



Section 512 of the Digital Millennium Copyright Act

An explanation of why Section 512 is so important and why it needs to be updated

I. Overview of the DMCA

In 1998, when the Digital Millennium Copyright Act (DMCA) was signed into law, the internet was in its infancy. Stakeholders and policymakers recognized how important creative content would be to the proliferation of the internet, and vice versa. Copyright owners wanted an effective means to combat rampant online piracy, and online service providers (OSPs) wanted to limit their liability for infringement by users occurring on their services.

Section 512 of the DMCA aimed to address these concerns by encouraging copyright owners and OSPs to work together to combat existing and future forms of online infringement. This approach was designed to remedy hardships faced not only by large copyright owners and OSPs, but also individual creators who undeniably lack meaningful tools to fight online infringement. To balance the interests of individual creators, copyright owners, and OSPs, section 512 included a notice and takedown process to enable infringing material¹ to be taken down expeditiously without the need for a court order and a “safe harbor” for OSPs that immunizes them for liability from the infringing acts of their users when the OSP takes down infringing material from its platform and meets certain other requirements.

Importantly, these [safe harbors](#) only apply when a user of an OSP engages in an infringement and not when the service provider itself is engaging in the infringing activities. Safe harbors are potentially available to four types of activities engaged in by OSPs:

- Transmitting, routing, or providing connections for infringing material (“mere conduit safe harbor”);
- Caching or temporary storage of infringing material (“caching safe harbor”);
- Hosting infringing material at the direction of a user (also known as user generated content, or “UGC,” services) (“hosting safe harbor”); and
- Linking, directing, or providing other tools that points users to infringing activities (“linking safe harbor”).

An OSP that satisfies certain threshold prerequisites and additional specific conditions applicable to some (or all) of the four safe harbor categories will be immune from copyright

¹ The terms “material” and “content” are used in this paper to encompass both infringing content that is hosted by an OSP and other infringing activity, such as linking to, caching, or storing infringing content.

infringement liability for the infringing acts of their users. The threshold requirements that all four categories of service providers need to satisfy to be eligible for safe harbor protection are:

- Adopting, reasonably implementing, and informing users of a policy that provides for terminating the accounts or subscriptions of repeat infringers; and
- Accommodating and not interfering with standard technical measures (STMs) used by copyright owners to identify and protect their works.

In addition to meeting these threshold requirements, the hosting and linking safe harbors only apply if the service provider:

- Does not have actual or “red-flag” knowledge that material or activity is infringing;
- Does not receive a financial benefit directly attributable to the infringing activity; and
- Complies with the DMCA notice and takedown process by expeditiously removing, or disabling access to the infringing material.
- Has designated an agent to receive notifications of claimed infringement by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, the name, address, phone number, and electronic mail address of the agent (and any other contact information which the Register of Copyrights may deem appropriate.)

II. How Section 512 Works in Practice

The basic framework of section 512 is as follows: an OSP can avoid copyright liability for the infringing activity of its users by promptly removing infringing content when it becomes aware—or *should* be aware—of the existence of that content on its service. One way that an OSP could become aware of infringement is through receipt of takedown notice identifying the infringing material. The [notice-and-takedown process](#) involves the copyright owner (or the owner’s agent) sending a takedown notice to an OSP requesting that the service remove material that is infringing their copyright(s). Section 512 outlines the [elements](#) that should be included in a takedown notice.

If an OSP wants to avail itself of the safe harbor, then it must expeditiously remove or disable access to the infringing material once it receives a compliant DMCA takedown notice. If the alleged infringer sends the OSP a counter-notice contesting the DMCA takedown notice, the copyright owner has 10-14 days to bring an action against the alleged infringer in federal court or before the new Copyright Claims Board (created by the recently enacted [CASE Act](#)) and to notify the OSP of such. If that happens, the OSP must keep the material down. If an action is not filed in that time frame, the OSP may re-post the infringing material.

