

**KERNOCHAN CENTER FOR LAW, MEDIA AND THE ARTS
COLUMBIA LAW SCHOOL**

**BEFORE THE
U.S. COPYRIGHT OFFICE**

Section 512 Study

Docket No. 2015-7

**Comments of the Kernochan Center for Law, Media and the Arts
Columbia Law School**

Introduction

The Kernochan Center for Law, Media and the Arts appreciates the opportunity to respond to the Notice of Inquiry, Request for Additional Comments concerning the study of section 512 published by the U.S. Copyright Office (NOI), 81 Fed. Reg. 216, 78636-42 (November 8, 2016).¹

The Kernochan Center for Law, Media, and the Arts at Columbia Law School is one of the leading centers for intellectual property research in the United States. Its faculty and staff dedicate their research and writing to copyright, trademarks and related areas as they concern traditional and emerging media, entertainment and the arts. The Center offers students an in-depth program of instruction, lectures, internships and externships while providing symposia, lectures, research studies and publications to the broader legal community. Founded as the Center for Law and the Arts, it was renamed in 1999 to honor Professor John M. Kernochan, its founder and a pioneer in teaching copyright in American law schools.

¹ Research assistance from Timothy Hamilton LL.M. '17 and Alexandra Mironoff J.D. '17 is greatly appreciated.

We hope our answers below to certain of the questions posed in the NOI will reinforce some of the points we made in our initial comments in November, and also convey our thoughts on the issues brought up at the Roundtable discussions this summer and reflected in the new questions posed below.² We are concerned that the robust Internet that we have today has come at a cost, disproportionately borne by the creators whose works are often exploited for profit by service providers. When §512 was adopted, the goal was to create balance between the needs of authors hoping to use the new forum as a creative outlet, and the desire of the technology community to grow the medium.³ One of the questions posed in this Request for Additional Comments is how one could impartially determine the success of §512. While we do not have an answer to that specific query, it does seem that if one side of the table almost uniformly believes the law to be working and the other side almost uniformly disagrees, that balance has not been reached.

1. (a) There is a great diversity among the categories of content creators and ISPs who comprise the Internet ecosystem. How should any improvements in the DMCA safe harbor system account for these differences? For example, should any potential new measures, such as filtering or stay-down, relate to the size of the Internet Service Provider or volume of online material hosted by it? If so, how?

We find it difficult to answer this question because we do not know the burdens and costs involved with acquiring and implementing a system which would automatically identify and remove infringing material (or prevent its posting in the first instance). If the costs are not high, then every ISP should be treated equally and, no matter the size, should be required to engage such systems. These systems could be deemed “standard technical measures,” and their implementation would not clash with the absence, under §512(m), of a duty to monitor.

Creating a tiered system of service providers: how are the tiers to be set? What defines a filtering-exempt small provider relative to a larger provider who would be subject to a duty to filter? Would the size of an Internet Service Provider be determined based on the volume of material that is transmitted through the site? Would it depend on the number of staffers (an Internet Service Provider could have only one or two staffers and few viewers, but transmit copious amounts of pirated material)? Subscribers? Views? It is impossible for us to determine if ISPs should be subject to differentiated regulations regarding filtering based on size when that term is not defined. Also, one would have to investigate whether a tiered system would merely incentivize larger providers to create a series of smaller entities in order to avoid having to implement technologies which might detract from their profits.

(b) Should efforts to improve the accuracy of notices and counter-notices take into account differences between individual senders and automated systems? If so, how?

² In this submission, we provide answers to questions 1-2, 8-12, and 14-15 of the NOI.

³ See H.R. REP. NO. 105-551, pt. 2 at 23 (1998).

It can be very difficult for individuals to file notices of infringement when they find their copyrighted works posted online without their authorization. This is due to multiple factors including the inability to find the information required for an effective notice, which can often be difficult to locate on a host site; the inability to understand the requirements presented; and a lack of knowledge of the proper language required to draft a compliant notice.⁴ Furthermore, because there are often many works being exploited against the wishes of the creator (often multiple copies of the same work repeatedly posted even after removed), it can be an overwhelming task for many individual creators to send out the copious number of notices needed to stem the tide of infringement. Those issuing counter-notices may not have the volume concerns that notice-providers have, but they, too, are sometimes crippled by the often convoluted explications of what is required in a counter-notice.⁵ Because individual authors do not have access to the automated systems of large content-creators, they are at a disadvantage.⁶ We believe that a standard notice (and

