided to copyrighted works. Such decisions are also contrary to Congressional intent. Although secondary liability is not an express part of the DMCA, Congress passed Section 512 against the backdrop of secondary liability jurisprudence that developed over several decades. And it is a widely-recognized canon of statutory construction that a statute will not be construed to alter the common law unless that intent is clearly stated.¹⁰ However, as observed in the Copyright Office's report, several decisions by lower federal courts involving Section 512 have altered common law principles.

Court Interpretations of "Red Flag" Knowledge Requirements Have Deviated From Common Law Principles Regarding Constructive Knowledge

First, court decisions have made it more difficult for copyright owners to establish that online service providers have the requisite knowledge for imposing contributory liability than is required by the common law – especially when it comes to so-called "red flag" knowledge.

⁷ *Grokster*, 545 U.S. 913, 930.

⁸ *Grokster*, 545 U.S. at 930.

⁹ *Grokster*, 545 U.S. at 929-930.

¹⁰ For a case applying the canon, *see, e.g., U.S. v. Texas*, 507 U.S. 529, 534 (1993).

Section 512(c) provides that, to be eligible for safe harbor from infringement claims, online service providers must lack actual knowledge of a specific infringement on their websites and also lack red flag knowledge of infringing activity taking place generally on their sites. The report cites legislative history indicating Congress used the term red flag to refer to "facts or circumstances from which infringing activity is apparent."¹¹ Online service providers that have either actual or red flag knowledge must then act expeditiously to remove or disable access to the infringing content in order to receive legal immunity.

Red flag knowledge is not a novel concept but is equivalent to the concept of "constructive knowledge." In the context of copyright infringement, constructive knowledge has to do with whether an individual or entity "should know" or "have reason to know" about an infringement, and it is a requirement element for establishing contributory liability.¹² As copyright law scholars have pointed out, Section 512 codified a 1995 U.S. District Court decision in *Religious Technology Center v. Netcom On-Line Communications Services*. *Netcom* recognized that the imposition of contributory liability for copyright infringement on online service providers that enabled such infringement depends on those providers having knowledge of the infringement.¹³ According to *Netcom*, an online service provider faces liability for materially contributing to the infringement if it knew or should have known – that is, if it had constructive knowledge – about the infringement.¹⁴ Thus, Section 512's "red flag" provision incorporates a constructive knowledge requirement, so that an online service provider will not receive legal immunity if it is aware of "red flag" knowledge of infringing activity taking place generally on its site.

But courts' imposition of a requirement that online service providers have knowledge of specific instances of a specific work being infringed on particular website URLs alters the statute's generalized red flag knowledge requirement for infringing activity. As a result, the report correctly concludes: "[C]ourts have set too high a bar for red flag knowledge, leaving an exceptionally narrow space for facts or circumstances that do not qualify as actual knowledge but will still spur an OSP to act expeditiously to remove infringing content."¹⁵ And such a high bar "protects activities that Congress did not intend to protect."¹⁶ Although the report does specifically address whether this judicial alteration is consistent with the common law, the courts' sharply narrow reading of Section 512 appears to require more than is demanded by the common law regarding constructive knowledge.

¹¹ Report, at 113.

¹² See, e.g. *Gershwin Publishing Corp. v. Columbia Artists Management Inc.*, 443 F. 2d 1159, 1162 (2d Cir. 1971). For an infringement case recognizing the doctrine of constructive knowledge, see, e.g., *Screen Gems-Columbia Music, Inc. v. Mark Fi Records, Inc.*, 256 F.Supp. 399 (S.D.N.Y. 1966).

¹³ See "Comments on Behalf of Copyright Law Scholars," U.S. Copyright Office, Section 512 Study, Docket No. 2015-7 (April 1, 2016), at 3-5; *Netcom*, 907 F.Supp. 1361 (N.D. Cal. 1995).

¹⁴ See *Netcom*, 907 F.Supp., at 1374.

¹⁵ Report, at 123.

¹⁶ Report, at 123.

