
Before the Copyright Office

Library of Congress

In the Matter of)
)
Section 512 Study:
Request for Additional Comments) Docket No. 2015-7
February 21, 2017)

Additional 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 additional comments on the impact and effectiveness of the DMCA safe harbor provisions contained in 17 U.S.C. § 512. We thank the Copyright Office for this opportunity to submit additional comments on the laws governing Internet piracy.

In both the initial round of comments and the public roundtables, Internet service providers (“ISPs”) and their representatives pointed to the growth of the Internet economy in the years since the 1998 passage of the DMCA as evidence that the immunity granted to ISPs is working as intended. While true, this growth has come at the cost of the creative community, a result that Congress expressly sought to avoid with the DMCA. In enacting the DMCA, Congress sought to allow the Internet to grow while also protecting copyright owners from rampant piracy. 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.”¹ But section 512, as interpreted by the courts, has allowed ISPs to develop user-driven platforms that turn a blind eye to massive copyright infringement and then receive a free pass when

¹ 144 Cong. Rec. 18774 (1998) (statement of Rep. Goodlatte).

they're taken to court. This has enabled a massive transfer of wealth from the creative sector to the tech sector. It has been estimated that \$50 billion a year has been reallocated from content creators to technology platforms.² The labor of authors and other individual creators supports the growth of our economy and fortifies the intellectual and imaginative welfare of our citizens. When authors' works are stolen without consequence to those who facilitate infringement for commercial gain, their financial ability to ply their trade is compromised.

We address the Copyright Office's inquiries below, limiting our comments to issues not directly addressed in, and refer the Copyright Office to, the Authors Guild's comments filed on April 1, 2016 (the "First Round Comments").³

CHARACTERISTICS OF THE CURRENT INTERNET ECOSYSTEM

1. How should any improvements in the DMCA safe harbor system account for differences among the categories of content creators and ISPs?

We are sympathetic to the fact that some ISPs, namely small companies and start-ups, may not be able to afford to implement the filtering mechanisms employed by some larger Internet companies. These smaller companies, if acting in good faith, may face the increased burden of policing their sites for infringements and responding to takedown notices. But filtering technology is not beyond the reach of many Internet companies, even now, and is only likely to become less expensive over time. It might also make sense to provide smaller-revenue ISPs a more generous window of time to act "expeditiously"⁴ to remove infringing material upon receipt of a takedown notice, but that should not require a change to the law, as courts might consider the abilities of an ISP in determining whether the ISP acted expeditiously. It is also possible that smaller ISPs that are not at a high risk of hosting or transmitting infringing content could be exempt from notice and take-down, discussed below in response to question 12.

Any improvements aimed at accounting for differences among service providers should not look only to the size or revenue of ISP; the primary consideration should be the risk

² See Jonathan Taplin, "Forget AT&T. The Real Monopolies are Google and Facebook." THE NEW YORK TIMES, Dec. 13, 2016, available at <https://www.nytimes.com/2016/12/13/opinion/forget-att-the-real-monopolies-are-google-and-facebook.html> ("In the past decade, an enormous reallocation of revenue of perhaps \$50 billion a year has taken place, with economic value moving from creators of content to owners of monopoly platforms.").

³ See The Authors Guild, Inc. First Round Comments in Response to the Copyright Office's Request for Public Comments on the Digital Millennium Copyright Act Safe Harbor Provisions, Apr. 1, 2016, COLC-2015-0013-86011, available at <https://www.regulations.gov/document?D=COLC-2015-0013-90422>.

⁴ § 512(d)(1)(B).

its platform poses to copyrighted content, which can be determined by looking not only to the revenue of an ISP or the number of users of its platform, but how it holds itself out in the market and whether it traffics in user-posted third-party content.

With respect to content creators, as explained in our First Round Comments and in Mary Rasenberger's statements at the New York City Section 512 Public Roundtable,⁵ individual creators are situated very differently from corporate rightsholders in their ability to utilize notice and takedown or to bring a claim. In general, measures such as voluntary agreements with the major ISPs are not available to individual authors and other creators.