⁴ *United States Copyright Office Public Roundtable on Section 512 in New York, Session 2*, (May 3, 2016), available at https://www.copyright.gov/policy/section512/public-roundtable/transcript_05-03-2016.pdf (hereinafter NYRT2) at 46-47 (remarks of Maria Schneider, Musician) (“To me, the thing that could solve everything is if there were requirements, standardized requirements and questions on the upload side, because right now on YouTube and most of these sites, they don’t ask you anything, nothing. On the download side, you get asked a ton.”); *U.S. Copyright Office Roundtable on Section 512 of Title 17 in San Francisco, Session 1*, (May 12, 2016) available at https://www.copyright.gov/policy/section512/public-roundtable/transcript_05-12-2016.pdf (hereinafter SFRT1) at 121-122 (remarks of Deron Delgado, American Association of Independent Music) (“And also talking about another challenge just in general, for the smaller labels, you know, I even -- just before I came here, I searched DMCA takedown notice. I got a lot of PDFs, a lot of legalese, a lot of everything else. But there wasn't a simple here, go here, click it, click this button and send a takedown. I got one. Most of the process -- it was a nine-step process finding out ISPs, finding out who the host is, finding out all this stuff. I mean, if you're just a bedroom producer that puts his music out on -- you know, via some of these distributors, then it's so beyond what they're capable of as opposed to just, hey, here you go, type in my information, upload my content and find it.”).

⁵ SFRT1, *supra* note 4, at 76 (remarks of Alex Feerst, Medium) (“Yeah, so we -- and so we have a policy page that sets things out as clearly as we can with as nice a font as we can provide. And we email, as you're saying, a link to that and information about the counter-notice procedure. I think, like many, we find that it's deeply under-utilized. People are intimidated. Most of the folks who are rewriting or who are parodying or who have simply written something that's critical, are afraid of the consequences of it if they're getting smoked out.”).

⁶ *United States Copyright Office Public Roundtable on Section 512 in New York, Session 1*, 75 (May 2, 2016), available at https://www.copyright.gov/policy/section512/public-roundtable/transcript_05-02-2016.pdf (hereinafter NYRT1), at 18 and 75 (remarks of Natalie Madaj, National Music Publishers Association) (“Yeah, so the resource level is fairly low. I am the only attorney in the office that works on the program and we have one intern who will help me pull URLs since, like I said, we're doing that all manually and she spends a lot of her time just searching the Internet for infringement uses... So I think NMPA probably falls somewhere between the level of resources we're able to contribute between individual creators and larger organizations and that we do not use the automated processes. We've attempted to sign up for Google's trusted content provider tool that allows you to send bulk takedown notices to be removed from their search. But the formatting process we found was very difficult and time consuming, particularly when we're in

counter-notice) form, drafted by the Copyright Office with significant input from creator and Internet Service Provider representatives, would allow for a streamlined process which would ultimately benefit both parties. Users would have a clear, easily available template which they knew would comply with the notice (or counter-notice) requirement, and ISPs would need to spend less time reviewing and rejecting notices for inaccuracies. We are confident that meetings with the Copyright Office would be a productive way of addressing the needs of all parties.

2. Several commenters noted the importance of taking into account the perspectives and interests of individual Internet users when considering any changes to the operation of the DMCA safe harbors. Are there specific issues for which it is particularly important to consult with or take into account the perspective of individual users and the general public? What are their interests, and how should these interests be factored into the operation of section 512?

We take this question as an opportunity to note the unique challenges individuals and small businesses face in removing materials posted without permission. A central complaint at both the New York and San Francisco roundtables was the time-consuming nature of searching for infringing activity and then sending notices to the ISPs hosting the material.⁷ Creators who operate individually often have to make the choice of policing the Internet or being creative.⁸ This diminishes the nation's creative output and

an office of people with very limited resources again.”; *id.* at 85 (remarks of Alisa Coleman, Abcko Music and Record) (“I wanted to make sure that everybody understands that when it comes to the music sector, in order to take advantage of those automated takedown services, you have to have agreements with those services. You can't just have access to YouTube's back end unless you have a contract with them in order to get to see their CMS management services.”).