Court Interpretations Have Deviated From Common Law Principles Regarding Willful Blindness

Second, lower court decisions have made it more difficult for copyright owners to establish that online service providers are contributorily liable for infringement by having willfully blinded themselves to knowledge of the infringement than under the common law.

Absent actual or red flag knowledge, an online service provider loses immunity under Sections 512(c) and (d) if the provider made intentional effort to avoid knowledge of the infringement or infringing activity. But according to the report: "By requiring evidence of specific instances of infringing material, rather than facts relating to infringement of specific copyrighted content, the courts have adopted a bar for demonstrating an OSP's willful blindness that is both higher than the criminal willful blindness standard articulated by the Supreme Court and higher than the standard of willful blindness traditionally applied in copyright cases."¹⁷ Indeed, the report concludes that this heightened requirement for establishing willful blindness is unsupported by the text of Section 512 and that it is "difficult to square with Congress' original intent."¹⁸

Court Interpretations Have Deviated From Common Law Principles Regarding Vicarious Liability

Third, lower court decisions have made it more difficult for copyright owners to establish that online service providers are vicariously liable for infringement – by directly benefitting financially from it and by having the right and ability to control access to the infringing content – than is required by the common law.

Section 512(c)(1)(B) provides that online service providers shall not be liable "for infringement of copyright by reason of the storage at the direction of a user of material . . . if the service provider . . . does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity."¹⁹ As the report recognizes: "Through this language, Congress sought to codify both the 'financial benefit' and 'right and ability to control' prongs of the common law vicarious liability standard."²⁰ This is consistent with the longstanding canon of statutory construction that when Congress makes use of a statutory term with established meaning at common law then the common law meaning will apply to that term.²¹

Although the report finds that "most courts appear to follow the common law's financial benefit prong" for vicarious liability, it identifies one District Court decision that required a copyright owner to prove a direct link between the financial benefit received by the online service provider and the specific infringing work at issue in the case. But as the report rightly concludes: "There does not appear to be support for such a requirement in either the common law of vicarious liability or the legislative history of section 512."²² Instead, the Copyright Office expresses its

¹⁷ Report, at 126.

¹⁸ Report, at 127.

¹⁹ Report, at 128.

²⁰ Report, at 128.

²¹ For a case applying the canon, *see, e.g., Carter v. U.S.*, 530 U.S. 255, 264 (2000).

²² Report, at 134.

view that a better financial benefit test would be based on "whether the existence of infringing material on the site is one of the primary draws for users, and whether the plaintiff's works were infringed by being performed or distributed through the site."²³

Deviation from the "right and ability to control" prong for vicarious liability according to the common law is more apparent. The report observes that both the Second and Ninth Circuits have held that in order to have the "right and ability to control," an online service provider must exert "substantial influence on the activities of the user," that may include "high levels of control over the users...[or] it may include purposeful conduct."²⁴ In other words, the report indicates that courts have added to the common law standard a requirement that copyright owners prove there were "affirmative steps... entailing some active involvement in the infringing activity" by the online service provider.²⁵ Here again the report disputes the idea that Congress intended to abrogate the common law standard for the right and ability to control prong by requiring "something more." Instead: "[T]he Office is of the opinion that the right and ability to control prong should correctly be interpreted in accordance with the common law standard."²⁶

Restoration of common law principles for secondary liability for copyright infringement should be a congressional imperative for reform or overhaul of the DMCA.

Court Interpretations Have Deviated From Congress's Intent in Additional Ways

In addition to lower courts' deviations from common law principles to unduly narrow exclusions from Section 512 safe harbors, interpretations of the scope of entities and activities that receive legal immunity have further undermined the ability of copyright owners to seek legal recourse for online infringements. Three examples identified in the report follow.

