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**Before the Copyright Office**

**Library of Congress**

In the Matter of )  
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**Section 512 Study:**  
**Notice and Request for Public Comment** ) Docket No. 2015-7  
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**Comments of the Authors Guild, Inc.**

The Authors Guild submits this statement on behalf of its over 9,000 members in response to the Copyright Office’s Request for Public Comment on the impact and effectiveness of the safe harbor provisions of the Digital Millennium Copyright Act (“DMCA”) contained in 17 U.S.C. § 512.

The purpose of copyright is to encourage the creation of new works—including and especially literary works, which contribute so greatly to our nation’s store of knowledge and culture. To continue to work effectively, U.S. copyright law must provide meaningful protection against the widespread online piracy of books and journals, so that authors can afford to write them.

American authors are concerned about e-book piracy, but have no effective way to combat digital theft. The section 512 safe harbors have been interpreted by the courts in a manner that leaves individual creators with no recourse against online piracy. The pirates themselves are impossible for individuals to locate and are mostly outside the United States. The online service providers (“OSPs”) that host the pirated content have the means to identify the pirates; they also have the legal and technical ability to take the infringing content down and to terminate the accounts of the pirate users, but they will only do so pursuant to notices that comply with the requirements in section 512(c)(3) of the Copyright Act, as strictly interpreted by the courts,<sup>1</sup> and will only take down the copy

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<sup>1</sup> See, e.g., *Perfect 10, Inc. v. CCBill LLC*, 448 F.3d 1102, 1112–13 (9th Cir. 2007), where the Ninth Circuit narrowly construed the notice provisions, finding notices ineffective which identified allegedly infringing material and even contained links to it, because CCBill had to piece together identifying information from different documents—a spreadsheet and an accompanying bank of images.

at the location (generally the URL) indicated in the notice because, as described below, a number of court decisions have essentially nullified the other requirements in section 512. Under current law, so long as an OSP complies with section 512(c) notices and has a bare-bones repeat infringer policy, it is protected from liability, even if it is profiting from the piracy and does absolutely nothing to discourage it. This result is absurd. Unless an author's pirated book is published by one of the few publishers that have the means to actively address piracy, the only recourse an author has is to send fruitless DMCA notices in a never-ending game of Whac-a-Mole. This is hardly a good use of an author's or anyone's resources. It does nothing but allow OSPs to avoid liability and save face. A better solution must be found.

We hear increasingly from our members that they feel helpless against the growing tide of online piracy. From 2009 to 2013, the number of Internet piracy alerts we received increased over 300%. In the next year alone, from 2013 to 2014, that number doubled. There is a direct connection between e-book piracy and authors' pocketbooks. Pirated copies deny authors much-needed royalty payments. Each time a standard frontlist e-book is pirated rather than purchased through a normal retail channel, its author forgoes what would have been nearly \$2 in royalties. Moreover, combating piracy through the ineffectual notice-and-takedown process cuts into valuable writing time. This adds up and can make a real dent in the typical author's earnings.

Not only have the section 512 safe harbors been ineffective at curtailing Internet piracy; they have also incentivized the growth of numerous businesses designed to distribute a continuous flow of infringing books, music, and films. The safe harbors are allowing service providers who traffic in pirated content to evade financial liability while simultaneously profiting from widespread copyright infringement of creative works of authorship.

The shortcomings of section 512 are felt particularly acutely by individual authors. Many publishers have the ability to absorb piracy-related losses. Indeed, this is often done through the one negotiable line in a publisher's budget—the line set aside for the advances it pays its authors; so, in this way, too, authors lose out. Also, publishers and other corporations often have the resources to outsource notice-and-takedown and to negotiate filtering or other arrangements with OSPs, either directly or through the services they hire. Independent authors do not even have access to these imperfect

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Similarly, in *UMG v. Veoh*, the district court rejected UMG's argument that Veoh, after receiving notices from the RIAA identifying names of artists whose work was alleged to be infringed upon, should have sought out actual knowledge of infringement. "What the RIAA did—*i.e.*, provide names of *artists*—and what the statute requires—*i.e.*, a representative list of *works*—are not quite the same." *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1110 (C.D. Cal. 2009), *aff'd on other grounds sub nom UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013).

solutions. Accordingly, section 512 must be reshaped to address and account for the interests of individual creators and copyright holders, who are the backbone of this nation's creative industries.

To avoid being overly repetitive, we address certain questions from the NOI together with others, as noted below.

## General Effectiveness of Safe Harbors

- 1. Are the section 512 safe harbors working as Congress intended?**
- 5. Do the section 512 safe harbors strike the correct balance between copyright owners and online service providers?**

Section 512 is not working as Congress intended. Congress intended to strike a balance between the needs of rightsholders and online service providers, ensuring their cooperation in combating piracy and promoting a robust Internet economy. In carving out the safe harbors from the traditional bounds of copyright protection, Congress acknowledged the need for protection against digital piracy in the Internet age, due to the ease of copying and distributing perfect copies, noting that “[c]opyright owners will *hesitate to make their works readily available* on the Internet without reasonable assurance that they will be protected against massive piracy.”<sup>2</sup> Congress also sensibly recognized that our digital infrastructure would not flourish in an environment where OSPs are subject to unlimited liability for the infringements of third-party users of their services. So section 512 of the DMCA was enacted to appropriately balance the rights of copyright holders with the needs of service providers investing in the growth of the Internet, between the interests of the growing tech community and the creative community.<sup>3</sup>

But the balance sought has not come to pass.

Congress was clear that the purpose of the statute was to incentivize service providers and copyright owners to “cooperate to detect and deal with copyright infringements that take place in the digital networked environment.”<sup>4</sup> Yet in reality cooperation is nowhere to be found in the regime that has been established by section 512, as interpreted by courts. In contrast to the cooperative regime envisioned by the DMCA’s drafters, the

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<sup>2</sup> S. Rep. No 105-190 at 8 (1998) (emphasis added).

<sup>3</sup> See *id.* at 21. (“The provisions in the bill balance the need for rapid response to potential infringement with the end-users legitimate interests in not having material removed without recourse.”)

<sup>4</sup> *Id.* at 20.

position now favored by courts is that “the DMCA . . . place[s] the burden of policing copyright infringement . . . squarely on the owners of the copyright.”<sup>5</sup>

At the heart of the DMCA is a bargain struck between copyright owners and service providers to protect creative works from rampant piracy on the Internet and to protect innocent OSPs from liability for infringing content posted by their users without the OSP’s assistance, knowledge, or encouragement. Rep. Goodlatte underscored this two-pronged approach when deliberating the bill, saying that “[i]f America’s creators do not believe that their works will be protected when they put them on-line, then the Internet will lack the creative content it needs to reach its true potential; and if America’s service providers are subject to litigation for the acts of third parties at the drop of a hat, they will lack the incentive to provide quick and sufficient access to the Internet.”<sup>6</sup>

Aiding creators in protection against copyright infringement was the tech sector’s side of the bargain, in exchange for its protection from financial liability. But courts have not held service providers to their side of the bargain.

Courts have left rightsholders without any practical ability to assert their basic rights on the Internet, encouraging mass-scale copyright infringement, contrary to both the letter and spirit of the section 512 safe harbors.<sup>7</sup> This has enabled service providers to infringe now and ask questions later. The safe harbors, rendered toothless by the courts, have allowed businesses to design sites that invite pirated content posted by third-party users. The service providers themselves then remain willfully blind to specific, individual infringing posts. They leave this infringing content up until a rightsholder sees it and then sends a takedown notice identifying specific, individual infringing posts. Courts have ruled that such enterprises are entitled to absolute immunity from monetary damages for copyright infringement.<sup>8</sup>

Any balance in the original statute, in other words, has been tipped in favor of the tech industry. Accordingly, Congress should revisit the statute to hold service providers responsible for their end of the bargain, and clarify service providers’ obligations in light of the safe harbor protections they receive.

### **3. How have section 512’s limitations on liability for online service providers impacted the growth and development of online services?**

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<sup>5</sup> *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1022 (9th Cir. 2013).

<sup>6</sup> 144 Cong. Rec. 18774 (1998) (statement of Rep. Goodlatte).

<sup>7</sup> This phenomenon is discussed in much greater detail below, in our responses to questions 19-21.