⁷ *Id.* at 25 (remarks of Eugene Mopsik, American Photographic Artists) (“The number -- the amount of resources that photographers have to dedicate to notice-and-takedown, if you wanted to try to adequately police your works on the Internet, this would be a full-time job. And most of our practitioners are one- and two-person studios. They simply don't have the manpower.”); *id.* at 130-131 (remarks of Hillary Johnson, Author) (“I'll just give you an example of the most egregious situation, which is a particular Facebook user who's probably published my book on his Facebook page three times over in the last 10, 15 years. I have started initially by sending takedown notices to Facebook and what I learned was it took about three days of my time to satisfy Facebook's demands to prove that I was the author, that I owned the copyright.”); *id.* at 164 (remarks of Perry Bashkoff, Warner Music) (“And the manpower hours to spend protecting the rights and protecting the works of our artists and our talent, it is simply not manageable.”); SFRT1, *supra* note 4, at 120 (remarks of Deron Delgado, American Association of Independent Music), *id.* at 123 (remarks of East Bay Ray, Musician) (“And the takedown system is so burdensome that I've given up. I'm not the first person given up. I mean, everyone I know that's in the independent music scene. And it's just so burdensome. And some people challenge that, and I fear, you know, it's burdensome for small companies -- ISPs and such.”).

⁸ SFRT1, *supra* note 4, at 24 (remarks of T.J. Stiles, Author) (“So as a result of piracy, we spend a lot of our time, which is a direct cost to creation -- it's a direct cost to our income -- scouring the entire internet looking for piracy.”); *id.* at 120-1 (remarks of Deron Delgado, American Association of Independent Music) (“And so we're still playing this whack-a-mole today, every day, which is costing money personally, about 10 to 12 hours of my time that has been spent on just managing those takedowns.”); NYRT1, *supra* note 6, at 62 (remarks of Prof. Sandra Aistars, Antonin Scalia

ultimately the diversity of creative materials available. In addition, individual creators are often less knowledgeable about the notice and take-down procedure and have difficulty filing acceptable notices due to the complicated requirements, beyond those required by §512(c)(3)(A), imposed by various ISPs.⁹

In light of the recent Second Circuit ruling in *Lenz v. Universal Music Corp. et. al.*, it appears that creators will, in some jurisdictions, be asked to do a fair use analysis of the allegedly-infringing material before issuing a take-down notice.¹⁰ This will further complicate the already heavy burden on individuals, as a fair-use analysis is both complicated and time-consuming.¹¹

Finally, if individuals or small businesses are served with counter notices, the expenses involved with litigation often deter creators from pursuing the matter further.¹² We

School of Law)(“I’ll just emphasize that the artists who we work with are constantly making a decision on a daily basis whether to create or to police and enforce their copyright interests.”).

⁹ An example of increased requirements can be found on many websites (*see e.g.* Spotify (<https://www.spotify.com/us/legal/infringement-form/>), which requires a description of how and why you believe the content in question infringes, going beyond §512(c)(3)(A)(v)’s requirement of a mere statement of good faith belief of infringement; Google requires those seeking to send a take-down notice to first answer a questionnaire

(<https://support.google.com/legal/troubleshooter/1114905#ts=1115648%2C1115846%2C1117010%2C1697877%2C1620446>) before taking them to the Notice submission page. NYRT1, *supra* note 6, at 57 (remarks of Lisa Shaftel, Graphic Artists Guild)(“Creators have found that they can’t satisfy the requirements from a lot of the ISPs in their takedown notices. In particular, artists have said that many ISPs have required that they prove copyright registration as part of their takedown notice or other means of proving ownership of the image. The majority of visual creators, artists, photographers don’t register their works and will not register their works. If they did, the Copyright Office registration system would be absolutely overwhelmed.”); *id.* at 71-2 (remarks of Prof. Stephen Carlisle, Nova Southeastern University)(“And I will tell you this. If you go to Google’s filing with the Copyright Office and say here is where to send your copyright takedown notice, if you copy that and paste that into your browser, you land on a page that does not take you to a takedown form. It takes you to a page which is several different pages removed from ever getting to the takedown form.”); SFRT1, *supra* note 4, at 67-8 (remarks of Keith Kupferschmidt, Copyright Alliance)(“If I could answer your -- second part of your question, which is, you know, what’s the biggest concern here, which is the small creators. It is the -- that -- you know, we did a survey of our creators that was referenced earlier. And it showed that 68 percent of the small creators, individual creators, we represent do not use the notice-and-takedown process. They have never heard of it. It was too much effort. It was too difficult. They were skeptical it wouldn’t do anything.”); *id.* at 121 (remarks of Deron Delgado, American Association of Independent Music).

¹⁰ 815 F.3d 1145 (9th Cir. 2016).

¹¹ *See e.g.*, NYRT1, *supra* note 6, at 25 (remarks of Eugene Mopsik, American Photographic Artists) (“The *Lenz* decision will have a chilling effect on the bringing of a notice-and-takedown because our photographers couldn’t evaluate fair use prior to that and, going forward, I don’t see how they stand a chance.”)