Court Interpretations Have Extended Immunity to Entities Not Included in Section 512's Text

Section 512(c) confers safe harbor from civil copyright infringement on online service providers that serve up content "at the direction of a user."²⁷ Yet as the report observes, activities not covered by the four corners of Section 512 – such as providing a marketplace for sales of physical goods, modification of user-uploaded content by online platform services, and financial services offered by third-party payment processors – have been granted safe harbor by lower courts on the grounds that those activities are sufficiently "related" or ancillary to protected activities delineated in the text. As the report states: "The Office is unconvinced that Congress, in 1998, intended to protect any additional services related to the storage of content, beyond the act of storage or providing access to the content."²⁸

Additionally, the report acknowledges that "courts have on occasion applied the section 512(a) safe harbor in an expansive manner, at times in ways likely not within the scope of what

²³ Report, at 134.

²⁴ Report, at 133.

²⁵ Report, at 133.

²⁶ Report, at 135.

²⁷ 17 U.S.C. § 512(c).

²⁸ Report, at 89.

Congress intended."²⁹ Section 512(a) provides what is often called "mere conduit" safe harbor to protect backend Internet infrastructure services, including "transmitting, routing, or providing connections" for content.³⁰ As the report understates, "the Office questions whether a third party that does not directly transmit or store user traffic or content, like payment processors, should be considered conduits entitled to protection under section 512(a)."³¹ Although a reading of the text of Section 512(a) indicates that question should be answered in the negative, courts have decided or at least hinted that third parties that do not act as "mere conduits" nonetheless receive immunity.³²

Court Interpretations Have Undermined Copyright Protections Against Repeat Infringers

At the expense of copyright protections, lower courts have offered a lax interpretation of Section 512(i)(1)(A)'s requirement that online service providers adopt and reasonably implement a policy to address "repeat infringers." This extra lenient approach is evident in at least three ways. First, as the report states: "Courts interpreting the meaning of 'repeat infringer' within section 512(i)(1)(A) largely have given [online service providers] discretion to define the term themselves." For instance, online service providers have free rein to determine how many infringement incidents or how high a volume of infringing activity makes a user a repeat infringer. The report cites lower court decisions that absolved online service providers from having to provide *ex ante* criteria for the types of conduct that constitute repeat infringement under their policies and from any obligation to consider evidence of repeat infringer conduct outside of what is identified in formal takedown notices.

Moreover, some online service providers have insisted that a "repeat infringer" is someone whom a court has previously adjudged to have committed infringement. But the text does not call for such a strict interpretation. The report rightly pushes back: "On this point, the Office reads the statute and the legislative history to support a finding that Congress did not intend for 'repeat infringer' to mean 'repeat adjudicated infringer,' in alignment with Congress' desire for section 512(i) to serve as a deterrent."³³

Second, courts have decided that Section 512(i)(1)(A) does not require that online service providers' adopted policy be put in writing or made available to the public. Here also the report rightly pushes back: "The Office further questions an outcome that allows an OSP to 'adopt' an unwritten policy, requiring only that the OSP communicate to its users that such a repeat infringer policy exists, but not the terms of the repeat infringer policy. Such a reading is difficult to reconcile when viewed in a larger context, and does not align with Congress' intent for the repeat infringer provision to serve as a deterrent to online infringement."³⁴

Third, courts have been decidedly lenient regarding online service providers' implementation of their repeat infringers policies. As a result, the report finds that courts have upheld the implementation of nearly every such policy, save for in extreme circumstances. The report

²⁹ Report, at 90.

³⁰ 17 U.S.C. § 512(a).

³¹ Report, at 91.

³² Report, at 91-92.

³³ Report, at 103.

³⁴ Report, at 106.

observes that the important deterrent for infringing activity that Congress intended "has been hampered by the courts' overly lenient application of section 512(i)(1)(A)."³⁵

As the report observes: "Congress intended for OSP's repeat infringer policies to serve as an important deterrent for infringing activity, by ultimately terminating the accounts or access of repeat infringers."³⁶ However: "The Office is of the opinion that such deterrence has been hampered by the courts' overly lenient application of section 512(i)(1)(A)."³⁷

Court Interpretations of "Representative List" Provision Have Undermined Copyright Protections