<sup>8</sup> See, e.g., *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 30 (2d Cir. 2012); *UMG v. Shelter*, 718 F.3d at 1021-22.

The section 512 limitations on liability have enabled a great boom in the growth and development of online services. The DMCA safe harbors were debated in and adapted to a different online environment, before user generated content, file sharing, and cloud services became prevalent. In 1998, when the DMCA took effect, the Internet was in its nascence.

But the picture today looks different. Now 84% of the country uses the Internet.<sup>9</sup> The DMCA era has been witness to an unprecedented tipping of the scales in favor of the technology industries, what Authors Guild Vice President Richard Russo has called a “redistribution of wealth from the creative sector to the tech sector.”<sup>10</sup> The tech sector is in its halcyon days,<sup>11</sup> while things look worse for most authors every year.<sup>12</sup> (The plight of individual creators isn’t exclusively the result of piracy, of course. It is the result of a combination of fair use expansion, digital piracy, and publishing industry consolidation, among other factors.)

The section 512 safe harbors have enabled websites to use copyrighted content as start-up capital. Safe harbor protection was not intended to apply to “pirate” websites “where sound recordings, software, movies or books were available for unauthorized downloading, public performance or public display.”<sup>13</sup> Yet the DMCA era has seen an explosion of these pirate websites, and the statute by and large leaves individual authors without recourse.

#### **4. How have section 512’s limitations on liability for online service providers impacted the protection and value of copyrighted works, including licensing markets for such works?**

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<sup>9</sup> Pew Research Center, “Americans’ Internet Access: 2000-2015,” June 26, 2015, available at <http://www.pewinternet.org/2015/06/26/americans-internet-access-2000-2015/>.

<sup>10</sup> Richard Russo, “Richard Russo on *Authors Guild v. Google*,” available at

<https://www.authorsguild.org/industry-advocacy/richard-russo-on-authors-guild-v-google/>.

<sup>11</sup> In 2015, Apple rounded out the top 5 of the 2015 Fortune 500 with \$182 billion in revenue and \$40 billion in profit. Amazon raked in \$89 billion in 2014 revenue. In the same year Google grew its revenue by 17.9%, to \$71 billion—\$14 of that in profit. (Fortune, “The Top Technology Companies of the Fortune 500,” June 13, 2015, available at <http://fortune.com/2015/06/13/fortune-500-tech/>.)

<sup>12</sup> A recently-released 2015 Authors Guild member survey revealed that the writing-related income of full-time book authors has dropped 30% since a similar 2009 survey, from \$25,000 to \$17,500. Part-time authors saw an even steeper decline, as their writing income over the same period dropped 38%, from \$7,250 to \$4,500. See “The Wages of Writing,” (Sept. 15, 2015) available at <https://www.authorsguild.org/industry-advocacy/the-wages-of-writing/>.

<sup>13</sup> See S. Rep. No. 105-190 at 48 (discussing loss of safe harbor protection for an OSP where a copyright owner can show an Internet location to be a “pirate” site).

The section 512 limitations on liability, as applied by the courts, have diluted the value of copyrighted works, and in some cases have foreclosed authors' desire and/or ability to enter the digital marketplace. The structure of section 512—debated and adapted in the era of Internet bulletin boards—doesn't reflect the reality of today's digital marketplace, where digital participation is essential to artists' livelihoods. Unlike in 1998, the digital market is now a necessity for authors of every stripe. The publication of the great majority of books in this country includes the release of e-book editions. And authors are increasingly reclaiming the rights to their older out-of-print titles and reintroducing them to the market by publishing their own e-book editions. Unfortunately, authors' increased digital autonomy has coincided with an unprecedented boom in the availability of unauthorized electronic books. More and more often, authors themselves don't make their works readily available—others do it first.<sup>14</sup>

The lack of liability for service providers trafficking in unauthorized copies eviscerates the copyright incentives and revokes the promise of the digital revolution. Piracy makes authors spend more time policing, and thus less time writing or exploiting their works. And the prevalence of free and low-cost online books forecloses authors from legitimate licensing markets. As Authors Guild member Joan Spicci Saberhagen told us recently: "If I attempted to trace all [the unauthorized copies] down, there would be no time for the real work of selling [the] backlist from my own small publishing business. The fact that the books are available free makes reselling rights difficult to impossible."

Lastly, the availability of unauthorized free and low-cost editions of first-run books has the ancillary effect of driving down consumers' perception of the cost of an e-book. When a bestselling thriller is available in an unauthorized edition—for \$2.99, say—from an illegitimate third-party vendor on Google Play, what are the chances a busy reader (1) recognizes it as a fraud and (2) takes the time to go to a legitimate vendor to purchase the title for \$12.99? A proper price begins to look like a rotten deal.

## **Notice-and-Takedown Process**

- 6. How effective is section 512's notice-and-takedown process for addressing online infringement?**
- 8. In what ways does the process work differently for individuals, small-scale entities, and/or large-scale entities that are sending and/or receiving takedown notices?**

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<sup>14</sup> Section 512 Study: Notice and Request for Public Comment, 80 Fed. Reg. 81862 (Dec. 31, 2015) (citing David Price, *Seizing the Piracy Universe* 3 (2013) ("The volume of infringing material accessed via the Internet more than doubled from 2010 to 2012, and [] nearly one quarter of all Internet bandwidth in North America, Europe, and Asia is devoted to hosting, sharing and acquiring infringing material.")).

As it pertains to individual creators, the section 512 notice-and-takedown process is— notoriously—completely ineffective. Due in part to the way the courts have interpreted the statute, notice-and-takedown is all individual authors have to help them with online piracy, and it does not work by itself.

Hardly the cooperative process envisioned by Congress, notice-and-takedown places all of the burden for identifying each instance of infringement on the rightsholder, even though it is the OSP that has the information and the technical and legal ability to effectively counter piracy.

An enforcement regime where creators are forced to rely solely on sending takedown notices into the ether is both inefficient and grossly inadequate to meaningfully combat Internet piracy. To begin with, takedown notices can be sent only *after* infringing material is posted. This means that sites established to trade in unauthorized copies are allowed to profit off of others' copyrighted works—unless and until the rightsholder happens to come across the infringement. And when the rightsholder sends a notice, assuming the OSP complies with the notice, it will only take the one instance of infringement down, ignoring others that it could easily locate and take down with the benefit of some simple information from the creator. Then, even once the infringing content is taken down, inevitably the same pirates will put the same work right back up on the site in another location.

It is plainly impossible (logistically and financially) for authors to keep track of every infringement of their rights, much less send a takedown notice for every infringing copy of their works. With the tidal wave of pirated content flooding the Internet at any given moment, reliance on notice-and-takedown ensures that the infringers will always win.

**7. How efficient or burdensome is section 512's notice-and-takedown process for addressing online infringement? Is it a workable solution over the long run?**

Notice-and-takedown is an immense burden for individual authors. The burden that courts have placed on rightsholders to track down and send notices for new infringements falls disproportionately on individual creators, who often do not have the resources to pay for automated takedown services. We heard from some of our members who have been victims of Internet piracy. Their frustration with notice-and-takedown is palpable.

As Damon DiMarco told us:

The DMCA does little or nothing to remedy the very real problem that someone has stolen your intellectual property, leaving your royalty stream—and that of middle class writers—to leak like sieves. Lately, I've come to think of the current DMCA policy as little more than playing Whac-a-Mole at a boardwalk arcade. Take one copy of your work down, three more pop up. Repeat, repeat, repeat. But no matter how well you play, no one ever awards you a kewpie doll. I guess I'm admitting that, much like a small-scale merchant in almost any mafia run town, I've succumbed. And so, it's worth noting, have many of the small publishers I work with.

Brad Schepp spoke to the frustration and sense of powerlessness inherent in the notice-and-takedown process:

For a year or so, every time I saw that a copy of one of my books was available, unauthorized and in electronic form, I would notify my editor. They would then send a takedown notice. But frankly I've stopped doing that. I have a Google Alert set up for my name. And it seems every time my name appears in print these days it's because a new unauthorized PDF version of one of my books is available from some pirate.

