ICLE tl;dr

Rebalancing Section 512

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tl;dr

Background: Section 512 of the Copyright Act, passed in 1998, was created to preserve incentives for online service providers (OSPs) and copyright owners to cooperate on detecting and policing copyright infringement, while also giving those OSPs greater certainty about their legal exposure. The idea was to provide a safe harbor to OSPs that would also help to fight piracy.

But... In practice, while Section 512 has reduced OSPs' liability risk, piracy has grown exponentially. This is partly due to how federal courts have interpreted the law. Indeed, the U.S. Copyright Office has concluded that, when it comes to Section 512, "Congress' original intended balance has been tilted askew."

KEY TAKEAWAYS

LITTLE INCENTIVE TO CURB PIRACY

Much of the challenge in combating online piracy stems from the sheer volume of content that traverses online services, making it unreasonable to expect OSPs to catch every infringement. But the amount of infringement that slips through is nonetheless substantial, accelerated by technological innovations like more comprehensive search engines, faster upload and download speeds, and the emergence of peer-to-peer file-sharing services.

One solution would be for OSPs to license content directly from copyright holders, which arguably would be more efficient and cost-effective than individual rightholders negotiating licenses with individual users of Internet services. Licensing by OSPs could also remove litigation risk, enable service users to benefit from the content, and ensure that copyright holders' rights are respected. TikTok, Facebook, Snapchat, Instagram, and YouTube, for example, increasingly license at least some content, so that their users have an authorized way to incorporate that content into posts and streams.

Unfortunately, the current safe-harbor regime gives OSPs little incentive to license content or otherwise proactively deter pirated content, insofar as they can presumptively monetize infringing content until rightsholders issue takedown notices.

To address this, Section 512's safe harbors should be conditioned on OSPs taking reasonable steps 1) to prevent infringement in the first place, and 2) to remove infringement that slips through a) once they have actual knowledge or b) when such infringement would be apparent to an entity in the business of disseminating user-generated content.

CLARIFYING THE KNOWLEDGE STANDARD

To be protected by Section 512's safe harbors, OSPs must have neither "actual knowledge" of infringement, nor "red-flag knowledge"—i.e., awareness of facts that make infringement apparent. Judicial interpretations of Section

512, however, have essentially collapsed the red-flag standard into the actual-knowledge standard, while progressively narrowing the scope of the actual-knowledge standard; the bar for legally relevant knowledge of infringing activity is now quite high.

To address this, the standard for when an OSP is considered to have "knowledge" of infringement ought to be changed from what an "ordinary" person might infer from the circumstances to what a reasonable person *in the user-generated content business* would infer. This broader knowledge standard would then be used to condition the safe harbors on OSPs taking reasonable steps both to prevent infringement and to remove that infringing content that does slip through.

SUBPOENAS AND NO-FAULT INJUNCTIONS

Even where OSPs do not host or display infringing content, they may sometimes facilitate its dissemination by others. To be eligible for the safe harbors, OSPs should be obligated to provide the identity of infringing parties and to prevent further access to the infringing content, even when the OSPs are not at fault for the underlying infringement. Around the world, these sorts of "no-fault injunctions" have been used effectively to combat piracy with no interference with OSPs' normal operations. Indeed, in some cases, private companies have voluntarily partnered with rightsholders to restrict access to content that a court has declared infringing.

STANDARD TECHNICAL MEASURES

Congress originally expected OSPs and rightsholders to collaborate in developing standard technical anti-piracy measures, such as filtering. In the nearly quarter century since Section 512's enactment, however, no standard technical measures (STMs) have emerged. Recently proposed legislation would empower the Office of the Librarian of Congress to develop STMs with relevant stakeholders. Despite some ambiguities and shortcomings in the bill's text, it offers a promising framework to address one of Section 512's longstanding deficiencies.

REPEAT INFRINGER POLICIES

Section 512 requires OSPs to implement policies to terminate service to repeat infringers. Courts, however, have interpreted these requirements loosely. The intended balance of assuring copyright holders that their rights will be protected in exchange for platforms enjoying limited liability is not achieved unless the platforms and their users know that costly repeat infringement will not be tolerated. To better address this goal, the Copyright Office should provide guidance on the minimum requirements needed to meet the repeat-infringer obligation, including by creating a model policy that will be presumed to comply.

For more on these issues, see the ICLE white paper "A Roadmap to Reform Section 512 of the Copyright Act" by Kristian Stout and Geoffrey A. Manne.

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