Lower courts have all but rendered inert the "representative list" provision regarding formal takedown notices. Section 512(c)(3)(A)(ii) provides that "if multiple copyrighted works at a single online site are covered by a single notification," an effective takedown notice may include "a representative list of such works at that site."³⁸ The report finds that court decisions recognize the right of copyright owners to submit representative lists of copyrighted works, "but then reject[] use of that list to provide notice with respect to infringing materials that are not specifically enumerated and located."³⁹ As the report indicates, despite Congress's apparent expectation that a rightsholder who sends a representative list of allegedly infringing works on an online service provider's website should expect the removal of related infringing works on that site that are not identified in the list, a number of courts have concluded that only a file-specific URL can satisfy the law.⁴⁰

Congress Should Countermand Courts' Overemphasis on Section 512(m) With a Limited "Notice and Stay Down" Requirement

As the report explains, the courts have been "[u]sing section 512(m) as the starting point for interpreting all other parts of section 512."⁴¹ Section 512(m) provides that eligibility for safe legal immunity does not depend on "a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection."⁴² The report observes that courts' solicitude for Section 512(m) has shaded its interpretations of red flag knowledge and repeat infringers provisions, for example.⁴³ However, the courts' overemphasis on Section 512(m) has come at the expense of a reasonable reading of other provisions and thereby created additional burdens for copyright owners, reduced accountability for online service providers, and enabled more online infringements.

³⁵ Report, at 109.

³⁶ Report, at 109.

³⁷ Report, at 109.

³⁸ 17 U.S.C. § 512(c)(3)(A)(ii).

³⁹ Report, at 145.

⁴⁰ Report, at 143, 145.

⁴¹ Report, at 126.

⁴² 17 U.S.C. § 512(m).

⁴³ Report, at 126-127.

Any reform or overhaul of Section 512 should make clear qualifications to the general no-duty to monitor policy. Congress should expressly identify types of circumstances in which online service providers have a limited duty to search for and remove infringing content. Such a limited duty should extend, for example, to specific copyrighted works that are identified in formal takedown notices and but which are posted on URLs that are not specified in such notices. Congress should pursue a "notice-and-stay" down policy approach that would require a limited duty to monitor for and remove future postings of specific copyrighted works identified in takedown notices.

Congress Should Reform the DMCA to Better Protect Copyrighted Works

The recommendations contained in the Copyright Office's Section 512 Report provide a helpful starting point for Congress to prepare legislation that will restore copyright protections and increase online platform services' accountability when their users post infringing content on their sites. In our view, any DMCA reform or overhaul should include the following important fixes – nearly all of which are recommended by the Copyright Office:

- Congress should restore the understanding that actual knowledge requires specific knowledge and red flag knowledge only requires general knowledge. With respect to red flag knowledge, Congress should clarify that it is not limited to specific or specific and identifiable instances of infringement. In so doing, Congress should restore the common law standard regarding contributory liability and constructive knowledge. Also, Congress should clarify that an online platform service's red flag knowledge of infringements creates a limited duty of inquiry into objectively obvious infringement – and that duty prevails over any lack of general monitoring requirement. And Congress should provide that types of red flag knowledge include users' express promotion of content as illegal and stolen, including such promotion through descriptive website URLs.
- Congress should restore the common law definition of willful blindness. It should clarify that there is willful blindness when an online service provider avoids general awareness of infringing activity and that it is not limited to specific or specific and identifiable instances of infringement.
- Congress should restore the common law standard for vicarious liability. It should clarify that the "financial benefit" does not require establishment of a direct link between the financial benefit received by the online platform service provider and the specific infringing content at issue in the case. Rather, the requirement is satisfied if the existence of infringing content is one of the primary draws for users of the site and the copyright owner's works were infringed by being performed or distributed through the site. Also, Congress should clarify that the "right and ability to control" prong does not require copyright owners go beyond common law requirements and prove that an online service provider was actively involved in the infringing activity.