One of the more demoralizing aspects of the notice-and-takedown regime is the time it steals from the work rightsholders ought to be doing, the work that copyright exists to incentivize: the creation and distribution of original works of authorship. According to Cheryl Kaye Tardiff, an author and publisher:

Over the past 8 years I have spent countless hours drafting DMCA notices and issuing them to various pirate sites. In many cases, the e-book was taken down—only to be back up a few months later. Even if they remove the link, I've found them back on the site weeks later. I've even had to tell my authors to expect piracy and ignore it because there's no point in stressing out over something that will never change until the laws change. Other than the financial aspect, e-book pirates have cost me thousands of wasted hours over the past 8+ years, not to mention a ton of stress.

The threat of piracy even prevents some authors from releasing their books in electronic form. As Susan Schenkel told us: “the upshot is I am not putting my recent book in e-

book form. It is affecting my writing life because not only is it difficult to be published and find readers; when you have a success, it gets stolen and nobody cares.”

The following story, told by author Hillary Johnson, is, sadly, not uncommon. Ms. Johnson wrote:

Regarding the DMCA, I will emphasize first that the ease with which digitized content (i.e., what I have written) may be cut and pasted into other people’s websites, blogs and onto Facebook and Twitter has essentially turned my own writing career into an anxiety-riddled enterprise and probably in fact ended my career. In addition, my financial status has been seriously impacted by copyright infringement and plagiarism, activities that are enhanced, enriched and enabled by the ease of cutting and pasting and illegal downloading.

In cases where I have requested, in the most polite, gentle fashion I can muster, that bloggers or Facebook posters remove material from my book from their blogs or from Facebook, I have been castigated online, told I am ignorant, that I do not have sole right to my book (though I own the copyright, having acquired it years ago from the book’s publisher), that they are engaging in scholarly discussions (though they are not employed at a teaching institution and have no credentials as teachers) and in one case, told the by the infringer that she had decided not to sue me for defamation of character.

For twenty years since my book was published, one Facebook user in particular has been posting what now amounts to probably thousands of pages of my book to his Facebook page, building up for himself several thousand followers. At first I tried to ignore it. When I couldn’t ignore it any longer, I began writing notices to Facebook to ask them to remove the content under the DMCA. Facebook has a form which must be filled out. It requires that you prove you are the copyright owner (my letter from my publisher letting me know they have relinquished the copyright to me suffices); then you must prove that you wrote the actual material that is posted—requiring that you Xerox and scan the particular page from the book that is posted to the site; you must send a photo of the jacket cover that has your name as the author; you must find the exact address of the post itself, which sometimes is challenging if the post is more than a few days in the past. My point is, to prepare the documents to prove to Facebook that they must remove the material under the DMCA is so

daunting, it can take up three days of your time. Finally, you get a generated e-mail from Facebook saying the material has been taken down. You look, and it actually is down. Hurrah! (Sometimes, it isn't down, however.) A day later you look just to be sure, and guess what? It's back up! Because the guy just went ahead and put it back up. And so you must start your application again, another three days out of your life. And with the same dubious results. Whac-a-Mole, right? You could spend the rest of your life trying to stop it and still be on the losing end.

So a few years ago, I started monitoring the site and taking screen shots. I have more than a thousand screen shots of my work on his Facebook page. I engaged a \$500 an hour attorney. The attorney was great but he said that the best he could do short of a lawsuit was do precisely what I had done—write to Facebook. He wrote to Facebook and they demanded that I provide the web addresses of each instance of copyright infringement. Well, it took days, and because it was so labor intensive, and I could only go back so far on Facebook, I was able to provide about 75 instances of infringement. The attorney sent another letter to Facebook with the addresses, and Facebook apparently sent a threat to this guy that they were going to dismantle his site if he persisted. In spite of many profanities about me posted to Facebook by him, and threats of lawsuits against me by several of his rich friends, and so on, I noticed that he did not stop posting material that was obviously from my book.

But one point to make here is that I had asked Facebook to take this material down on numerous occasions in the past. Now I was saying to Facebook, via my attorney, this guy has done this at least 75 times more since I last notified you about this—and Facebook still did not remove the page—they simply sent another warning.

So what is this guy doing a year later? He is posting quotes from my book as if they came from nowhere at all—there is no citation, no indication of where the quote came from, etc. Blind quotes—no sourcing whatsoever. He also continues to publish a lengthy passage from my book that was stolen by another blogger, who is now deceased but his blog is still online. I wrote the deceased man's wife and told her the material was infringement and she quickly took it off the deceased man's blog, but my Internet plagiarist somehow continues to post this passage as if it's on the late blogger's blog and therefore my torturer is unimpeachable—or so he thinks. You know—it wasn't he who committed the infringement—it was

the other guy.

This is but one example.

Entire books have been written that have drawn their material from my book without once citing the book, as if it had somehow moved into the public domain about 100 years before its time. And why? I think it's because so many people have been able to get away with copying and pasting portions of the book on the Internet so often and for so long that at this juncture, people really don't know that all that material came from one book, that a human being spent ten years doing shoe-leather investigative reporting to dig up that story and craft that narrative. It is in an unofficial public domain because the Internet is so lax that copyright infringement goes unpunished, and is essentially allowed, and even encouraged when people like the Facebook poster I just described are simply warned rather than having their activities stopped as the DMCA promises.

So the thought of undertaking another book is rather horrifying to me and I have not written any books since 1998 as a result of this experience. On top of this, to my shock and horror Google copied both of my books without my permission, and if you know where to go, you can simply download a copy of either of my books for free. I had been planning to try to make some income for my old age by digitizing these books—but why bother? Google has done that for me. Why buy a digitized copy from Amazon when you can get it free from Google?

I used to be a serious journalist who covered big stories for national magazines. I would like to do that again and I would have liked to have been doing that for many years. I would really like to write another book. It turns out that these days magazines post your articles to the Internet a month after they appear in the hard copy magazine. Guess what? More cutting and pasting. So, instead, I tweet. It turns out 140 characters is about as much copyright infringement as I can bear. If you take my 140 characters as your own, I don't mind. But that's my limit.

Has this impacted my finances? I'll say. I live on food stamps and social security. But the book I published in 1996, a *New York Times* bestseller, belongs to every jerk on the Internet who wants a piece of it.

Clearly, the system is not working.

- 9. Please address the role of both “human” and automated takedown processes under section 512, including their respective feasibility, benefits, and limitations.**

The difficulties surrounding “human” takedown efforts should be clear from our response to question seven. Individual authors, by and large, do not have much experience with automated takedown processes. They may be a decent investment for big publishers, but by and large individual authors don’t find them worth the price tag, especially when you consider the fact that so many instances of perceived piracy are scams.<sup>15</sup>

- 10. Does the notice-and-takedown process sufficiently address the reappearance of infringing material previously removed by a service provider in response to a notice? If not, what should be done to address this concern?**

No. The reappearance of previously removed material is so ubiquitous it has its own shorthand: the Whac-a-Mole problem. What we need instead of notice-and-takedown is a “notice and stay-down” regime: Once a webhost is on notice that a work is being infringed, it should not receive continued safe harbor protection unless it takes reasonable measures to remove any copies of the same work reposted by the same user and also takes down *all* infringing copies of the work that bear the same reasonable indicia provided by the rightsholder.

It’s clear that many Internet service providers have the means to rid their sites of pirated content. But instead they rely on the safe harbor provisions to knowingly allow pirates to use their platforms to traffic in stolen creative content. In enacting section 512, Congress intended to protect innocent service providers from liability for user infringement—provided they cooperated with the copyright owners to take infringing content down and keep pirates off of their sites. But section 512 has been interpreted to allow far broader immunity, and, as a result, Internet service providers currently have little motive to reduce piracy.

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<sup>15</sup> There are anti-piracy services, such as MUSO and DMCAForce, which make themselves available to individual authors, but they come at a price, and it is often a price individual authors are unwilling to pay. According to a 2013 investigation by the publisher Springer, only about half of the piracy notifications it received from its authors concerned actual copyright infringement. The other half concern cases in which the website purporting to have copyrighted content is actually a scam. See “Anti-Piracy Strategies for Springer eBooks,” available at [http://static.springer.com/sgw/documents/1410503/application/pdf/Anti-piracy+information+for+Authors\\_August2013.pdf](http://static.springer.com/sgw/documents/1410503/application/pdf/Anti-piracy+information+for+Authors_August2013.pdf).