¹² SFRT1, *supra* note 4, at 18 (remarks of Devon Weston, Digimarc) (“[...] when you’re working across hundreds of thousands of, you know, notice and takedown over thousands of websites, the inefficiencies just stack up. And it becomes impossible for a small rightsholder to manage that kind of enforcement on their own and necessary to engage with a group like ours, which of course comes

support the creation of a small claims court to adjudicate these matters quickly and in a cost-effective manner.

8. *For ISPs acting as conduits under section 512(a), what notice or finding should be necessary to trigger a repeat infringer policy? Are there policy or other reasons for adopting different requirements for repeat infringer policies when an ISP is acting as a conduit, rather than engaging in caching, hosting, or indexing functions?*

Internet Service Providers that qualify for safe harbor protections under §512(a) have much less of a role in the dissemination of material than their counterparts under §512(b), (c) or (d). Nevertheless, ISPs should terminate the accounts of all users, who repeatedly use an ISP's network to transmit infringing material. The courts have not agreed on what is necessary to trigger a repeat infringer policy. In *Capitol Records, LLC v. Escape Media Group, Inc.*, the Southern District of New York ruled that implementing a system which blocked copyright owners from informing Escape of infringement on its site illustrated that Escape was not applying its termination policy in a reasonable manner (since presumably it could not determine what materials were infringing and who posted them if it refused to receive DMCA notices.)¹³ In another case, the Ninth Circuit held a termination policy deficient when the providers failed to implement the policy despite having actual or red flag notice of infringement.¹⁴ But

at a price that outstrips the individual rightsholder's ability to keep up with that. Additionally, I think the counter-notice system is broken. So the idea that counter-notice can be issued without any sort of discrimination in terms of whether there's any validity to it, that the rightsholder has to respond by bringing a federal lawsuit -- you're left with the choice to either, you know, take on an extremely costly and probably ineffective federal lawsuit versus taking no action at all and the content being re-enabled. So we think it's high time that it changes.”); *id.* at 190 (remarks of Ellen Seidler, Fast Girl Films) (“It’s happened multiple times, actually, but on YouTube, sending a takedown notice for a full-length copy of a film only to receive a counter-notice claiming fair use, and because we don’t have the resources to go to court to enforce the takedown, within 10 days, the full copy of the movie is back online.”); *id.* at 285-6 (remarks of Jeff Sedlik, PLUS Coalition) (“Just to give you a real world example, Online Auction House has thousands of sellers selling t-shirts of infringing work, and they are -- it's obvious that it's infringing work, objectively obvious that it's infringing work. Individual creators are -- and rightsholders are filing DMCA takedowns, and the auction house takes one down at a time, but they know that it's unlikely that any one of those individual creators is going to bring a suit because they can't afford to do so. And so they allow these infringements to continue, these sellers to continue.”); NYRTI, *supra* note 6, at 158 (remarks of Rebecca Tushnet, Organization for Transformative Works) (“Small creators do often decline to interact with the legal system.”).

¹³ No. 12-CV-6646, 2015 WL 1402049, at 58 (S.D.N.Y., Mar. 25, 2015).

¹⁴ *Perfect 10, Inc. v. CCBill LLC and Cavecreek Wholesale Internet Exchange d/b/a CWIE*, 488 F.3d 1102, 1111 (9th Cir. 2007). The court ruled CCBill was not eligible for protection under §512(d) and that it did not have enough information to determine whether CCBill met the safe harbor requirements of §512(a). It remanded to the District Court for further investigation. The court ruled that, provided defendant CWIE met the threshold requirements of §512(i), it did qualify for safe harbor under §512(c). In our answer to Question 14 below, we note that as interpreted by the courts, there is very little difference between actual knowledge and “red flag” knowledge. Thus, infringers tend to have their accounts terminated only when an ISP has very specific knowledge of infringement.

other courts have not held ISPs to such a standard. In one case, the Central District of California has ruled that ISPs may terminate a user's account one day and reinstate the user the next and still be considered to have a reasonable repeat-infringer policy.¹⁵ Currently, there seems to be no clear standard articulating circumstances that trigger an ISP's obligation to terminate a subscriber. Nor it is clear when a subscriber, once excluded from a network, may rejoin that network, as this is not mentioned in §512(i)(1)(A). Perhaps this section needs to be amended to address these issues.

9. Many participants supported increasing education about copyright law generally, and/or the DMCA safe harbor system specifically, as a nonlegislative 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?

