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Righting Incentives to Combat Online Piracy

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More than two decades after Congress sought to strike a balance between the interests of creators and service providers with the [Digital Millennium Copyright Act](#) (DMCA), it is clear that [Section 512](#) of the Copyright Act has failed to create the right incentives to curb online copyright infringement. Indeed, as a May report from the U.S. Copyright Office [concluded](#), the “original intended balance has been tilted askew.”

As laid out in the DMCA, [Section 512’s goal](#) was to “preserve strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements” while simultaneously providing “greater certainty to service providers concerning their legal exposure for infringements.” While the law has certainly accomplished the latter, it has been at the expense of the former.

The good news is that Congress has taken notice. Sens. Thom Tillis (R-N.C.) and Chris Coons (D-Del.)—the chair and ranking member, respectively, of the Senate Judiciary Subcommittee on Intellectual Property—have held a series of hearings on potential reforms to the Copyright Act, with another scheduled for [Dec. 15](#). Tillis also recently solicited feedback to guide a discussion draft of reform legislation he intends to make public shortly after the hearing. (Our answers to Tillis’ questionnaire can be found [here](#).)

The problem

Back in 1998, there were reasons for lawmakers to believe Section 512 would help Internet users, copyright holders and online service providers (OSPs) alike. Holding OSPs culpable for *any* misuse of copyrighted material in the vast amount of user-generated content they carry would create unreasonable litigation risk and hinder development of online distribution services. That would be bad for Internet users, for copyright holders who benefit from the lawful dissemination of their content and for the OSPs themselves. In that sense, providing OSPs limited liability protection for collaborating to curb piracy was seen as a way to create a healthier online ecosystem to everyone’s advantage.

But as Section 512 has been applied by the courts, OSPs need do little more than respond to takedown notices from copyright holders. At that point, the copyrighted content has already been unlawfully disseminated and damage has already been done. Moreover, in the interim, service providers can continue to monetize the infringing content through ad placement or other mechanisms. In essence, Section 512 has in practice given OSPs an economic incentive to do as little as possible to prevent infringement for as long as possible so that

they can avoid costs and continue to generate revenue. That is antithetical to the copyright system, which is supposed to give copyright holders the ability to determine how their content is disseminated and to negotiate compensation.

Such concerns are compounded by the fact that a single unauthorized version of a copyrighted work on one Internet site may quickly be replicated into hundreds of versions at hundreds of sites across the globe. Copyright holders must scour the entire Internet for unauthorized versions of their content in a constant state of notice-sending, only to have the content continue to pop up. That is a costly and time-consuming burden for any copyright holder. The burden is even greater for independent creators who do not have their own content-protection departments. The hours and days they lose policing the Internet for their copyrighted material is time they could be spending on their craft.

Potential solutions

Proper safe harbors should encourage OSPs to help prevent copyrighted content from being improperly disseminated. Ideally, such rules could also encourage OSPs to license content. That would enable them and their users to benefit from the content without litigation risk, but while respecting copyright holders' rights. One of the benefits of intermediaries is that they can more efficiently negotiate such agreements with copyright holders than the copyright holders could with each of the service providers' many users.

But the near-complete absence of intermediary liability means OSPs have little incentive to curb piracy or license content. As a condition of receiving safe harbor protection, OSPs should be required to take reasonable steps: 1) to prevent infringement and 2) to stop, upon notice, infringement that has already occurred. Such steps would include:

- **Authentication of Identities.** Ensuring online service providers know their users' true identities would discourage those users from engaging in piracy, while also making it harder for users to simply change account names once caught. It would also help copyright holders to seek redress, including in cases where all they want is to ask users to cease unintentional infringement. Identities could generally remain confidential, disclosed to third parties only when needed to resolve a case of infringement.
- **Education Measures.** Unintentional infringement might be avoided if OSPs briefly explained to users the principles of copyright and fair use and asked whether they were transmitting content that contained someone else's copyrighted work. Such explanations and inquiries should be provided at the point a user seeks to disseminate content. Links could be included pointing to more detailed information on the Copyright Office's site.
- **Revisions to the Knowledge Standard.** According to the text of Section 512, to be protected by the safe harbors, OSPs must not have either "actual knowledge" of infringement or be "aware of facts or circumstances from which infringing activity is apparent." This awareness of facts or circumstances is often referred to as "red flag" knowledge. But courts have all but read this standard out of the statute. The statute

should be revised to make clear that OSPs are required to act when infringement is apparent, even if they have not been alerted to a specific instance of infringement by a copyright holder.