2. How should the interests of individual Internet users be factored into the operation of section 512?

From its beginnings in 1912 the Authors Guild has worked to defend the First Amendment rights of writers or all stripes and opinions. As an organization dedicated to protecting the free flow of information, we value an open Internet and the discourse and exchange it enables. Individual Internet users benefit immensely from their ability to use the Internet to access and distribute information and expression. But there is no First Amendment interest in stolen material.

Technology firms make much of the relatively few, isolated instances where takedown notices (usually automated) mistakenly sweep in fair uses of copyrighted works. They suggest that these erroneous takedown notices are rampant and justify curtailing the ability of all rightsholders to enforce their rights. But the fear of false or incorrect takedowns is a red herring. The number of works improperly taken down is infinitesimal compared to the millions of instances of infringement that occur daily and contribute to the very serious devaluing of authors' work and their ability to make a living from their trade.

In any event, the access and distribution interests of Internet users are already adequately protected by both the counter-notice provisions of § 512(g) and § 512(f)'s prohibition on misrepresentation, as discussed below.

⁵ See Transcripts of U.S. Copyright Office Section 512 Public Roundtable, May 2-3, 2016, Statements of Mary Rasenberger, Authors Guild, available at <https://www.copyright.gov/policy/section512/>.

OPERATION OF THE CURRENT DMCA SAFE HARBOR SYSTEM

- 3. How should the divergence in stakeholders' views be considered by policy makers? Is there a neutral way to measure how effective the DMCA safe harbor regime has been in achieving Congress' twin goals of supporting the growth of the Internet while addressing the problem of online piracy?**

As the Copyright Office has observed, and as was abundantly clear in the public roundtables it hosted in May 2016, the technology sector and the creative sector are polarized when it comes to the question of whether the safe harbor regime is working as Congress intended. It is abundantly clear that, of Congress' twin goals, only one has been met: the Internet economy flourishes while online piracy festers.

While the principle of compromise might lead one to believe there is a third way somewhere between each sector's position, making law is not about compromising between stakeholders, it's about doing what's right—creating law that is in the nation's overall interests. Section 512 has been interpreted by courts in a manner that has allowed piracy to continue to flourish, providing massive returns at minimal cost to ISPs. The result is that the creative economy has been crippled at the expense of the Internet economy, and one main reason is the rampant use of copyrighted content without compensation. Congress is in a position to remedy this by amending section 512 in the manner described in our First Round Comments so that the platforms which traffic in infringement and pirated material (and profit from it) bear a greater share of the burden for keeping such material out of circulation.

- 4. What are the most significant practical barriers to use of the notice-and-takedown and counter-notice processes, and how can those barriers best be addressed?**
- 6. Participants also noted disincentives to filing both notices and counter-notices, such as safety and privacy concerns, intimidating language, or potential legal costs. How do these concerns affect use of the notice-and-takedown and counter-notice processes, and how can these disincentives best be addressed?**

The most significant practical barriers for authors using the notice-and-takedown process are (a) difficulty locating ISPs' takedown forms and contact information for designated agents and (b) the lack of a standardized takedown form. Both of these problems could be solved if the Copyright Office were to offer an official, standardized takedown form in a prominent place on its website.

Authors and other copyright holders encounter a host of troubles when trying to send takedown notices. As a threshold matter, many of them have difficulty finding the takedown forms provided by ISPs and locating the contact information for designated agents, many of which tuck away their forms and designated agent contact information in areas of their website that are difficult to navigate to. ISPs engaging in this game of hide-the-ball are technically abiding by the letter of the law, because section 512 only requires ISPs to provide takedown information “on its website in a location accessible to the public.”⁶ To remedy this, Congress should require that, in order to receive safe harbor protection, an ISP must host the information required of it by the statute in a conspicuous location on its website.

Further, many authors are frustrated by the fact that different ISPs utilize different DMCA takedown forms, some of which oblige rightsholders to provide information beyond that required by the statute. The creation of an official, standardized takedown form, compliant with the § 512(c)(3) notification elements and hosted on the Copyright Office website, would help remedy this. Congress should also clarify that ISPs may not require any information beyond the notification elements enumerated in the statute.