We commend the Copyright Office's educational efforts of the past few years. The increased participation in World IP Day; comprehensive outreach to elementary and high school students; and the Office's new, easier to navigate website have helped educate the public. But there is more that can be done. For example, as we mentioned in our answer to Question 2 above, the recent Ninth Circuit decision in *Lenz* indicates that creators may have to conduct a preliminary fair use analysis prior to sending a takedown notice under §512(c)(1)(C).¹⁶ While we are concerned that the decision will unreasonably increase the burdens on individual copyright owners, we understand that it may be adopted (or has been adopted in some form) in other circuits. Perhaps the Office could produce a guide for non-lawyers discussing how to conduct such an analysis.

We do not believe this is an area ripe for legislation.

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?

We will answer questions 10 and 11 together as we feel they are closely related. We applaud any efforts to incentivize and assist in the creation of technical capabilities which would enable more service providers to review postings for unauthorized material

¹⁵ *Arista Records LLC v. Myxer Inc.*, No. CV 08-03935, 2011 WL 11660773, 21 (C.D. Cal. Apr. 1, 2011).

¹⁶ *Lenz v. Universal Music Corp., et. al.*, 815 F.3d 1145, 1151 (9th Cir. 2016).

and remove the necessity of human review in the majority of cases. Ideally, an automated system could detect how much of a creative work was incorporated into a post and automatically allow the ISP to post those with, say, a match under 90% while saving for human review those with a higher rate of similarity. Service providers would avail themselves of these measures at the time that users upload the content, thus minimizing the need for the notice and counter-notice system and limiting the presence of infringing material on the Internet. Additionally, it would be beneficial to develop a program which would preserve an author's identifying information. Although removal of identifying information might violate §1202(b), it appears to occur all too often (indeed, on some websites, automatically)¹⁷ and is difficult to remedy.¹⁸ The government should encourage technology companies to develop programs which would make such information more difficult to remove from the material the author created.

Fingerprint technologies such as Content ID and Audible Magic already have the capability to identify material once it has been input onto a network. The challenge is to make these types of technologies available to all stakeholders. It is unreasonable to ask individuals to lead the development and enforcement of these systems, however. Many ISPs have more money, experience and access to developers than even an organization representing creators from a specific industry. Under §512(i), Standard Technical Measures means "technical measures that are used by copyright owners to identify or protect copyrighted works." This should not discourage ISPs from leading the way in developing and implementing such systems. .

An answer to Question 11 depends on what developments become available. It is hard to mandate standard protection measures if either none are commonly available or the price is too steep for every copyright holder and service provider to have reasonable access to them. As written, §512(i)(2) incentivizes ISP non-cooperation, because the standard technical measure with which ISPs should not interfere is one arrived at

¹⁷ See, e.g., Jane C. Ginsburg, *The Most Moral of Rights: The Right to be Recognized as the Author of One's Work*, 2016-17 GEO. MASON J. OF INT'L. COMMERCIAL L. 44, 65-72 (2016) available at <http://www.georgemasonjicl.org/wp-content/uploads/2016/08/Summer-Issue-2016.pdf> (discussing the stripping of author-identifying information by various digital platforms).

¹⁸ NYRT1, *supra* note 6, at 57 (remarks of Lisa Shaftel, Graphic Artists Guild) ("Many websites strip the metadata of the images when the images are uploaded. So even when visual creators make the effort to identify themselves in their image files, that data is stripped, especially when uploaded to social media websites. Often the infringers will simply crop the image so that the creator's name is removed from the image or they do the opposite and they include attribution of the artist or the photographer, presuming that if they give attribution to the visual creator, then that makes the infringing use okay."); *United States Copyright Office Public Roundtable on Section 512 in San Francisco, Session 1*, (May 13, 2016) available at

https://www.copyright.gov/policy/section512/public-roundtable/transcript_05-13-2016.pdf (hereinafter SFRT2) at 66-7 (remarks of Jeffrey Sedlik, PLUS Coalition) ("So we unfortunately see the routine stripping of this metadata in the images that are publicly displayed, which means that nobody can get at that information. [...] And then, it's stripped out especially on social media but in other platforms as well. And it is as simple as extracting it in the resize process and reinserting it back into the image to maintain it. Most applications do this.")

“pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process.” If there is no consensus, there can be no standard measure, so there is direct incentive for ISPs to slow the process. It may be necessary to amend this provision to provide incentives for ISPs to cooperate.

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. If it is not advisable, what particular problems would such a system impose? Are there ways to mitigate or avoid those problems? What implications, if any, would such a system have for future online innovation and content creation?