The notice-and-takedown process has become synonymous with section 512 of the DMCA, but it’s not the only way that OSPs can become aware of infringement and thereby be required to remove or disable infringing content. The two other ways that an OSPs can become aware of infringement and be required to remove or disable infringing content are when the OSP has

actual knowledge of the infringement and when the OSP becomes aware “of facts or circumstances from which infringing activity is apparent” (commonly referred to as “red flag” knowledge). The red flag knowledge standard is intended to require OSPs to take action when they are generally aware of facts or circumstances from which infringing activity would be objectively apparent. Importantly, while section 512(m) makes clear that OSPs have no duty to proactively monitor for infringement, it does not prevent them from investigating an infringement once they have actual knowledge of infringement or they become aware “of facts or circumstances from which infringing activity is apparent”.

III. Section 512 Shortcomings

At the outset, section 512 seemed to have achieved Congress’s purpose; but court rulings and other unanticipated changes in the online environment have rendered these provisions less effective, creating an ecosystem where mass copyright infringements are an unfortunate and regular occurrence. In the over two decades since the DMCA was enacted, online infringement has increased exponentially, causing widespread harm to the economic and creative vibrancy of the copyright community. While section 512 remains a workable legal framework, it is evident that the statute is under strain and that additional stakeholder collaboration is needed in order for the statute to live up to its potential as imagined by Congress. The most significant areas of concern related to section 512 include:

A. A Broken Notice and Takedown System

The number of takedown notices being sent on a daily basis is staggering, and this number is steadily increasing. The Copyright Office’s recently published [Section 512 Report](#) recognizes that the massive amounts of notices sent by copyright owners represent a never-ending uphill battle against infringement. The report details the frustrations related to the constant game of “whack-a-mole” that copyright owners must engage in when targeted infringing content immediately reappears after being removed.

This ineffectiveness of the notice and takedown system is felt most acutely by individual creators who lack the resources of larger copyright owners to make a meaningful impact. The time that these creators use to send takedown notices is time that they aren’t using to create new copyrighted works, which pushes many to give up enforcement efforts all together. These creators are defenseless against the volume and reach of online infringement, especially given the speed at which content is reposted anew by users.

Individual creators face numerous other significant barriers to the effective use of the notice and takedown process, including the lack of uniformity and consistency from one OSP’s web form to the next, and the practice by some OSPs of imposing requirements beyond those prescribed under the law. In addition, these individual creators and small businesses also have difficulty locating web forms due to inconspicuous placement— since the DMCA only requires the information to be “in a location accessible to the public,” but not conspicuously placed. It’s

critical that, in addition to clarifying that OSPs cannot impose notice requirements beyond those prescribed under the law, that Congress and/or the Copyright Office explore ways to ensure that infringing material *stays down* after an initial takedown.

B. Meaningless red flag knowledge standards

An OSP will lose safe harbor protection if it fails to take infringing material down when it has actual or red flag knowledge of the infringement. To determine whether an OSP has red flag knowledge, the court must determine whether (1) the OSP was aware of the circumstances of infringement (the so-called “subjective prong”); and (2) the “infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances” (the so-called “objective prong”).

Unfortunately, influential decisions in the Second and Ninth Circuit have rendered the red flag knowledge standard effectively meaningless, as they’ve allowed OSPs to turn a blind eye to any infringement that isn’t explicitly brought to their attention in takedown notices. These courts’ interpretation of the red flag standard is so restrictive that it has basically eliminated the carefully balanced burden allocation that Congress intended and effectively written the red flag knowledge standard out of the statute. To fix the confusion courts have sowed, the existing standard must be revised in a way that gives the red flag knowledge standard a clear meaning, distinguishable from actual knowledge, and promotes OSP accountability.

C. No clear meaning to the term “expeditiously”

For an OSP to obtain safe harbor protection, section 512 requires that the OSP act “expeditiously” to remove or disable access to material claimed to be infringing whenever the OSP has actual or red flag knowledge, or receives a takedown notice. It is essential that OSPs act immediately to remove or disable infringing material when it becomes aware of an infringement (no matter the means by which it becomes aware). Unfortunately, it often takes OSPs days or weeks to take action. Any undue delay removing infringing material—especially live, unpublished, pre-release and newly released content—can cause serious harm to the copyright owner and the value of the copyrighted work. The problem is that section 512 does not define the term “expeditiously,” and OSPs have taken advantage of that loophole by dragging their feet. Therefore, it is essential that Congress and/or the Copyright Office clarify the meaning of “expeditiously” to fulfill the intent of Congress when it enacted the DMCA.