5. Are changes to the section 512 timeline needed? If so, what timeframes for each stage of the process would best facilitate the dual goals of encouraging online speech while protecting copyright holders from widespread online piracy?

The Guild recognizes that mistaken or bad-faith takedown notices could be (and, though rarely, *have been*) used to chill online speech. The first part of the timeline for counter-notification is well-tailored to protecting users’ First Amendment interests while also respecting the copyright holder who sent the original takedown notice. In certain cases, however, 10-14 days could indeed impinge on speech.

The requirement that the copyright holder must notify the ISP within 10 days that she “has filed an action seeking a court order” also places an unrealistic burden on the copyright holder to find a lawyer, raise funds, if necessary, and file an action in that amount of time. Congress should instead require that the copyright holder, in order to prevent replacement, notify the ISP by a sworn statement of an *intent* to file an action within a shorter amount of time—say, 5 days—from being notified that the work is subject to a counter-notification. Statements of false intent would be disincentivized by the misrepresentation provisions of § 512(f).

⁶ § 512(c)(2).

- 7. Some participants recommended that the penalties under section 512 for filing false or abusive notices or counter-notices be strengthened. How could such penalties be strengthened? Would the benefits of such a change outweigh the risk of dissuading notices or counter-notices that might be socially beneficial?**

False notices filed in bad faith in order to chill speech or block the free flow of information are a threat to an open Internet and should be penalized. Section 512(f) has become an effective tool against bad-faith takedown notices, and so we do not believe the penalties need to be strengthened. If Congress does nevertheless consider strengthening the penalties under section 512, it must take utmost care not overreach and dissuade legitimate use of the notice-and-takedown system. False notices, though few, are largely the result of automization of the takedown process. Takedown automization—an innovation rendered necessary by the overwhelming volume of infringing content available on the Internet—is an essential tool in the fight against digital piracy, and its use should not be dissuaded. Accordingly, any strengthening of the section 512 penalties should only target rightsholders acting in bad faith. A provision that penalizes automated but mistaken notices or good-faith notices that do not “substantially” comply with the notification elements would dissuade individual creators from good-faith notices, further jeopardizing their interests in the digital economy.

POTENTIAL FUTURE EVOLUTION OF THE DMCA SAFE HARBOR SYSTEM

- 9. Many participants supported increasing education about copyright law generally, and/or the DMCA safe harbor system specifically, as a non-legislative way to improve the functioning of section 512. What types of educational resources would improve the functioning of section 512? What steps should the U.S. Copyright Office take in this area? Is there any role for legislation?**

As more and more creative content is distributed and consumed in the online environment, copyright education and media literacy training are essential to raising future generations to respect creative property. The Copyright Office could work with the Department of Education to develop a copyright curriculum that would be a required part of K-12 public education. Sufficient appropriations should be allocated to allow for the development and implementation of the copyright curriculum. Educational resources like forms and checklists should be incorporated into the curriculum to ensure students understand the roles of ISPs, notice senders and counter-notice senders in the DMCA regime, that they are themselves copyright holders, and what to do if they, as ISP users, receive notification from an ISP that they have posted content subject to a takedown

notification.

10. How can the adoption of additional voluntary measures be encouraged or incentivized? What role, if any, should government play in the development and implementation of future voluntary measures?

11. Several study participants pointed out that, since passage of the DMCA, no standard technical measures have been adopted pursuant to section 512(i). Should industry-wide or sub-industry-specific standard technical measures be adopted? If so, is there a role for government to help encourage the adoption of standard technical measures? Is legislative or other change required?

Effective, reasonably priced filtering and other anti-piracy technologies are available today, but they are not available to individual creators, and their adoption has been voluntary. In practice, this means that anti-piracy technology is not deployed as broadly as it ought to be. Moreover, individual authors are often left out of the equation. These measures are often scaled to the needs of corporate copyright holders and are implemented by ISPs only by voluntary agreement, which individuals are not party to and lack the ability to conduct on their own. The Authors Guild would support voluntary measures if individual creators—who have been left out of voluntary measures to date—could be brought to the table and be part of the negotiating process, and if adopted solutions would cover them as well as corporate rightsholders.

