

CLIENT ALERT

U.S. Copyright Office Weighs in on "Unbalanced" DMCA Safe Harbor System

Jun.04.2020

On [May 21, 2020](#) the U.S. Copyright Office published its highly anticipated [report](#) about Section 512 of Title 17 of the United States Code. The aim of the report was to determine, in light of the monumental changes the Internet has undergone since the days of dial-up and floppy disks, whether Section 512 continues to work “effectively in achieving its aim of balancing the needs of online service providers (OSPs) with those of creators.” The Copyright Office’s report marks the first time the government has studied the effectiveness of the controversial Section 512 since it was enacted more than 20 years ago. As noted by the Copyright Office, “[t]he proper balance of intermediary safe harbors and liability online is a topic on which few stakeholders have no opinion, and passions (as well as rhetoric) run high on all sides.”

[Section 512](#) was enacted in 1998 as part of the Digital Millennium Copyright Act (DMCA) in an effort to establish an efficient and collaborative system whereby copyright owners and OSPs could work together to combat online copyright infringement. The purpose of Section 512 was to achieve a balance between the competing goals of (1) providing legal certainty for OSPs and (2) protecting the interests of copyright owners against the threat of online infringement. To that end, Section 512 contains “safe harbor” provisions to shield OSPs from liability for the actions of their websites’ users. Specifically, to be protected by Section 512, OSPs must put measures in place to ensure copyright owners are able to protect their works. For example, OSPs must generally implement a “notice-and-takedown” procedure for removing infringing content when notified, accommodate copyright owners’ use of “standard technical measures” to identify or protect their works, and establish policies providing for termination of the accounts of repeat infringers.

As the Copyright Office acknowledged in its report, “[w]hile OSPs generally declare section 512 a success story, rightsholders report that it has largely failed to protect them from online infringement as promised by Congress.” Interestingly, the Office noted that it is precisely this “sharp divergence” in the assessments of section 512 by OSPs and copyright owners that “indicates that the statute in practice is not achieving the balance Congress originally intended.” Indeed, the Office further mused that “[t]he fact that one of the two principal groups whose interests Congress sought to balance is virtually uniform in its dissatisfaction with the current system suggests that at least some of the statute’s objectives are not being met.”

Ultimately, the report concluded that the balance that Congress intended when it established the Section 512 safe harbor system is askew. The report noted that the scale of online copyright infringement remains a significant problem and that the degree and breadth of cooperation between OSPs and rightsholders that was hoped for in 1998 has not come to full fruition. Although the Copyright Office did not explicitly recommend any wholesale legislative changes to Section 512, it did point out numerous areas where Congress may wish to consider clarifying or “fine-tuning” the operation of Section 512 to better balance the interests of copyright owners with those of OSPs.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

[Anne Elise Herold Li](#)

Partner – New York

Phone: +1 212.895.4279

Email: ali@crowell.com

Deirdre Long Absolonne

Senior Counsel – New York

Phone: +1 212.803.4065

Email: dabsolonne@crowell.com

Michelle Chipetine

Associate – New York

Phone: +1 212.895.4221

Email: mchipetine@crowell.com

Suzanne Trivette

Associate – New York

Phone: +1 212.895.4312

Email: strivette@crowell.com