We support a notice and stay down system. As June Besek stated at the New York Roundtable, creators have a very difficult time keeping infringing material off the Internet.¹⁹ She was not the only participant who expressed frustration at the persistent presence of unlicensed material on websites despite the creator’s diligent sending of DMCA notices.²⁰ Having a system whereby an author could effectively stop the posting

¹⁹ NYRT1, *supra* note 6, at 233 (remarks of June Besek, Kernochan Center for Law, Media and the Arts) (“I think the bottom line is content holders can’t get their stuff down. And I don’t mean that service providers aren’t in good faith taking things down as requested, but just the whole time sequence is such that there’s not any time when it actually comes down because it keeps getting back up there. So it really is, you know, to some degree, the whack-a-mole problem that everybody refers to.”).

²⁰ *Id.* at 25 (remarks of Eugene Mopsik, American Photographic Artists) (“[...] the amount of resources that photographers have to dedicate to notice-and-takedown, if you wanted try to adequately police your works on the Internet, this would be a full-time job. And most of our practitioners are one- and two-person studios. They simply don’t have the manpower. And most of the time, you’re chasing a phantom. You can’t even identify who it is you’re after.”); *id.* at 27 (remarks of Richard Burgess, American Association of Independent Music) (“But because we have this one service out there in particular that hides behind -- cynically hides behind section 512 notice-and-takedown, we really just cannot control our content, our works to the extent that we need to in order to be able to build a good business again. And from -- we represent hundreds of independent labels and of course many more hundreds of artists and their content. And I would say that most, if not all of our labels have just really given up sending takedown notices. We have labels with 250 staff and we have labels with five staff who are clearly at the lower end, who simply do not have the resources to be able to send these notices and to be able to police those. But even if you do, it is the whack-a-mole game that you talk about. You just simply cannot win.”); *id.* at 37 (remarks of David Kaplan, Warner Bros) (“I would say that my experience dealing with 512 has been that over the last several years, we’ve seen an increase in efficiency in terms of platforms making it easier to submit notices, submit notices in bulk, faster response times. But there hasn’t been an equal emphasis on efficacy. So I would argue that the fact that you have millions of notices submitted isn’t necessarily a measure of the system working. It could actually be an indication of the system not working because I think that, as four people already say, the words whack-a-mole, that could become a mantra I think for a lot of the content owners who are speaking today.”); *id.* at 86 (remarks of Alisa Coleman, ABKCO Music & Records) (“Oh, there’s a whole cottage industry of people that are these takedown cowboys. [...] But there are also a lot of other companies that don’t have takedown mechanisms in the same way and that we have negotiated independently the ability to

and reposting of unauthorized material would help both authors and ISPs alike. Authors would be able to reduce the amount of time spent searching the Internet for infringing posts, and ISPs would have many fewer notices to review.

How this system would operate ties in with our answer to Questions 10 and 11 above. It is easy to say notice-and-stay-down would be a positive step towards protecting authors' rights. It is even possible to state that the technology is available today to make progress towards that goal. For example, systems such as YouTube's Content ID program can identify proprietary material and provide the rightsholder with choices about how to treat the material.²¹ It would be ideal if an author could authorize such a system to reject automatically any attempt to upload the material. But it is difficult to implement such a program unless websites can have access to these technologies.

There is one more item to note regarding notice-and-stay-down. Opponents argue that a notice-and-stay-down system would limit users' rights to create parodies or other fair uses of copyrighted material.²² Whether a stay-down filter would trap non-infringing copying largely depends on the extent of identity between the source work and the

give them white lists or black lists so that we can say these are the songs and these are the recordings that should be up and these are the ones that shouldn't be up. And there's a catch- 22 with that. We're still playing whack-a-mole with that system and trying to monitor what they're doing. But what we're finding out is that they do have the ability to take things down and keep them down. They do have the ability to work with us to make that happen."); *id.* at 137 (remarks of Marc Ostrow, Law Offices of Marc D. Ostrow) ("And when you look at the statistics of the fact that Google and YouTube, the notices are going up and up, that doesn't even take into account the probably millions of small creators who are themselves small businesspeople, including myself, that don't even send notices because the system is so useless. In terms of counter-notifications, that is a system that in my experience, and those people I know and my clients, very few counter-notices are even served because of the whack-a-mole situation. The person who has the content taken down will simply repost it and over we go again.").

²¹ *How Content ID works*, YOUTUBE, <https://support.google.com/youtube/answer/2797370?hl=en> (last visited February 14, 2017).