A number of court decisions in recent years, as discussed below, have construed section 512 of the Copyright Act to require a copyright owner to send a notice for each separate instance of infringement, specifying the URL.<sup>16</sup> This is completely ineffective, as the same pirates will put the same material right back up at a different location, with zero deterrence. The OSP has no obligation either to take down infringing copies if the location is not specified or to remove a copy that is reposted immediately after being taken down.

As a result, notice-and-takedown is just not working. Individual copyright owners do not have the resources to find and send notices for every instance of infringement online, much less to keep resending them for copies reposted after being taken down. Authors and other individual copyright owners do not have access to automated systems that track infringing copies and send countless notices, nor do they have the bargaining power to make the kind of deals with OSPs that entertainment industry corporations can.

Giant Internet companies, on the other hand, do have the capability to track, monitor, and prevent piracy, but instead they are profiting from its proliferation.

Service providers argue that they cannot be responsible for identifying pirated copies themselves. “Only copyright holders know what material they own,” a Google lawyer testified. “Service providers cannot by themselves determine whether a given use is infringing.”<sup>17</sup> We are not suggesting that service providers should have human eyes review and make a legal analysis about every piece of content posted any more than we can expect individual authors to locate every infringing copy on a service and keep up with it on a daily basis. But a search engine functions automatically, and there are clear indicia of pirated books that can be automatically detected. Once a service provider has been notified of the indicia or given other information sufficient to automate identification of infringing copies of a work, such as through finger print or similar technologies, or other machine searchable identifiers, it should be required to keep all infringing copies of that work off the service.

It makes no sense to place the entire burden of identifying pirated content on the individual author, especially when the OSP is profiting from the piracy and has the ability to conduct automated searches and removals. Once a service provider is notified of pirated content and has been provided with sufficient information to identify that content,

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<sup>16</sup> See, e.g., *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 30 (2d Cir. 2012); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1022 (9th Cir. 2013).

<sup>17</sup> Testimony of Katherine Oyama, Senior Copyright Policy Counsel, Google Inc., before the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, Hearing on “Section 512 of Title 17,” March 13, 2014, available at <http://judiciary.house.gov/cache/files/be93d452-945a-4fff-83ec-b3f51de782b3/031314-testimony---oyama.pdf>.

the server should be required to keep that content off its site. We believe that is what Congress always intended when it enacted the DMCA.

Here's an example of how "notice and stay-down" might work in practice: an author finds a pirated copy of her book on Google Play, offered by a user who has created an account called "Best Books." She sees that it is priced at \$2.99, which raises red flags for her; she clicks on the link and sees that the cover is different from any cover she has authorized. She also sees that the publisher is incorrectly identified. She sends a notice to Google, with an image of the fake cover and false publisher name, along with a URL for the pirated copy. Google takes the copy down a day later. The next day, the same book with the same cover is reposted on the site. From then on, Google should be required to automatically remove any instance of the entire book that anyone other than an authorized person (as provided by the copyright owner) posts on the site.

Notice and stay-down might also be effected via section 512(j) injunctive relief, as described in response to questions 27–28 below, if the courts would apply it as intended by Congress.

**11. Are there technologies or processes that would improve the efficiency and/or effectiveness of the notice-and-takedown process?**

Yes, but despite many publishers' implementation of anti-piracy software and technological protection measures, the problem continues to grow. According to the International Intellectual Property Alliance, the effectiveness of protection measures is limited by "business models built entirely around manufacturing and distributing technologies, software, devices, components, or tools, or around providing services, to gain unlawful access to the content or to copy it without authorization."<sup>18</sup>

Nonetheless, there are effective technologies that have been developed in the publishing sphere. Scribd, for example, a platform allowing its users to upload texts, has its automated BookID system, which compares samples of works in the BookID database with materials uploaded to Scribd, helping authors and publishers identify infringing uses of their works on the Scribd platforms.

Matching technologies such as BookID would be a key component of a successful notice and stay-down regime—as discussed in our response to question 10 above. Once a service provider receives a takedown notice for and identifies a particular work, the OSP can employ matching technology to identify subsequent infringing copies of a work.

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<sup>18</sup> International Intellectual Property Alliance, 2014 Special 301 Letter to U.S. Trade Representative (Feb. 7, 2014), at 10.

**12. Does the notice-and-takedown process sufficiently protect against fraudulent, abusive or unfounded notices? If not, what should be done to address this concern?**

Yes, the notice-and-takedown process sufficiently protects against unfounded notices. Section 512 (f) provides that “any person who knowingly materially misrepresents under this section . . . that material or activity is infringing . . . shall be liable for damages.”<sup>19</sup> The threat of damages in and of itself ought to be enough to prevent unfounded notices.<sup>20</sup>

The problem of unfounded notices, however, is hardly widespread. The few instances of unfounded notices tend to be high-profile cases paraded by tech evangelists as prima facie evidence of copyright owners’ deep and abiding distaste for free speech on the Internet. In reality, they are incredibly rare, and are inflicting little damage compared with the damage suffered by authors.

Service providers imply that they fear inhibiting free speech by taking down non-infringing content. The safe harbors “have allowed for an explosion of creativity and free expression,” Google testified. “These opportunities for creators are the direct result of the DMCA safe harbors.”<sup>21</sup> Defending free expression is part of the Authors Guild’s core mission; we would never support an anti-piracy measure that jeopardized free expression. But the free speech concerns expressed by OSPs are a smokescreen: the First Amendment has never been interpreted to allow unlawful uses of expression. There is no First Amendment interest in viewing child pornography and there is no First Amendment interest in reading stolen books, whether those books are stolen from the shelves of a bookstore or a library or through the Internet. Instead, First Amendment concerns weigh completely in the other direction, because by imperiling authors’ rights to make a livelihood, their expression is compromised.

Last, there is already a remedy for unfounded takedown notices. Users may file a counter-notice if they believe their post has been taken down improperly. Doing so

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<sup>19</sup> 17 U.S.C.A. § 512(f)(1).

<sup>20</sup> Moreover, this is a provision of the DMCA that has been enforced. In *Lenz v. Universal*, for example, the Ninth Circuit held that a recipient of a takedown notice is entitled to damages for an unfounded notice, even where the unfounded part of the notice at issue is a matter as questionable as a copyright owner’s failure to consider whether the potential infringing material was a fair use. *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1138 (9th Cir. 2015).

<sup>21</sup> Testimony of Katherine Oyama, Senior Copyright Policy Counsel, Google Inc., before the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, Hearing on “Section 512 of Title 17,” March 13, 2014, available at <http://judiciary.house.gov/cache/files/be93d452-945a-4fff-83ec-b3f51de782b3/031314-testimony---oyama.pdf>.

requires the OSP to repost the material within 10–14 business days, unless the copyright owner has filed an action for injunctive relief.<sup>22</sup>

**14. Have courts properly interpreted the meaning of “representative list” under section 512(c)(3)(A)(ii)? If not, what should be done to address this concern?**

The courts have not properly interpreted the meaning of “representative list” under section 512(c)(3)(A)(ii). The representative list language was intended as a safety valve to ease the burden of individuals and other rightsholders of having to track down and list the specific URL of each infringing copy on a site containing multiple infringing works.<sup>23</sup> Moreover, the compliance of DMCA takedown notices should not be judged rigidly. The Senate Report makes clear that the standard is “one of substantial compliance” with the statutory requirements.<sup>24</sup>

The language used in the Senate Report (“it is not necessary for a compliant notification to list every musical composition or sound recording that has been or could be infringed at that site”<sup>25</sup>) also underscores that Congress, even in the late 1990s, recognized the impracticality of requiring copyright holders to provide a complete list detailing every infringing copy of every work on sites replete with infringement.

Courts in the Second and Ninth circuits have largely ignored the representative list language and its purpose, insisting that OSPs need only take down content that is specifically identified by location, which generally requires listing out each work, contrary to section 512(c)(3)(A)(ii). In *UMG Recordings*, for example, the video-sharing website Veoh received DMCA notices from multiple copyright holders, with a list containing names of artists whose works were being infringed. The District Court, however, concluded that the notices were inadequate because they provided Veoh with “names of artists” and not a “representative list of works,” and “an artist’s name is not ‘information reasonably sufficient to permit the service provider to locate [such] material.’”<sup>26</sup>

Contrary to the *UMG* court’s overly restrictive interpretation of section 512(c)(3)(A)(ii), the text of the statute explicitly states that a copyright owner is not required to identify every individual infringing work on a site that contains multiple infringing works.

