



THINK FORWARD

U.S. Copyright Office and Lawmakers Agree: The DMCA Fails to Function in the New Millennium

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The Digital Millennium Copyright Act of 1998 (“DMCA”) was intended as a mechanism to provide safe harbor for burgeoning Internet sites hosting user-generated content. The DMCA’s goal was to shield these user-driven sites from the specter of lawsuits resulting from users’ posts of copyrighted materials on those sites. The DMCA addressed the concern that applying traditional copyright liability to a user-driven site would result in strict censorship by the site or the site’s exposure to significant legal liability. The DMCA’s safe harbor protection, however, was and continues to be premised on the Internet sites’ timely removal of infringing content. The DMCA did not anticipate the explosion of social media platforms and other interactive websites, which have become ubiquitous today.

Now, over 20 years after the DMCA’s passage, the U.S. Copyright Office has determined that the DMCA has “tilted askew.”^[1] In an almost 200-page report issued May 19, 2020, the Copyright Office warned that the DMCA no longer accomplishes its intended function, and called for Congress to reexamine foundational aspects of the DMCA, including the level of knowledge of infringement a website must have before removing infringing content.^[2] The Copyright Office also asked lawmakers to consider a “clear, documented, and publicly available repeat infringer policy,”^[3] advising that such a policy is an “appropriate minimum requirement...to comply with the [DMCA], as well as to act as a deterrent to infringement”^[4] of copyrighted works. On June 2, 2020, two weeks after the report’s issuance, the Subcommittee on Intellectual Property of the Senate Judiciary Committee hosted artists, tech industry titans and lobbyists, and various copyright experts, who testified regarding the Copyright Office’s report.

Recognizing copyright owners’ frequent battles with tech giants, such as Facebook, Instagram, and YouTube, all of whom are dependent on user-generated content and frequently decline to remove complained-of content, Senator Thom Tillis of North Carolina said that “fixing the current [DMCA] framework is [not] enough.”^[5] Tillis argued that “we may be at a point where we need to design an entirely new system to combat online piracy, one that recaptures the balance that Congress intended.”^[6] Don Henley, front man for The Eagles, agreed with Senator Tillis, stating that the DMCA “does not work for artists and songwriters.”^[7]

In counterpoint, the head of the Internet Association,^[8] Jonathan Berroya, testified that the DMCA is working “as...intended,” and that “disturbing the balance of the DMCA will do little to curb [] piracy [of copyrighted works], will needlessly reduce legal certainty for all parties involved, and will greatly increase threats to a thriving U.S. digital ecosystem that truly fosters creativity.”^[9]

The Internet Association has long regarded the DMCA as integral to the growth and development of social media and other user-focused Internet sites. However, purveyors of artistic works, such as

movie studios and recording artists, as well as companies that create artistic works to package and promote their goods and services, frequently find the DMCA insufficient to combat rampant misuse and infringement of copyrighted works.

The Copyright Office's report views these problems as systemic, stating that "the scale of online copyright infringement and the lack of effectiveness of [DMCA] notices to address that situation remain significant problems."^[10]

Looking Ahead

The Copyright Office's report and the Congressional hearing suggests that a DMCA update may be on the horizon. In the meantime, copyright owners should continue protecting their works by policing popular social media sites and filing takedown requests detailing their rights.

^[1] "Section 512 of Title 17: A Report of the Register of Copyrights," *United States Copyright Office*, page 1 (May 2020).

^[2] *Id.* at 136-139.

^[3] *Id.* at 3.

^[4] *Id.*

^[5] Subcommittee on Intellectual Property, "Is the DMCA's Notice-and-Takedown System Working in the 21st Century?," *Committee on the Judiciary Hearings* (June 2, 2020).

^[6] *Id.*

^[7] *Id.*

^[8] The Internet Association is a lobbying organization that represents the interests of Facebook, Inc. Twitter, and Google, LLC, among other Internet companies, before Congress.

^[9] Subcommittee on Intellectual Property, "Is the DMCA's Notice-and-Takedown System Working in the 21st Century?," *Committee on the Judiciary Hearings* (June 2, 2020).

^[10] "Section 512 of Title 17: A Report of the Register of Copyrights," *United States Copyright Office*, page 197 (May 2020).