INTELLECTUAL PROPERTY ALERT

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U.S. Copyright Office Releases Report on Digital Millennium Copyright Act

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The Digital Millennium Copyright Act ("DMCA"), signed into law in 1998, has had an enormous and long-lasting impact on the rights of copyright owners and the evolution of the internet. The DMCA was originally created by Congress to enact two international treaties and to provide protections for copyright owners from the use, sharing, and piracy of their material on the internet.[1] The DMCA represents the rare instance of proactive legislation where legislators had the foresight to appreciate the internet's potential as a commercial vehicle.

The DMCA has matured over the last two decades to create a predictable legal system around the expansion of internet commerce. As a result of a recent House Judiciary Committee review of the U.S. Copyright Act (which includes the DMCA), the U.S. Copyright Office conducted policy studies of the Copyright Act to help Congress evaluate the suitability of the Copyright Act and DMCA for the 21st century. Further to this effort, the Copyright Office recently released its final report on the DMCA (the "Report").[2]

While the DMCA is divided into five titles[3], the Copyright Office Report specifically focuses on Section 512 which sets limits on liability for online service providers ("OSPs") related to copyright infringement. As the Report states, Congress intended Section 512 to balance two goals: (1) providing "legal certainty" for the OSPs in matters of copyright infringement due to their users' activity, and (2) "protecting the legitimate interests" of the rights owners and authors of the content "against … rampant, low barrier online infringement." In an effort to strike this balance, the DMCA offers specific safe harbors from liability for OSPs and offers right holders, as the Report states, "an expeditious and extra-judicial method for addressing infringement." However, in perhaps the most important statement in its Report, the Copyright Office determined that "Congress' original intended balance has been tilted askew."

While the Copyright Office did not suggest a large-scale rework of the DMCA, as a result of its "tilted askew" perspective, the Copyright Office's Report did present the following 12 recommendations:

1. **Eligible Types of OSPs.** Congress originally categorized OSPs into four groups that would be eligible for safe harbors. However, the Copyright Office suggests that those categories have been expanded to now exclude liability for things Congress did not originally intend. For example, Section 512(c) has been expanded to include many activities "related to" hosting.

2. **Repeat Infringer Policies.** In order to qualify for safe harbors, OSPs must have a policy for the termination of repeat infringers, and the Copyright Office suggests addressing some of the ambiguities in the repeat infringer requirements.

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1 *See* U.S. Copyright Office, The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary (December 1998).

2 *See* U.S. Copyright Office, Section 512 of Title 17: A Report of the Register of Copyrights (May 2020).

3 *See* U.S. Copyright Office, The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary (December 1998).

3. **Knowledge Requirements for OSPs.** In order to qualify for a safe harbor, an OSP must lack knowledge of infringing activity to a certain degree. The Report notes that certain knowledge requirements may be narrower than Congress intended and proposes that the interpretations should be evaluated and clarified.

4. **Representative List and Identification of Location.** The Copyright Office suggests that clarification is required regarding what information is needed in a takedown notice to identify the infringing material and the copyrighted material being infringed.

5. **Knowing Misrepresentation and Abusive Notices or Counter-Notices.** The Report notes that stakeholders have called for increased penalties regarding knowing material misrepresentations in takedown notices and counter-notices.

6. **Knowing Misrepresentation and Fair Use.** The Copyright Office recognized that the *Lenz*[4] case had the impact of inserting a good faith standard on the knowing misrepresentation requirement in takedown notices and suggests that Congress monitor the effect of the decision and consider clarifying language.

7. **Standard & Non-standard Notice Requirements.** Due to, among other things, changing communication methods and the potential obsolescence of the current notification standards, the Copyright Office suggests that Congress consider shifting the minimum notice standards for a takedown notice to a regulatory process that would allow the Copyright Office "to set more flexible rules and 'future-proof' the statute against changing communications methods."

8. **Time Frames Under Section 512.** The Report suggests that Congress consider an alternative dispute resolution model to address the issues surrounding when to require access to content after a counter-notice.

9. **Subpoenas.** Section 512(h) permits subpoenas to identify an infringer, which the Copyright Office identifies as restrictively interpreted by federal courts. The Report suggests clarifying the language, especially in regards to the application of that Section to OSPs that it describes as "mere conduits."

10. **Injunctions.** Under Section 512(j), the DMCA allows for limited forms of injunctive relief against OSPs. While the Copyright Office does not suggest congressional intervention, it does state that if Congress believes that the relief should be broader, then "it may want to clarify the distinction between notice-and-takedown relief and Section 512(j) relief."

11. **Non-statutory approaches.** The Copyright Office plans to implement educational materials on Section 512, facilitate voluntary initiatives, and help identify standard technical measures.

12. **Alternative Stakeholder Proposals.** The Copyright Office reports on "developments involving online intermediary liability in other countries" and new approaches submitted by commentators. However, for proposals such as "notice-and-staydown" and "website blocking," the Copyright Office report suggests further study.

These twelve comments and observations presented by the Copyright Office will likely be a catalyst for the evolution of the DMCA. Neal Gerber Eisenberg will continue to monitor the status of the DMCA and any related legislation.

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4 *See Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015).

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