D. Lack of Standard Technical Measures

When Congress enacted the DMCA, it recognized that technological solutions would be an important part of any solution to rampant online infringement and strongly urged OSPs and copyright owners to work together to expeditiously commence voluntary, interindustry discussions to develop standard technical measures (STMs). This rationale led Congress to include section 512(i) in the DMCA, specifically conditioning eligibility for safe harbor protection

on whether a service provider “accommodates and does not interfere with standard technical measures,” which are to be developed based on “a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process.”

Unfortunately, since the inception of the DMCA over twenty-two years ago, no STMs that protect copyrighted works have been adopted, effectively rendering the provision useless. To be sure, there are existing technologies capable of identifying and removing unauthorized copyrighted material posted by users, and some of the larger OSPs have already implemented these technologies. The problem is that the technologies are not made available to others as is required under section 512(i), which says that STMs must be made “available to any person on reasonable and nondiscriminatory terms,” because OSPs have refused to come to the table with other stakeholders to have them adopted as an STM. To ensure that stakeholders work in good faith towards the development of STMs, the Copyright Office should be given regulatory authority to adopt STMs and promulgate related regulations. Congress should also consider amending section 512(i) to clarify that (1) “accommodate and not interfere” means that the OSP must adopt the STM, and (2) that a “broad consensus” does not mean unanimity.

E. Misinterpreting a duty to investigate as a duty to monitor

Section 512(m) of the DMCA makes clear that safe harbor protection is not conditioned on an OSP “monitoring its service or affirmatively seeking facts indicating infringing activity monitoring their service for infringement.” While proactively monitoring for infringement is not required by the DMCA, OSPs do have a duty to respond to or investigate infringing activity when they have actual or red flag knowledge. Yet OSPs have perpetuated a misguided interpretation of 512(m) that allows them to turn a blind eye to infringement and avoid any investigation into infringement unless they are provided with the most specific details and locations of egregious infringement. OSPs have been able to perpetuate this misconception thanks to unfounded court decisions that have blurred the line between monitoring and investigating. As the Copyright Office notes in its 512 Report, courts have interpreted an OSPs lack of duty to monitor in “a manner that effectively limits the usefulness or applicability” of other provisions in the DMCA, such as the representative list requirement discussed below. Without clarification that a reactive duty to investigate infringement is distinct from a proactive duty to monitor, the effectiveness of other provisions of the DMCA is at risk of being rendered meaningless. Congress should consider updating section 512(m) to make absolutely clear that an investigation into infringement is unequivocally distinct from a proactive duty to monitor.

F. Safe harbor eligibility has not been limited to the activities expressly enumerated in the statute

The problem with the four safe harbor categories is not with the categories themselves, but rather with how the courts have misconstrued the scope of the categories and whether a particular OSP’s conduct falls within the scope of a certain category. Section 512 is structured so that the categories of services eligible for safe harbor are clearly spelled out in paragraphs (a) through (d), but some court decisions have expanded safe harbor protection to “related

activities” that are not found anywhere in the statute. The result has been a broadening of the scope of the statute to include any number of activities that were never intended to be subject to the safe harbor liability shield. Congress should clarify that classes of service providers should only cover those activities expressly set forth in the statute, *and not related activities*.

G. Misinterpreting the representative list and locating infringing material requirements

Section 512 requires that a takedown notice must identify the “copyrighted work claimed to be infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a *representative list* of such works at that site” and “information reasonably sufficient to permit the service provider to locate the [infringing] material.” Despite this clear language, courts have placed the burden on copyright owners to list *every instance* of infringement on an OSP’s website *and* to provide specific URLs in a takedown notice—none of which is required by the statute. Where there are multiple works being infringed, it is clear from the statutory language and the legislative history that Congress did not intend to require that takedown notices identify infringing material by URLs. Most creators lack the time, money, and resources to list with specificity every single URL containing every single infringing copy of their work in a takedown notice—a gargantuan task. By misinterpreting the representative list and locating infringing material requirements, courts have rendered these provisions meaningless. It’s essential that Congress reenforce the original intent of the DMCA by clarifying that sections 512(c)(3)(A)(ii) and (iii) do not require specific URLs of every location and instance of infringement.