- **Preservation of Rights Management Information.** Digital works often have embedded data indicating who the copyright holders are and how the content may be used. OSPs should be held culpable if they negligently, recklessly or knowingly remove that data. Copyright holders should not be required, as is the case today, to demonstrate that the online service provider acted with an intent to facilitate infringement. The lack of accurate rights-management information makes it harder for copyright holders to enforce their rights, as well as for individuals willing to license content to determine who to approach to do so. OSPs should thus have an obligation to ensure that rights-management information included by a copyright holder remains intact, especially since OSPs often monetize that content through advertising or other means.
- **Filtering and Staydown:** Allowing all copyright holders to provide “fingerprints” of their content would enable OSPs to prevent copyrighted content from being unlawfully uploaded or otherwise disseminated. It could also help ensure that any copyrighted content that slips through and is subsequently taken down manages to stay down. Preventing unauthorized dissemination through filtering could also reduce the number of takedown notices copyright holders would need to send and OSPs would need to process—saving everyone time, hassle and money. Filtering technologies, such as Google’s [Content ID](#), already exist, although Google does not make it available to all copyright holders. The EU has recently adopted filtering requirements. A U.S. filtering requirement would help to foster a market for the creation of additional filtering solutions.
- **Adoption of Standard Technical Measures.** Section 512(i) requires OSPs to accommodate standard technical measures for preventing piracy that have been developed through a voluntary, consensus process. The immunity from liability that the safe harbors provide, however, reduces OSPs’ incentive to collaborate to develop standard technical measures. The Copyright Office should be authorized to certify certain solutions as standard technical measures, and even to commission the creation of additional ones. This would help foster a market for such measures.
- **Improving the Takedown Process.** The statute allows copyright holders to provide representative lists in their notices for takedown, rather than require them to itemize every URL for takedown. Yet OSPs often impose technicalities before they will act on a representative list. The Copyright Office should be authorized to create model forms deemed to provide adequate notice, as well as to specify what kind of information is both necessary and sufficient to require takedown.
- **Effective Repeat Infringer Policies.** The statute already requires OSPs to have policies to terminate service to repeat infringers, and to reasonably implement those policies. Courts have historically interpreted those requirements rather laxly. The Copyright Office should be authorized to create a model repeat-infringer policy deemed to comply with the requirement.

In addition to creating baseline requirements such as the ones listed above, the Copyright Act should be revised to provide additional tools to resolve disputes. Creating a small claims

process, as provided in the [CASE Act](#), could alleviate the burdens of litigation for smaller copyright holders, smaller OSPs and individual users. Also, courts ordinarily have authority to issue no-fault injunctions to third parties when doing so is necessary to effectuate their rulings. In the copyright context, even when U.S. courts have ruled that websites have willfully engaged in infringement, ceasing the infringement can be difficult, especially when the parties and their facilities are located outside the United States. Courts should be clearly authorized to issue no-fault injunctions requiring OSPs to block access to sites that the courts have ruled are willfully engaged in mass infringement. Such orders are already available to courts in many other countries and have not, as some hyperbolically predict, “broken the Internet.”

Revising the Copyright Act as described above would encourage OSPs both to prevent the initial infringement and to more effectively curtail continued infringement that has slipped through. OSPs could decline to implement these content-protection requirements, but they would lose the safe harbors and be subject to the ordinary standards of copyright liability. OSPs also might more widely choose to license copyrighted works that are likely to appear on their platforms. That would benefit copyright holders and Internet consumers alike. The providers themselves might even find it leads to increased use of their service—as well as increased profits.

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