²² NYRT1, *supra* note 6, at 76 (remarks of Ellen Schrantz, Internet Association)(" But on the question about stay-down, I think it's critical to emphasize two very fundamental problems that would occur with such a regime. The first being that that improperly shifts the burdens under the DMCA, that under 504(m) and just the legislative history that we see, there is a reason that the identification of infringing content belongs to the rightsholder. And shifting that over would endanger the limitations and exceptions that are critical to copyright law, fair use and others would not be protected under a stay-down regime and would in fact endanger free speech and creativity online."); NYRT2, *supra* note 4, at 187 (remarks of Michael Michaud, Channel Awesome, Inc)("And basically, there are artists and there are also producers who do shows, who do movies on YouTube far bigger than stuff in the current industry. And a lot of them start out with fair use. They rely on fair use to get their work out there, and then they move from there, whether it be cover by Justin Bieber or Lindsey Stirling. And then they do their own stuff and go from there."); *id.* at 237 (remarks of Sarah Feingold, Etsy, Inc)(" I see so many abusive notices to squash free speech and fair use."); SFRT2, *supra* note 17, at 278 (remarks of Joshua Lamel, Re:Create)(" I just think, you know, we're treading into a place that scares me as a user and scares me from the perspective of, you know, allowing copyright law to be used as a harassing tool to prevent a lot of legitimate speech.").

uploaded copy, and the tolerance of the filter for partial replications. The greater the identity between the source work and the uploaded work, the less likely the copy will manifest the kind of authorial contribution that transforms a copy into a fair use. In any event, filtering is only a first step. Additionally, there would need to be human review available for those uses “caught” by the automated review, to analyze whether or not the use was a “fair” one and therefore permitted. Finally, we acknowledge that even with a high identity threshold, such programs could both produce false positives on the one hand, and could fail to block some infringement on the other. But we believe that a carefully-calibrated stay-down filter could minimize the notices and counter-notices that take up time for all stakeholders and would be a start, albeit an imperfect one, to righting the balance between creator and Internet provider.

14. Several study participants mentioned concerns regarding certain case law interpretations of the existing provisions of section 512. Additionally, two new judicial decisions have come out since the first round of public comments was submitted in April 2016. What is the impact, if any, of these decisions on the effectiveness of section 512? If you believe it would be appropriate to address or clarify existing provisions of section 512, what would be the best ways to address such provisions (i.e., through the courts, Congress, the Copyright Office, and/or voluntary measures)? Please provide specific recommendations, such as legislative language, if appropriate.

We are very concerned about judicial interpretation of §512’s red flag standard and the effect it is having on securing creators’ rights.²³ In *Viacom Int’l, Inc. v. YouTube, Inc.*, the Second Circuit eviscerated the red flag language of §512 because it treated the §512(c)(1)(A)(ii) standard as an objective standard of actual knowledge, as opposed to a subjective standard under §512(c)(1)(A)(i).²⁴ The statute’s text sets a lesser level of certainty; it requires only that the ISP be “aware of facts or circumstances from which infringing activity is apparent.” Awareness of “apparent” infringing activity is not synonymous with precise knowledge of specific infringements. As Troy Dow stated at the New York Roundtable, this is also not the standard Congress sought in drafting §512.²⁵ He cited the Senate Report which acknowledged that an ISP would have no duty to seek out copyright infringement, but would not qualify for the safe harbor if it turned a blind eye to “red flags of obvious infringement.”²⁶ The Senate Report also states

A service provider wishing to benefit from the limitation of 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 which meets the “red flag” test, even if the copyright owner or its agent does not notify it of a claimed infringement.²⁷

²³ Please see answer to Question 2 above regarding our concerns about the ruling in *Lenz v. Universal Music Corp. et. al.*, 815 F.3d 1145 (9th Cir. 2016).

²⁴ 676 F.3d 19, 25-6 (2d Cir. 2012).

²⁵ NYRT1, *supra* note 6, at 221 (remarks of Troy Dow, Disney).

²⁶ *Id.* (citing S. Rep. No. 105-190, at 45 (1998)).

²⁷ *Id.* (citing S. Rep. No. 105-190, at 48 (1998)).