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<sup>22</sup> 17 U.S.C.A. § 512(g)(2).

<sup>23</sup> See S. Rep. No. 105-190, at 46.

<sup>24</sup> *Id.* at 46 (“The standard against which a notification is to be judged is one of substantial compliance.”).

<sup>25</sup> *Id.*

<sup>26</sup> *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1110 (C.D. Cal. 2009), *aff’d* on other grounds *sub nom UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013).

Instead, it contemplates “[i]dentification of the copyrighted work claimed to have been 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.”<sup>27</sup>

The legislative history further confirms that Congress recognized it would often be futile for copyright holders to provide an exhaustive list identifying every copyrighted work and every act of infringement, especially in cases involving massive infringement:

Where multiple works at a single on-line site are covered by a single notification, a representative list of such works at that site is sufficient. Thus, for example, where a party is operating an unauthorized Internet jukebox from a particular site, it is not necessary that the notification list every musical composition or sound recording that has been, may have been, or could be infringed at that site. Instead, it is sufficient for the copyright owner to provide the service provider with a representative list of those compositions or recordings in order that the service provider can understand the nature and scope of the infringement being claimed.<sup>28</sup>

But courts require more specificity than Congress intended, holding that the burden of “identifying the potentially infringing material and adequately documenting infringement [falls] squarely on the owners of the copyright.”<sup>29</sup>

The Fourth Circuit’s approach, as expressed in *ALS Scan v. RemarQ Communities*, is preferable. It reversed a lower court’s holding that a DMCA notice was deficient because it didn’t identify every infringing work. The appellate court clarified that the DMCA does not “seek to burden copyright holders with the responsibility of identifying every infringing work—or even most of them—when multiple works are involved. Instead, the requirements are written so as to reduce the burden on holders of multiple copyrights who face extensive infringements of their works.”<sup>30</sup>

The law should be clarified as to what exactly constitutes a “representative list.” Should a record company be permitted to send a webhost a list of all its artists and demand all infringing copies of their works be taken down? Clearly not. But an individual author who has found a handful of infringing copies of her works on one site should be able to identify the URLs where those infringements are located, and also specify that all other infringing copies of her works be taken down.

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<sup>27</sup> 17 U.S.C.A. § 512(c)(3)(A)(ii).

<sup>28</sup> H.R. Rep. No. 105-551 (Part II), at 55; S. Rep. No. 105-90, at 46.

<sup>29</sup> *Perfect 10, Inc. v. CCBill LLC*, 448 F.3d 1102, 1113 (9th Cir. 2007).

<sup>30</sup> *ALS Scan, Inc., v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4<sup>th</sup> Cir. 2001).

**15. Please describe, and assess the effectiveness or ineffectiveness of, voluntary measures and best practices—including financial measures, content “filtering” and takedown procedures—that have been undertaken by interested parties to supplement or improve the efficacy of section 512’s notice-and-takedown process.**

Others can better respond to this question, as authors largely have been left out of any voluntary measures and best practices. We note only that, in practice, voluntary measures and best practices generally are developed between major OSPs and industry groups or corporations and that individual creators are not included in the negotiation process or the resulting agreements. As a result, authors and other individual creators also have not obtained any of the benefits that might accrue to copyright holders as a result of these voluntary measures or best practices.

As noted below in our response to questions 24–25, we strongly recommend that individual creators be considered in any future voluntary measures and best practices.

**Legal Standards**

Unsurprisingly, the legal standards discussed below largely have been developed in the context of cases brought by corporate copyright holders, not individual creators. Only major corporate copyright owners have the means to bring the suits—which underscores another aspect of the plight of the individual artist in the Internet age: case law is developed to suit fact patterns that are vastly different than those encountered by the individual author on a daily basis, and thus the law takes shape without accounting for the particular set of problems and needs of the individual copyright owner.

**19. Assess courts’ interpretations of the “actual” and “red flag” knowledge standards under the section 512 safe harbors, including the role of “willful blindness” and section 512(m)(1) (limiting the duty of a service provider to monitor for infringing activity) in such analyses. How are judicial interpretations impacting the effectiveness of section 512?**

Under Sections 512(c) and (d), to qualify for safe harbor protection, a service provider must make inaccessible or remove infringing content in each of *three separate* instances: (1) when it receives a DMCA-compliant takedown notice, (2) when it has “actual knowledge” of infringing material, or (3) when it has “red flag” knowledge, that is, when it becomes “aware of facts and circumstances from which infringing activity is

apparent.”<sup>31</sup> A number of court decisions, however, have conflated the “actual” and “red flag” standards with the notice provisions, holding that sections 512(c)(1)(A)(i) and (ii) and (d)(1)(A) and (B) require actual knowledge of location specific instances of infringing activity, with the result that the type of knowledge of specific infringing activity required under the actual knowledge and red flags awareness standards looks very much like the type of information required in a DMCA-compliant takedown notice.<sup>32</sup>

The plain language of the statute does not require that knowledge of infringing material means knowledge of the location of a specific infringing copy or URL. Yet, to an alarming extent, courts have read into the statute such a requirement.

Decisions in the Second and Ninth Circuits have directly conflicted with Congress’s expressed intention that under the red flags standard “[o]nce one becomes aware of such infringement [] one may have an obligation to check further.”<sup>33</sup> It is illustrative that in connection with the Section 512(d) safe harbor, Congress noted that “a service provider would have no obligation to seek out copyright infringement, but it would not qualify for the safe harbor if it had turned a blind eye to ‘red flags’ of obvious infringement.”<sup>34</sup>

Basic rules of statutory interpretation, as well as the legislative history, make clear that a site’s takedown obligation does not depend only on receiving a DMCA-compliant notice (or all of the information that should be contained in such a notice): “Section 512 does not require use of the notice and takedown procedure. A service provider wishing to benefit from the limitation on liability under subsection (c) must ‘take down’ or disable access to infringing material residing on its system or network of which it has actual knowledge or that meets the ‘red flag’ test, even if the copyright owner or its agent does not notify it of a claimed copyright infringement.”<sup>35</sup>

In *UMG v. Veoh*, a case heard in the Ninth Circuit, the District Court provides a textbook instance of the conflation of the knowledge standards. In reaching its conclusion, the District Court created an artificially high bar for finding red flag knowledge, effectively conflating the two knowledge standards. The standard the District Court articulated—that not even “true and undisputed” officer-level knowledge of widespread infringement

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<sup>31</sup> 17 U.S.C.A. § 512 (c)(1)(A).

<sup>32</sup> See, e.g., *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099 (C.D. Cal. 2009), *aff’d on other grounds sub nom UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013); *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 523 (S.D.N.Y. 2010), *aff’d in part, vacated in part, reversed in part*, 676 F.3d 19 (2d Cir. 2012).

<sup>33</sup> H.R. Rep. No. 105-551 (Part I), at 26 (1998).

<sup>34</sup> S. Rep. No. 105-190, at 48.

<sup>35</sup> S. Rep. No. 105-190 at 45; H.R. Rep No. 105-551 (part I) at 54 (1998).

would constitute red flag knowledge<sup>36</sup>—effectively requires actual knowledge of specific infringing material.

In affirming the District Court on this issue, the Ninth Circuit reasoned that “[r]equiring specific knowledge of particular infringing activity makes good sense . . . [because] [c]opyright holders know precisely what materials they own, and are thus better able to efficiently identify infringing copies than service providers.”<sup>37</sup> Such reasoning places an enormous burden on copyright holders, particularly individual creators, who cannot afford to spend their days trolling the Internet for infringing copies and cannot afford to purchase services to do it for them. We would contend that the service providers who enable and profit from providing access to pirated works—and whose businesses are built around the very algorithms capable of identifying infringing works—are better positioned to identify infringements, particularly after they have been put on notice of the existence of infringing copies of a particular work.

