Kluwer Copyright Blog

The US Copyright Office Section 512 Study: Why the Entertainment Industry Is Claiming Victory

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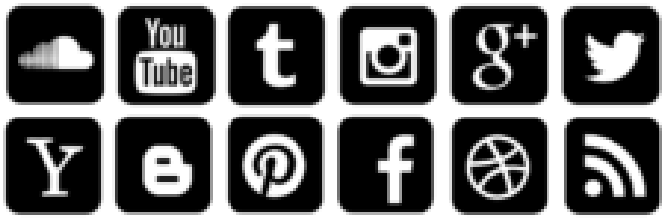

There are not many surprises in the just released Copyright Office Section 512 Study. On virtually every issue about which the copyright industry had complained for the last two decades regarding the notice and takedown regime first established by the Digital Millennium Copyright Act (DMCA) in 1998, now codified in 17 U.S.C. § 512—from its eligibility rules to its knowledge requirements to the availability of injunctive relief—the Office took that industry's side.

Is there anything that online service providers (OSPs) should be cheerful about from that Study? Perhaps it will be a relief that the Study didn't recommend that Congress adopt the notice-and-staydown mandates that some copyright industry groups wanted and that the EU's Digital Single Market Directive now requires. Nor did it recommend that OSPs be generally required to use automated content recognition technologies to prevent copyright infringement (or even "best efforts" to ensure that infringing materials are not uploaded to its site, although the Study's interpretation of "red flag" knowledge may mean that large hosting platforms would have to do this). Despite the Study's extensive discussion of site-blocking injunctions in other countries, the Study did not endorse changing the DMCA rules to confer on US courts power to issue them. (The Office did, however, recommend further study of both site-blocking and notice-and-staydown rules).

According to the Office, the basic framework of the DMCA safe harbors should remain intact. However, anyone who reads this report carefully will realize that the Office has done as much as it can to erode the limits built into § 512 and place ever more responsibility on OSPs (and risks of terminated accounts for users accused, rightly or wrongly, of infringement). While not recommending specific legislative changes, the Study often suggests that Congress "clarify" certain DMCA provisions that the copyright industries don't like.

A basic premise underlying the Study is this: "the 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 some of the statute's objectives are not being met." This premise is false given that copyright industry groups never wanted the safe harbors to be adopted in the first place. They much preferred the recommendation in the Clinton Administration's 1995 Intellectual Property and the National Information Infrastructure report that asserted that OSPs were and should be strictly liable for any copyright infringement that happened on their sites or through their computer networks.

(The Study's assumption that OSPs and copyright industries are the only stakeholders whose views on the DMCA safe harbors should be heeded is disturbing. What about, for instance, the user-creators who depend on OSPs such as Etsy or Ravelry to make their creations available? What about Internet users more generally?)

Major copyright industry groups reluctantly agreed to the carefully negotiated set of safe harbor rules in 1998 as a compromise with other industry groups to attain key objectives through the DMCA, most notably, the exceptionally strong anti-circumvention rules on which the copyright industries would not budge. The copyright industry may well have thought that the provision in § 512 that conditions eligibility for the safe harbors on the commitment of OSPs to adopt standard technical measures would adequately protect their interests. As the Study observes, no standard technical measures have as yet been adopted through cross-industry consensus. The Study announced that the Office will hold a symposium to launch discussions about the future adoption of such measures by OSPs.

The biggest disappointment for me in the Section 512 Study was its cavalier and largely dismissive attitude toward fair use. The Study discounted evidence of wrongful takedown notices offered by OSPs and civil society groups. It criticized as wrongly decided the Ninth Circuit's decision in Lenz v. Universal Music Group Corp., 815 F.3d 1145 (9th Cir. 2016). Universal sent a takedown notice to YouTube regarding Lenz's short video of her baby dancing with some Prince music in the background, which Lenz thought was fair use. The court in Lenz held that a copyright owner could not claim that it had a good faith belief of infringement before sending a takedown request if it did not consider whether a use such as Lenz's might be fair.

The Study notes that some OSPs have decided not to remove content alleged to infringe when the OSPs were convinced the challenged uses were fair. The Study chided them for doing so: "OSPs do not appear to be fully honoring the requirement in § 512(c)(1)(c) that upon receiving a takedown notice that is compliant with § 512(c)(3), they 'respond[] expeditiously to remove or disable access to' the material." Under the Office's interpretation of § 512, in other words, OSPs must remove or block access to content about which a takedown notice has been received regardless of whether the use is fair.

The federal courts emerge as the "bad guys" in the Study's story about how Congress' intent to achieve balance through the safe harbors has been undermined. The Second Circuit decision in Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012) and the Ninth Circuit's decision in UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006 (9th Cir. 2013) come in for particularly harsh criticism. In the Office's view, the courts have erroneous understandings of what constitutes actual knowledge of infringement, "red flag" knowledge, and willful blindness to infringement.

In particular, the Study attacks the Second Circuit's interpretation of the so-called "red flag" knowledge provision of § 512(c)(1)(A)(ii) in Viacom v. YouTube as requiring awareness of facts and circumstances from which a reasonable person would know a specific infringement had occurred. (To me, this ruling makes sense because OSPs cannot remove or disable access to infringing materials if they don't know what and where they are.)

The Study asserts that general knowledge of infringement on an OSP's site should suffice to constitute "red flag" knowledge. The Study views § 512(m), which states that OSPs do not have a duty to monitor their sites to detect infringement, not as a means of protecting legitimate interests of OSPs, but only user privacy interests. The Office thinks OSPs should be more active in monitoring their sites for infringement. And if there is an inkling of evidence of infringement, the Study assumes the OSPs have a duty to investigate further.

There is much more to be said about the Office's Section 512 Study (for instance, about its views on repeat infringer policies and vicarious liability), but this blog offers a taste of some of its most radical assertions. No wonder major copyright industry groups have been singing the praises of the Study's conclusions.

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