“Standard technical measures” as defined in § 512(i) have not yet been adopted because the statute requires that they be adopted pursuant to a “open, fair, voluntary, multi-industry standards process”⁷ and the tech sector has not had sufficient incentive to participate in such a process, nor has such a process been facilitated by a convening body. The government, particularly the Copyright Office or the United States Patent & Trademark Office, can play a crucial role here by becoming that convening body. Since the case law has largely favored ISPs, there has been little motivation on the part of the tech sector to convene. A government agency could also ensure that individual creators are part of the standards process and that any resulting content-identifying technology remains affordable and practical for individual creators, not just corporate copyright holders. Legislation would not be required because the statute contemplates a “voluntary” standards process.

The anti-piracy technologies that have been developed are not available to individual creators. For instance, in the book publishing sector, the text-uploading platform Scribd has developed a content identification system called BookID that could be adopted more

⁷ § 512(i)(1)(B).

broadly throughout the industry to help authors and publishers identify infringing works. We understand that BookID was originally developed to save server space by ensuring that identical documents would not be hosted twice, so that there would be only one hosted copy of any given document uploaded. As we discussed in our First Round Comments, matching technologies like BookID could be adopted as standard technical measures and could be a key component of a successful notice-and-staydown regime: once a service provider receives a takedown notice for and identifies a particular work, the ISP could employ matching technology to identify subsequent infringing copies of a work.

Given the variety of formats copyrighted content is distributed in, industry-specific standard technical measures would most likely need to be adopted.

12. Several study participants have proposed some version of a notice-and-stay-down system. Is such a system advisable? Please describe in specific detail how such a system should operate, and include potential legislative language, if appropriate.

The Authors Guild has been a staunch advocate of a notice-and-staydown regime. We laid out the case for staydown in a 2015 letter to members of the House Judiciary Committee⁸ and in our First Round Comments, where we discussed how a staydown regime could work:

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.

Recognizing that notice and staydown might be more difficult for smaller ISPs to implement and that many ISPs only rarely, if ever, host, transmit or link to infringing material on their services, the Authors Guild would not oppose limiting the application of

⁸ See "Guild to Congress: Close Internet Piracy Loopholes, Implement 'Notice and Stay-Down,'" July 10, 2015, available at <https://www.authorsguild.org/industry-advocacy/guild-to-congress-close-internet-piracy-loopholes-implement-notice-and-stay-down/>.

notice and staydown requirements to ISPs that regularly traffic in and benefit from third-party content. User-generated content platforms, for instance, would be subject to notice and staydown, while a retailer that only allows users to post comments about the company's products or services and does not permit the uploading of third-party content might not.

Another way to address this issue would be to have notice and staydown apply only to those service providers who have received "X" or more notices, with "X" being a significant number; or to have it apply to ISPs that have received actual red flags knowledge (as defined in the manner described in response to question 10 below) of significant infringement occurring on their services.

13. What other specific legislative provisions or amendments could improve the overall functioning of the DMCA safe harbor regime? Please be specific, including proposed statutory language as appropriate.

Safe harbor immunity requires that an ISP removing infringing content in each of three 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." As we discussed in detail in our First Round Comments, 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 the location of specific instances of infringing activity, with the result that the type of knowledge of specific infringing activity required under both the actual knowledge and red flags awareness standards looks very much like the type of information required in a DMCA-compliant takedown notice. Congress can remedy this state of affairs by clarifying what exactly constitutes "red flag" knowledge, as compared to actual knowledge, in a way that includes awareness of massive infringement on one's service.

Specifically, we recommend adding a definition of "awareness of facts or circumstances from which infringing activity is apparent" to either section 101 of the Copyright Act or section 512(k) to clarify that the standard includes awareness of infringement in general, and not just actual location-specific knowledge of each item of infringing content.