In *Viacom v. YouTube*, a case heard in the Second Circuit, the trial court similarly held that the knowledge of awareness of infringement sufficient to disqualify a service provider from safe harbor is “knowledge of specific and identifiable infringements.”<sup>38</sup> The Second Circuit affirmed, pointing to section 512’s requirement that a service provider is obliged to act expeditiously to remove the infringing material,<sup>39</sup> and reasoning that “expeditious removal is possible only if the service provider knows with particularity which items to remove.”<sup>40</sup> Such thinking betrays a naïve understanding of the capabilities of most online service providers who traffic in pirated content. They are eminently capable of finding any material on the sites they administer.

The result of this misplaced burden is that the safe harbors, intended to protect those service providers undertaking reasonable, good faith efforts to keep their sites piracy-free, instead shield bad actors. Even worse, service providers are penalized for trying to be good digital citizens and monitoring their sites for user-posted infringing content, because that knowledge leads to liability.<sup>41</sup>

To be clear, we are not advocating what the Ninth Circuit has lampooned as a “should have known” approach.<sup>42</sup> But it would be eminently reasonable, and in keeping with the balance of interests struck by the Copyright Act as a whole, for Congress to intervene and

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<sup>36</sup> See *UMG v. Veoh*, 665 F. Supp. 2d at 1111.

<sup>37</sup> *UMG v. Shelter*, 718 F.3d at 1021-22.

<sup>38</sup> *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 523 (S.D.N.Y. 2010), *aff’d in part, vacated in part, reversed in part*, 676 F.3d 19 (2d Cir. 2012).

<sup>39</sup> See 17 U.S.C.A. § 512 (c)(i)(A)(iii)

<sup>40</sup> *Viacom v. YouTube*, 718 F.3d at 30.

<sup>41</sup> See 17 U.S.C. § 512(c)(1)(A).

<sup>42</sup> See *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1021 (9th Cir. 2013).

clarify that the notice, knowledge, and awareness provisions mean three distinct states of mind and do not all sink or swim together based on whether or not a rightsholder is able to cull together a URL of every infringing copy of her work within the service provider's control.

When it comes to “red flag” willful blindness, courts have emphasized that the question is not what a reasonable person would have deduced given all the circumstances, but whether the service provider deliberately proceeded in the face of blatant factors of which it was aware, and, as the legislative history has it, “turned a blind eye to ‘red flags’ of obvious infringement.”<sup>43</sup> The standard seems sound in theory, but has been applied by courts in confounding ways.

In *YouTube*, for example, even where YouTube's own estimates put the percentage of copyrighted material on the service at 75–80%, and even though YouTube was aware that “significant quantities of material on the YouTube website were infringing” and emails among the executives showed that they even knew of specific instances of infringement, according to the Second Circuit, there was insufficient evidence of knowledge or red-flag awareness even to create a triable issue of fact.<sup>44</sup>

These decisions and others like them have created a backwards incentive for website operators to steer clear of infringement prevention technologies, such as filtering services, that might give rise to knowledge of specific acts of infringement. The knowledge and even encouragement of pervasive infringement, such as was evident in the cases described above, is precisely the type of “willful blindness” that Congress sought to prevent when enacting the DMCA. Otherwise, service providers have no incentive to cooperate with rights holders.

Section 512(c)(1)(A) instead should be construed consistent with the longstanding meaning attributed to knowledge in the context of contributory liability in copyright and elsewhere in the law—that is, when “the infringing nature” of the site “would be apparent from even a brief and casual viewing, safe harbor status . . . would not be appropriate.”<sup>45</sup>

The manner in which courts have read section 512(m)(1) is at the root of the courts' tortuous interpretation of the knowledge standards in section 512(c) and (d). Section 512(m)(1) limits an OSP's duty to monitor for infringing activity; and courts have interpreted it to mean that an OSP does not have to review or search its own service for infringing content, even when there are plenty of red flags. But just because a service

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<sup>43</sup> H.R. Rep. No. 105-551, pt. 2, at 42.

<sup>44</sup> *Viacom v. YouTube*, 718 F.3d at 30.

<sup>45</sup> H.R. Rep. No. 105-551, pt. 1, at 58.

provider has no affirmative “duty to monitor” does not mean there is no duty to respond once infringement has been brought into the open. The legislative history clarifies that a service provider “must take down or disable access to infringing material residing on its system or network in cases where it has actual knowledge or that the criteria for the “red flag” test are met—even if the copyright owner or its agent does not notify it of a claimed infringement.”<sup>46</sup> The legislative history also makes clear that subsection (m) is “designed to protect the privacy of Internet users,”<sup>47</sup> not to absolve OSPs of all responsibility for the content flowing through their channels.

### **How are judicial interpretations impacting the effectiveness of section 512?**

By requiring knowledge of specific infringing activity as a prerequisite of 512(c)(1)(A) knowledge, courts have equated 512(c)(1)(A) knowledge with the specific identifying information contained in a takedown notice. Courts’ general reluctance to find 512(c)(1)(A) knowledge even in instances where infringing activity is open, obvious, and overwhelming leaves rightsholders with the notoriously ineffective notice-and-takedown provisions as their only recourse in the face of massive and unabated copyright infringement.

Worse, loose interpretation of the knowledge standards incentivizes service providers *not* to look into infringing activity, because by doing so they could acquire knowledge leading to the loss of safe harbor liability. This is far from the cooperative rightsholder-OSP synergy the drafters of the DMCA intended to foster to effectively combat piracy in the online environment.

### **20. Assess courts’ interpretations of the “financial benefit” and “right and ability to control” standards under the section 512 safe harbors. How are judicial interpretations impacting the effectiveness of section 512?**

Section 512(c)(1)(B) essentially restates, and thus clearly is intended to reflect, the common law standard for vicarious liability under copyright law, i.e., where the defendant (1) has the right and ability to supervise or control, and (2) has a direct financial interest in the infringing activity. Section 512(c) and (d) both condition the safe harbor on the OSP’s not receiving “a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to

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<sup>46</sup> H.R. Rep. at 54.

<sup>47</sup> S. Rep. 105-190 at 55.

control such activity.”<sup>48</sup> But courts, particularly in the Second and Ninth Circuits, interpret 512 (c)(1)(B) as requiring “something more” than being able to stop the infringement by taking the infringing material down or kicking the infringers off the service—which is what would be required to prove traditional vicarious liability.<sup>49</sup>

Courts have held that merely having the ability to disable access to or remove infringing material, or discontinue service to an infringer, did not show right and ability to control,<sup>50</sup> that the enforcement of policies that prohibit users from engaging in illegal or unauthorized conduct did not show right and ability to control,<sup>51</sup> or even providing vendors with transaction processing capabilities for credit card purchases did not show the right and ability to control within the meaning of 512(c)(1)(B).<sup>52</sup> If none of these activities qualify as “the right and ability to control,” it is hard to imagine what would. The ways that an OSP can assert control over infringing activity precisely is by blocking, taking it down, or discontinuing service to the infringer, just as the owner of a music hall or swap meet has the ability to control infringing activities on their premises.<sup>53</sup>

The Second Circuit in *Viacom Int’l, Inc. v. YouTube, Inc.*<sup>54</sup> agreed that section 512(c)(1)(B) requires “something more” than the ability to remove or block access to materials posted on a service provider’s website, but admitted that: “The remaining—and more difficult—question is how to define the ‘something more’ that is required,” advising only that the “something more” must exert “substantial influence” on the activities of the users.<sup>55</sup>

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<sup>48</sup> 17 U.S.C.A. § 512(c)(1)(B).

<sup>49</sup> See, e.g., *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1026–31 (9th Cir. 2013) (“until [a service provider] becomes aware of specific unauthorized material, it cannot exercise its ‘power of authority’ over the specific infringing item.”); *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 37–38 (2d Cir. 2012) (what must be shown is “something more than the ability to remove or block access to materials posted on a service provider’s website.”); *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500, 530-35 (S.D.N.Y. 2013) (Vimeo lacked the “something more” where Vimeo employees responded to user questions by ignoring copyright infringement or posted infringing videos themselves.); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 555 (4th Cir. 2004).

<sup>50</sup> See *Io Groups, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1151 (N.D. Cal. 2008). (“[T]he pertinent inquiry is not whether Veoh has the right and ability to control its system, but rather, whether it has the right and ability to control the infringing activity.”)