H. Ineffective and unenforced repeat infringer policies

Section 512(i) provides that to be eligible for the DMCA safe harbor, an OSP must adopt and reasonably implement “a policy that provides for the termination in appropriate circumstances of subscribers and account holders...who are repeat infringers.” The problem is that there is little transparency surrounding OSP policies and how, if at all, they are being implemented by OSPs. While many OSPs claim to have policies that will suspend and eventually terminate users from accessing their services after a certain amount of “strikes,” recent court cases have revealed that these policies are rarely enforced. Even in instances of repeated infringement notifications from copyright owners, OSPs all too often turn a blind eye to the actions of repeat infringers in order to retain as many users of their service as possible. Congress should require OSPs to reveal their repeat infringer policies and the enforcement of these policies.

IV. Section 512 Myths v. Facts

Myth #1: The DMCA notice and takedown system is working as Congress intended.

- The Facts: Some critics of Section 512 reform claim that the large number of takedowns is evidence that the notice and takedown system is working. That is a complete fallacy. The large number of takedowns is not a measure of success; it is an indicator of a system-wide failure—especially when those numbers are increasing. One potential solution to the whack a mole problem mentioned above lies in adopting a notice and *stay-down* system in which material identified by copyright owners as infringing is not allowed to reappear following an initial takedown. A stay-down process would relieve OSPs and copyright owners of the burden of spending an inordinate amount of time and resources trying to prevent copyright infringements of the very same works on the very same sites, over and over again.

Myth #2: Any attempt to update section 512 would impose impossible burdens on small or startup OSPs that do not have the resources to effectively combat infringement.

- The Facts: This argument is a diversionary tactic used by large OSPs that have become the wealthiest and most powerful companies in the world over the last twenty years, and the trade associations that represent them. The DMCA’s safe harbors were intended to give nascent companies room to grow and innovate in the early years of the internet; not to give a free pass to the facilitation of infringing activity.

While we agree that the burdens placed on small OSPs should not be the same as those imposed on smaller and start-up OSPs, it is important that OSPs of all size be required to take reasonable and appropriate steps that effectively address infringement on their site or service. What is reasonable and appropriate may vary depending on the size and type of the OSP and the magnitude of the infringement problem on the site or service. What that means is that certain heightened obligations should exist for well-established and capable OSPs, but OSPs that are not subject to these heightened obligations must still be held to a standard that requires that the measures they take be effective in addressing infringing activity on their sites. Small OSPs must not get a “free pass”; otherwise, they may use that limitation as an excuse to grow their business on the back of infringement – something that has become all too common as a result of the unintended overbreadth of the DMCA’s safe harbors

Myth #3: Updating the DMCA would run afoul of the First Amendment by stifling online speech by making it easier for content to be removed from the internet without due process.

- The Facts: The assertion that imposing accountability on OSPs would “break the internet” by stifling speech is a common scare tactic used by those who are enjoying the status quo. The position is based on deceptive claims that meritless and abusive takedown notices currently result in legitimate content and speech being removed from the internet—with no recourse on behalf of the user who posted it. This assertion is false, as section 512 already contains safeguards to ensure that users

can challenge misguided notices. For example, the counter-notification process outlined in section 512(g) allows users to object to the removal of the alleged infringing material identified in a takedown notice and to have the material reposted. In addition, section 512(f) imposes serious penalties on any notice sender who knowingly misrepresents that material is infringing, providing an extra layer of protection against attempts at stifling speech or censorship. The counter-notification process and misrepresentation penalties are integral to protecting users against any speech stifling activity, and there is no possibility that any update to the DMCA would remove these safeguards.