Although it is clear that Congress had intended this broader definition from the statutory language itself (e.g., the use of "infringing activity" rather than "*the* infringing activity" and the fact that the phrase must mean something different than actual knowledge), as well as from the intent of the statute (to provide safe harbor coverage where ISPs cooperate to keep mass piracy off of the Internet), the predominate case law now requires actual, item- and location-specific knowledge. Such a clarification would mean that ISPs

that knowingly make their services available for infringing activity, and are aware that significant amounts of infringement are taking place on or through their services (regardless of whether they know of specific instances, located at specific URLs) would be incentivized to engage in notice and staydown. This solution would repair section 512 so that it is able to function in the manner Congress intended.

Secondly, a definition of “actual knowledge” should be added to clarify that it means that the ISP actually knows the infringing is occurring but does not require knowing exactly where and when the infringement is occurring. This would bring “actual knowledge” as used in section 512 more in line with its standard common law meaning, and would provide the standard with a different application than the requirements for a takedown notice under section 512(c)(3).

By adding the above two definitions, it would be clear that the three separate requirements in sections 512(c)(1)(A)-(C) and (d)(1)-(3) are three independent standards.

Third, as we’ve stated in our First Round Comments and at the Public Roundtables, Congress should address the lack of clarity surrounding the meaning of the “financial benefit” and “right and ability to control” standards under section 512(c)(1)(B). The courts have valid concerns regarding how to apply section 512 in several areas (here, they have been led to a tortured interpretation of the meaning of “right and ability to control” due to a perceived conflict with § 512(m)). From a statutory interpretation perspective, however, there is a certain inconsistency in courts’ inability to reconcile these provisions in section 512 and apply the plain language and traditional understanding of the “financial benefit” and “right and ability to control” standards, taken from the common law standard for vicarious liability, while they have no trouble collapsing red flags and actual knowledge.

Specifically, we believe that Congress should clarify that an ISP has the “right and ability to control” when (i) infringing material resides on its system, and (ii) the ISP retains the right and has the ability to remove or block infringing content. This is the manner in which the same standard is interpreted under the vicarious liability standard for secondary copyright infringement. Indeed, it is difficult to imagine how one controls copyright infringement better than by kicking the infringer or the infringing material out of the dance hall or flea market—or in the online world, off the service. This could be achieved by adding a definition of “right and ability” to control that expressly includes the right and ability to remove or block infringing content.

Fourth, the Authors Guild would also like to see an amendment to section 512(c)(3) to clarify that a “representative list” means what it says—a representative list. The copyright owner should be allowed to provide a list of samples of works it owns that have been infringed, and not be required to list of each item by title and URL. When Congress

enacted section 512 with the DMCA, it understood that rightsholders would not have the tools or the same access as the ISP to material on the ISP's platform that would enable it to locate all infringing copies of its works, but that that burden should fall on the ISP. As the legislative history states, when "the infringing nature" of the site "would be apparent from even a brief and casual viewing, safe harbor status . . . would not be appropriate."⁹

Courts have largely ignored Congress' clear intent to put some of the burden on ISPs to locate infringing works once they have been made aware that infringement of certain works is occurring on their services. As described above, the ISP has a far greater ability to locate infringing material on its own site once it knows to look for it than does the rightsholder. Courts have been led down this path by section 512(m)(1), which states that service providers should not be required to monitor their services or seek "facts indicating infringing material, except to the extent consistent with standard technical measures." As such, in addition to adding the above definitions, Congress should enact an amendment to section 512(m) that clarifies its interaction with the rest of section 512. This could be accomplished by amending the definition of "standard technical measures" in section 512(i)(1)(B) to (a) delete the requirement for a formal multi-industry standards process because, as explained above, no standards process has been put in motion and there is no incentive for ISPs to participate in one, and (b) add that the then-current industry standard (i.e. commonly used and readily available) filtering technologies fall under the definition of "standard technical measures" regardless of whether they are developed from a standards-setting process.

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We thank the Copyright Office for the opportunity to participate in this important conversation about the proper balance of our Internet piracy laws, and we are available for consultation.

⁹ H.R. Rep. No. 105-551 (Part I).