<sup>51</sup> See *id.*

<sup>52</sup> See *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1109-10 (W.D. Wash. 2004).

<sup>53</sup> See, e.g., *Fonavisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996) (finding contributory liability for copyright infringement where the operator of a swap meet had knowledge of and controlled the site and facilities enabling the infringement); *Dreamland Ballroom, Inc. v. Shapiro, Bernstein & Co.*, 36 F.3d 364 (7th Cir. 1929) (finding that a music hall that hired an orchestra was liable for the orchestra’s infringement).

<sup>54</sup> 676 F.3d 19 (2d Cir. 2012).

<sup>55</sup> *Id.* at 36.

The reason courts have taken this strained approach to the liability standard in section 512 is a perceived conflict with the general condition in 512(i) for service providers to implement a repeat infringer policy, as well as the requirements to take infringing material down once an OSP has actual or red flags knowledge or the vicarious liability standard applies under 512(c) and (d). Courts have found this hard to reconcile: “Congress could not have intended for courts to hold that a service provider loses immunity under the safe harbor provision of the DMCA because it engages in acts that are specifically required by the DMCA.”<sup>56</sup> Because otherwise, they argue, section 512(c)(1)(B) would disqualify any service provider that in fact has the ability to do exactly what section 512(c) of the DMCA requires service providers to do to benefit from the safe harbor: to disable access to or remove material in response to notice, knowledge or awareness of infringing activity.

Congress needs to address the lack of clarity surrounding the meaning of the “financial benefit” and “right and ability to control” standards under the section 512 safe harbors. The courts have valid concerns regarding how to apply section 512 in several areas and this is one (albeit it does seem odd that courts have had a hard time reconciling these provisions in section 512 and applying the plain language of the “financial benefit” and “right and ability to control” standards under the section 512 safe harbors, but have no trouble collapsing red flags and actual knowledge together with the notice requirements).

Specifically, we believe that Congress should clarify that an OSP has the “right and ability to control” when (i) infringing material resides on its system, and (ii) the OSP retains the right and has the ability to remove or block infringing content.

Congress should direct the Copyright Office to conduct a rulemaking to set guidelines for fleshing out what it means for an OSP to have the ability to remove or block infringing content, as this is likely to change as technology changes, and the rulemaking process provides the technology and the public input that will allow the rules to keep up with the technology.

## **Repeat infringers**

### **22. Describe and address the effectiveness of repeat infringer policies as referenced in section 512(i)(A).**

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<sup>56</sup> *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1095 (C.D. Cal 2001).

**23. Is there sufficient clarity in the law as to what constitutes a repeat infringer policy for purposes of section 512’s safe harbors? If not, what should be done to address this concern?**

The adoption, reasonable implementation, and meaningful publication of a “repeat infringer” policy is a threshold prerequisite for the section 512 limitations on liability. It was instituted based on the sound theory that “those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access.”<sup>57</sup> But courts have generally construed this provision too loosely, granting safe harbor to OSPs with blatantly toothless repeat infringer policies.

As a result, many OSPs do the bare minimum. The statutory language requires merely that the limitations on liability apply only to service providers that have “adopted and reasonably implemented . . . a policy that provides for the termination in appropriate circumstances of subscribers and account holders . . . who are repeat infringers,”<sup>58</sup> without going into further detail. Many service providers merely track this language in their policies without defining what constitutes repeat infringement, or giving the policy more than lip service.<sup>59</sup>

The statute itself is silent on what constitutes a repeat infringer policy for purposes of section 512’s safe harbors, and courts have interpreted this silence as an “intent to leave the policy requirements . . . loosely defined.”<sup>60</sup> While that was prudent legislative drafting—to leave the repeat infringer policy requirements loosely defined in order to allow for the development of industry standard best practices—a better-defined rule or a number threshold would be more effective now that we know the extent of Internet piracy. As one court has said: “The statute does not suggest what criteria should be considered by a service provider, much less require the service provider to reveal its decision-making criteria to the user.”<sup>61</sup> But the courts have to make decisions under section 512(i)(1), such as whether (1) the service provider implemented its policy; and (2) that implementation was reasonable.<sup>62</sup>

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<sup>57</sup> H.R. Rep. No. 105-551 (part I) at 61.

<sup>58</sup> 17 U.S.C.A. § 512 (i)(1)(A).

<sup>59</sup> YouTube’s terms of service, for example, state simply that “YouTube will terminate a user’s access to the Service if, under appropriate circumstances, the user is determined to be a repeat infringer.” June 9, 2010, available at <https://www.youtube.com/static?template=terms> (last accessed Feb. 23, 2016).

<sup>60</sup> *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500, 513 (S.D.N.Y. 2013), quoting *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1101 (W.D. Wash. 2004).

<sup>61</sup> *Corbis v. Amazon.com*, 351 F. Supp. at 1102.

<sup>62</sup> See, e.g., *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109-10 (9th Cir. 2010).

They need guidance to do so. They are floundering without it and making rules up themselves based on the particular facts and parties in front of them.

For instance, there are not set rules on the number of notifications that need be sent before terminating a user engaging in infringing activity.<sup>63</sup>

Courts have also struggled with when and how an OSP should determine who the repeat infringers are in order to terminate them.<sup>64</sup>

Clearly, the courts need guidance if the repeat infringer policy requirement is to have any teeth. Here again, we recommend that the specifics of what a repeat infringer policy and its reasonable implementation should look like be set through a rulemaking process. As such, all interested parties could participate in setting the rules (not just parties to a litigation) and when technologies or practices change, as they will, a new rulemaking could be conducted at any time to account for those changes.

## Standard Technical Measures

### **24. Does section 512(i) concerning service providers' accommodation of "standard technical measures" (including the definition of such measures set**

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<sup>63</sup> See, e.g., *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500, 511-517 (S.D.N.Y. 2013) (approving repeat infringer policy based on terminating a user after receipt of three DMCA notifications); *UMG Recordings, Inc. v. Veoh Networks Inc.*, 655 F. Supp. 2d 1099, 1118 (C.D. Cal. 2009), *aff'd on other grounds sub nom UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013) (approving repeat infringer policy based on terminating a user after receipt of two DMCA notifications); *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132 (N.D. Cal. 2008) (approving repeat infringer policy based on terminating a user after receipt of two DMCA notifications).

<sup>64</sup> See, e.g., *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 41 (2d Cir. 2012) (service providers have no obligation to deploy search technology except to the extent that such monitoring constituted a "standard technical measure"); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109-10 (9th Cir. 2010) ("to identify and terminate repeat infringers, a service provider need not affirmatively police its users for evidence of repeat infringement"); *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1117 (C.D. Cal. 2009), *aff'd on other grounds sub nom UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013) (finding reasonable implementation of Veoh's policy where Veoh did not automatically terminate users whose videos were blocked by Audible Magic filters because the filters lacked the reliability of a sworn declaration, and where Veoh did not necessarily terminate users who had uploaded multiple infringing works that were identified in a single DMCA notification); *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1145 (N.D. Cal. 2008) (noting that while it was undisputed that IP addresses identified particular *computers*, there was no evidence that Veoh could identify particular *users*, because "section 512(i) does not require service providers to track users in a particular way or to affirmatively police users for evidence of repeat infringement"); *cf. BMG Rights Management (US) LLC et al v. Cox Enterprises, Inc. et al.*, No. 1:2014cv01611, Dec. 1, 2015, at 36, (OSP that had policy of "nominally" terminating repeatedly infringing accounts, but reactivating the accounts upon request, did not qualify as reasonable implementation of a repeat infringer policy), *available at* <http://cases.justia.com/federal/district-courts/virginia/vaedce/1:2014cv01611/310858/703/0.pdf?ts=1449073744>.

**forth in section 512(i)(2)) encourage or discourage the use of technologies to address online infringement?**

**25. Are there any existing or emerging “standard technical measures” that could or should apply to obtain the benefits of section 512’s safe harbors?**

Section 512(i)(1)(B) requires an OSP to accommodate and not interfere with “standard technical measures” (“STMs”) in order to be able to take advantage of the safe harbors. The statute defines STMs as those which “have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process” and “are available to any person on reasonable and nondiscriminatory terms” and “do not impose substantial costs on service providers or substantial burdens on their systems or networks.”<sup>65</sup>

The above definition underscores the aspirational aspects of the DMCA: the statute foresaw an environment of cooperation and collaboration between copyright holders and service providers. But, as we have seen in many areas of section 512, its implementation has not played out as intended and, given a vacuum of standards, courts have ended up giving undue leeway to OSPs in applying the safe harbors.

