



Perspectives from FSF Scholars
January 11, 2021
Vol. 16, No. 2

Congress Should Hold Big Tech Accountable for Copyright Violations

by

Seth L. Cooper *

Each year, Big Tech social media websites rake in billions from ads they place alongside user-uploaded videos and music. But federal copyright law too easily allows Internet giants like Google and Facebook to duck accountability for costly copyright violations when users upload massive amounts of infringing content on their sites.

With a new Congress now in place, it's time for an overhaul of the "notice-and-takedown" system for removing infringing content from Internet websites. A draft bill released on December 22 by Senate IP Subcommittee then-Chairman Thom Tillis, called the "Digital Copyright Act of 2021," offers a promising route to overhaul the old system. The 117th Congress should refine and advance the Tillis bill or similar legislation to make user-upload sites more proactive in stopping infringements.

Section 512 of Digital Millennium Copyright Act of 1998 (DMCA) grants legal immunity from copyright infringement to online platform services that expeditiously remove infringing content posted by users of their websites. The DMCA's "notice-and-takedown" system might have made sense in the days of 56 kbps dial-up Internet connections, few user-upload sites, and a much smaller Internet user base. But today the system is besieged by staggering amounts of infringement on popular user-upload sites such as YouTube and Twitter.

Copyright owners of media content regularly are compelled to send hundreds or even thousands of takedown notices to online service providers for repeat postings of the same movie or song. Unfortunately, the existing "notice-and-takedown" system does too little, too late to protect copyright owners from suffering hundreds of millions in losses from unauthorized use of their works. Meanwhile, Big Tech companies that curate their websites' content to attract heavy Internet traffic and online ad dollars escape liability for rampant copyright infringements on their sites.

Yet Big Tech's too easy immunity from online copyright infringement has been sharply questioned in recent months. On November 9, the Intellectual Property Enforcement Coordinator (IPEC) released its Joint Strategic Plan for federal agency policy toward copyrights. The IPEC Plan pledged that the Trump Administration would further examine the system's impact on copyright protection and enforcement. That examination should continue regardless of change in Administrations.

A May 2020 Copyright Office report bolsters the case for modernizing the "notice-and-takedown" system. The report identified judicial interpretations of Section 512 that have reduced the responsibility of online platforms for user-posted infringing content below common law standards for secondary liability that apply to other media outlets. As a result of these misguided interpretations of the law, the balance that Congress struck in Section 512 between promoting innovation and copyright protection is out of whack. Big Tech platforms now receive the tremendous benefits of immunity without having to make efforts necessary to stem significant infringing activity on their websites.

Congress should correct dubious interpretations of copyright law. For example, Congress should clarify that if an online platform service has constructive or "red flag" knowledge of infringing activity generally on its website it is duty-bound to inquire into obvious infringements on its site. It also should clarify that an online service provider's liability due to "willful blindness" includes avoidance of general awareness of infringing activity. Additionally, Congress ought to specify that a takedown notice listing multiple infringing copies on a website applies to future unauthorized postings of that same content. These fixes and others would help ensure that Big Tech platforms take proactive steps to eliminate access to infringing content as conditions for receiving legal immunity.

But Congress should go beyond making fixes to the law. An overhaul of Section 512 is most likely needed to secure copyrights on the Internet in 2021 and beyond. This overhaul should make legal immunity depend on compliance with a "notice-and-staydown" requirement. When a copyright owner submits a takedown notice to an online service provider and new postings of that infringing content later appear on the same website, the provider should be obligated to expeditiously remove it. A "notice-and-stay-down" requirement would help relieve a copyright holder of the burden of constantly monitoring user-upload sites for unauthorized serial re-postings.

Importantly, Senator Tillis's "Digital Copyright Act of 2021" includes a "notice-and-staydown" requirement. And it would require an online platform service to remove newly-discovered postings of a copyright owner's content following receipt of a takedown notice that contains a "representative list" of infringements on the platform's website. As can be

expected, the Tillis draft bill stands to benefit from further input. For instance, the legislation should expressly restore common law standards for knowledge and secondary liability, consistent with the Copyright Office's report. But in any event, the Digital Copyright Act of 2021 ably serves its purpose in teeing up real reform to address pervasive online infringements.

In 2021, Congress should finally modernize online copyright protections by revamping the "notice-and-takedown" system. Big Tech websites should no longer enjoy special favoritism while copyright owners suffer huge losses from online piracy.

* 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

Randolph J. May and Seth L. Cooper, "[Congress Must Modernize Copyright Law to Curb Massive Online Theft](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 58 (November 5, 2020).

Randolph J. May and Seth L. Cooper, "[Congress Should Preserve Anti-Circumvention Rights: The Online Market for Movies and Music Depends on DMCA Section 1201](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 52 (October 6, 2020).

Seth L. Cooper, "[Congress Should Stop States From Infringing Copyrights](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 43 (July 31, 2020).

Randolph J. May and Seth L. Cooper, "[Copyright Office Report Should Spur Modernizing the DMCA](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 5 (June 30, 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, [Modernizing Copyright Law for the Digital Age – Constitutional Foundations for Reform](#) (Carolina Academic Press, 2020).