- Congress should better specify the types of online service functions that qualify for safe harbor and distinguish functions that are outside its scope. It should specify that legal immunity does not extend to third-party services or so-called "related" services that do not actually store or provide access to online content. Such services should not be considered "conduits" and receive safe harbor.
- Congress should make clarifications to strengthen its provision against repeat infringers. It should require that an online service provider's policy be put into writing and made publicly available. And online service providers should be required to contain written records of formal and informal claims about infringement by users. It should clarify that "repeat infringers" means repeat *alleged* infringers and *not* repeat *adjudicated* infringers. Additionally, Congress should clarify that ignoring internal red flags and other evidence of infringing activity not contained in formal takedown notices constitutes evidence of lack of reasonable implementation. And it should reassert a standard of reasonableness in the implementation of such policies rather than recognize violations only occur in extreme cases.
- Congress should restore the representative list provision by clarifying that such a list applies to all unauthorized copies of the specific copyrighted content identified in the list and that are posted on the online service provider's site – and that the list is not limited to only those specific URLs identified in the list. Also, Congress should specify that a copyright owner's furnishing of a representative list establishes a limited duty on the part of online service providers to inquire into and expeditiously remove future infringing copies of the specified copyrighted contents from their sites. This means establishing a limited "notice and stay down" provision.

This list is by far not exhaustive, as additional reforms pertaining to the "notice and takedown" process and to available legal remedies identified in the report should be considered. Moreover, Congress should exercise its prerogative to explore reforms beyond those contained in the report, consistent with the Constitution's entrusting Congress with the power to secure copyrights. Such reforms should include, for instance, a more widespread "notice and stay down" requirement regarding infringing works online.

Importantly, when added up, the number of changes that ought to be considered to modernize Section 512 makes a case for a legislative overhaul of the DMCA. But regardless of whether reform involves a series of fixes to the law's existing framework or an entirely new framework that incorporates the substances of those same fixes, Congress needs to make DMCA reform a reality and better protect copyright owners from mass online infringement.

Conclusion

The U.S. Copyright Office's report on Section 512 of the DMCA is a helpful starting point for drafting legislative reforms needed to protect movies, TV shows, sound recordings, and other content from infringements that cost copyright owners hundreds of millions of dollars each year. A series of amendments to Section 512 are strongly needed to correct court decisions that have

put undue burdens on copyright owners, departed from common law standards for secondary liability, and reduced online platform accountability for infringing content posted on their sites.

The sweeping number of changes needed to modernize Section 512 makes a strong case for a legislative overhaul of the DMCA. Restoration of common law principles for contributory and vicarious liability should be a reform imperative. And Congress should exercise its prerogative to explore reforms beyond those contained in the report, consistent with the Constitution's entrusting Congress with the power to secure copyrights. Such reforms should include, for instance, a more widespread "notice and stay down" requirement when copyright owners submit formal takedown notices and future postings of that same infringing content are posted on the same sites.

* Randolph J. May is President and Seth L. Cooper is Director of Policy Studies and a Senior Fellow of the Free State Foundation, an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland.

Further Reading

Seth L. Cooper, "[Congress Shouldn't Blanket Copyright Owners of Sound Recordings with New Restrictions](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 30 (June 8, 2020).

Randolph J. May and Seth L. Cooper, "[Modernize Copyright Protections to Combat Worldwide Online Piracy](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 27 (May 28, 2020).

Randolph J. May and Seth L. Cooper, "[World IP Day 2020 – Protecting Americans' Copyrights from Digital Piracy](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 21 (April 29, 2020).

Randolph J. May and Seth L. Cooper, "[Copyright Law Needs a Digital Age Modernization](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 19 (April 16, 2020).

Randolph J. May and Seth L. Cooper, "[The Copyright 'Notice and Takedown' System Needs Modernizing](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 12 (March 11, 2020).

Randolph J. May and Seth L. Cooper, "[The Constitutional Foundations of Strict Liability for Copyright Infringement](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 3 (January 10, 2020).

Randolph J. May and Seth L. Cooper, [Modernizing Copyright Law for the Digital Age – Constitutional Foundations for Reform](#) (Carolina Academic Press, 2020).