As a result, there has been no impetus to conduct the sort of standards creation process to develop STMs that was contemplated by Congress—i.e., “pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process”—and certainly none that would be “available to any person on reasonable and nondiscriminatory terms.”<sup>66</sup>

We would support an industry effort to create effective STMs that would be available to all, such as an industry-wide standard fingerprinting technology for books and other texts—but only if individual creators and their representatives were part of the process, and only if any resulting standards were available for use on an affordable and reasonable basis to individual creators, as well as large corporate owners. Congress could direct the Copyright Office to convene such a group, rather than leave it to the industry to do so on its own. The technologies are sufficiently mature and available at this point in time; it would simply be a matter of agreeing on what STMs should be adopted on an industry-

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<sup>65</sup> 17 U.S.C.A. § 512(i)(2)(A).

<sup>66</sup> *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1174 (C.D. Cal. 2002), quoting H.R. Rep. 105-551(II), at 61; S. Rep. at 52 (1998) (“There is no indication that the ‘strong urging’ of both the House and Senate committees reporting on the bill has led to ‘all of the affected parties expeditiously [commencing] voluntary interindustry discussions to agree upon and implement the best technological solutions available to achieve these goals.’”).

wide basis. The applicable STMs will vary by industry, so each industry would likely have to have its own standards creation process.

## Remedies

**26. Is section 512(g)(2)(C), which requires a copyright owner to bring a federal lawsuit within ten business days to keep allegedly infringing content offline—and a counter-notifying party to defend any such lawsuit—a reasonable and effective provision? If not, how might it be improved?**

Ten business days is not sufficient time for an individual author to provide a verified certificate of registration and file a federal lawsuit. Section 512(g)(2)(C) is an important counterweight to a service provider’s ability to quash a takedown simply by sending a takedown notice. That counterweight, though, is rendered ineffective because the time frame to file suit is impracticable.

Moreover, individual creators are generally averse to resolving disputes with service providers through lawsuits, and they often lack the resources.

Thirty days would certainly be a more reasonable time frame within which a rightsholder is required to file a lawsuit.

**27. Is the limited injunctive relief available under section 512(j) a sufficient and effective remedy to address the posting of infringing material?**

It is impossible to know whether section 512(j) is a sufficient and effective remedy to address the posting of infringing material as relief under section 512(j) has never been applied by a court. Congress enacted section 512(j) to allow rightsholders to obtain injunctive relief even if they were protected under the safe harbors. It also was intended to enable rightsholders “to secure cooperation of those with the capacity to prevent ongoing infringement.”<sup>67</sup>

When the DMCA was first enacted, it was understood to protect OSPs from damages but not from all injunctive relief. And, indeed, the limited injunctive relief provided under section 512(j) should be a useful provision for reigning in service providers who continue to profit from infringing content despite having received reams of takedown notices. Paul Doda, in his article “Distinguishing ‘Common Carriers’ from ‘Common Thieves,’” calls

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<sup>67</sup> H.R. Rep. 105-551, Part 2, at 11.

such service providers “structural infringers,” sites that “reap substantial profits from the content they exploit without having to invest a single dollar to develop, create, or publish it.”<sup>68</sup>

“To date,” Doda argues, “DMCA jurisprudence does not adequately consider a host site’s good faith when assessing its compliance with the statute’s safe harbor requirements.” To remedy this and to hold these structural infringers accountable, courts ought to be granting 512(j) injunctive relief more frequently.

Here again, guidelines created through a rulemaking process to establish under what circumstances in today’s Internet environment section 512(j) injunctions could be granted. This would provide both injured copyright holders and the courts with a road map to start using section 512(j) to help alleviate the structural infringer problem.

## **28. Are the remedies for misrepresentation set forth in section 512(f) sufficient to deter and address fraudulent or abusive notices and counter-notifications?**

Yes, the remedies set forth in section 512(f) are sufficient to deter and address fraudulent or abusive notices and counter-notifications. Misrepresentations are made incredibly rarely as compared to the massive number of legitimate notices sent.

Section 512(f) provides clear liability for any knowing, material misrepresentations in notices stating that material or activity is infringing, or counter-notices stating that that material or activity was removed or disabled by mistake or misidentification. And courts have been favorable to such liability.<sup>69</sup>

Furthermore, section 512(c)(3)(A) requires statements right on the notice as to the accuracy and truth of the notice.<sup>70</sup> This serves as a huge deterrent to misrepresentations.

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<sup>68</sup> See Paul Doda, “Distinguishing ‘Common Carriers’ from ‘Common Thieves’: Requiring Notice and Stay Down for ‘Structurally Infringing’ Host Sites that Discourage Legitimate Electronic Storage, Incentivize Copyright Infringement, and Exploit the DMCA 512(c) Safe Harbor,” *forthcoming* 63 J. Copyright Soc’y USA 3, available at [https://www.elsevier.com/data/assets/pdf\\_file/0014/152141/Paul\\_Doda\\_Distinguishing\\_Common\\_Carriers\\_from\\_Common\\_Thieves.pdf](https://www.elsevier.com/data/assets/pdf_file/0014/152141/Paul_Doda_Distinguishing_Common_Carriers_from_Common_Thieves.pdf).

<sup>69</sup> See *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1138 (9th Cir. 2015).

<sup>70</sup> 17 U.S.C. § 512(c)(3)(A)(v) and (vi): “(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.”

Much has been made of the very few instances of false notices, which largely have been in the context of automated takedowns, which swept in fair uses. But millions and millions of infringements occur every day, and these infringements cause real damage to creators, in some cases tipping earnings low enough that the individual author can no longer engage in her creative work professionally, but must take on other work. And, in the case of corporations in our sector, namely publishers, it forces them to publish more commercial and less literary works.

## **Summary**

The damage caused by the courts' overbroad application of the safe harbors has caused real, palpable damage to our creative sectors already. Many of the problems with using section 512 today stem from the fact that it attempts to provide both the legislative structure and the details for a practical system of cooperation to address online infringement. But legislation is an unwieldy tool for addressing all the ins and outs of such a system in practice, especially when the technologies it applies to are moving along under our feet. Congress did an excellent job foreseeing where the issues might lie in practice, especially considering how early in the development of the Internet it was at the time. But it is impossible to draft legislation with the necessary detail to implement the type of complex, ambitious system of cooperation conceived under section 512.

Technology and practices have changed dramatically in the intervening years. And court decisions are not an efficient or fair means of establishing the guidelines needed to apply section 512 in practice. Litigation is slow, and it is expensive; and because it is so expensive, it is also a discriminatory means of establishing implementing guidelines: only wealthy corporations can afford to litigate; everyone else has to swallow whatever rules the OSPs establish. Moreover, litigation applies only to a particular set of facts and the parties in the litigation.

Accordingly, in a number of places we have recommended that Congress amend the law to direct the Copyright Office to conduct full and transparent rulemakings to create implementing rules to address many of the issues that have arisen and will arise under section 512. Rulemakings would allow all interested parties, including individual creators, to have input and would provide the flexibility needed to change the implemented law over time to keep up with evolving technology and practices.

The fact that in many arenas we are still, in 2016, having a conversation about matters such as the few instances of overbroad notices, rather than focus on the need to make section 512 effective at keeping piracy off the Internet, is somewhat galling and

incredibly short-sighted. We love our technology, and the tech sector has brought enormous value to our nation, but we cannot continue to allow technology platforms for creative content to accrue the better part of value from that content, especially if they are not willing to accept responsibility for it. Tech companies that provide access to creative content (and which more and more are becoming the primary way we access creative content) have gotten very rich in recent years, and in the process have drained wealth out of the creative community, leaving individual creators poorer than ever. We are a nation built on the inspiration and creative work of individual creators. Let's not take them for granted.

That's why we need legislative reform to section 512.

We applaud the Copyright Office for embarking on this much-needed study, and we are available for consultation.