It would appear to us that these two sentences imply that “red flag” is not synonymous with actual knowledge, contrary to the opinion of the Second Circuit. Were they to be considered one and the same, there would have been no need for the reference to actual knowledge or material meeting the “red flag” test. Furthermore, the “red flag” test does not contradict §512(m)’s provision that ISPs have no duty to monitor their sites. Duty to monitor implies an ongoing responsibility to preemptively scour one’s site for infringement; a “red flag” is a trigger, an alert that infringement is present and must be addressed.²⁸ The language of §512(m), that an ISP has no duty to monitor its service or affirmatively seek facts indicating infringing activity, implies an investigation undertaken without the prompting that repeated notices would give. This interpretation is supported by the recent decision in *BMG Rights Management LLC v. Cox Communications, Inc.* in which the court ruled that Cox Communications was liable for direct infringement of musical compositions because it repeatedly ignored infringement notices.²⁹ The Second Circuit recently reached a similar outcome in *EMI Christian Music Group v. MP3Tunes, LLC*.³⁰ The court noted that MP3Tunes executives themselves loaded songs onto the site from infringing websites and could catalog (and thus identify) the songs other users made available for download. This could, according to the Second Circuit, allow a jury to conclude that MP3Tunes knew of repeat infringers and failed to remove them from the service.³¹ In addition, the court suggested that asking MP3Tunes to track and remove users who uploaded infringing content to the website’s index might not be too great a burden and would not require a duty to monitor as proscribed under §512(m)(1) because the website knew from take-down notices received which links were infringing.³² In remanding the case back to the District Court, the Second Circuit has made a step towards rebalancing the rights of copyright owners on the Internet.

15. What approaches have jurisdictions outside the United States taken to address the question of Internet Service Provider liability and the problem of copyright infringement on the Internet? To what extent have these approaches worked well, or created problems for consumers, content creators, ISPs, or other stakeholders?

European Union law is governed by the Directive 2000/31/EC, the E-Commerce Directive.³³ It exempts service providers from liability in ways similar but not identical to §512:

Article 12 covers “Mere conduit” providers (akin to those providers covered under 17 U.S.C. §512(a)):

²⁸ See PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT, §8.1, at 8:9-8:10 (3d ed. Supp. 2014).

²⁹ 2016 WL 4224964 at 14.

³⁰ 844 F.3d 79 (2d Cir. 2016).

³¹ *Id.* at 90.

³² *Id.* at 91.

³³ COUNCIL DIRECTIVE 2000/31/EC 2000 O.J.(L178) (EC).

“Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, provided on condition that the provider:

- (a) does not initiate the transmission;
- (b) does not select the receiver of the transmission; and
- (c) does not select or modify the information contained in the transmission.

The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.”³⁴

Article 13 covers “caching” providers such as those in akin to §512(b):

“Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information’s onward transmission to other recipients of the service upon their request, on condition that:

- (a) the provider does not modify the information;
- (b) the provider complies with conditions on access to the information;
- (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognized and used by industry;
- (d) the provider does not interfere with the lawful use of technology, widely recognized and used by industry, to obtain data on the use of the information; and
- (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it have been disabled, or that a court or an administrative authority has ordered such removal or disablement.”³⁵

Article 14 covers ISPs that act as hosts (akin to §512(c)): “Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the

³⁴ *Id.* at 12-13.

³⁵ *Id.* at 13.

information stored at the request of a recipient of the service, on condition that:

- (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
- (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to the information.”
- (c) Though “this shall not apply when the recipient of the service is acting under the authority or control of the provider.”³⁶

In 2012, the French Supreme Court (the Cour de cassation) ruled there was no obligation for providers of hosting services to prevent the reappearance of contents they have already taken down, as such a “stay down” policy contradicted Article 15 of the E-Commerce Directive (which prohibited member states from imposing on ISPs a general duty to monitor the content on their websites).³⁷ That same day, however, the High Court held a search engine too closely implicated in facilitating end-user copyright infringement to claim the benefit of ISP liability limitations.³⁸ The Cour de cassation underscored the importance of the service provider’s remaining aloof from the referenced or stored content. In that case, the High Court overturned an appellate court judgment that had applied the EU’s service provider liability limitation to the “Google Suggestions” search term function. The association of record producers charged that Google’s “suggestions” of the keywords “Megaupload,” “Rapidshare” and “Torrent” in response to user searches for song or album titles or performer names facilitated infringement. Google refused to remove the suggested keywords on the grounds that their provision was completely automatic and that the users could have found the infringing sites (not all of whose content is infringing in any event) without the keywords, and therefore their suppression would not completely eliminate infringement. The court of appeals adopted Google’s reasoning. In reversing, the High Court held:

Google systematically oriented its users, through the provision of key words that it suggested based on the number of requests, toward sites containing recordings made available to the public without the authorization of the recording artists or producers, in such a way that Google provided the means to violate copyright or performers’ rights. By complying with the measures that the plaintiffs requested to avoid or bring an end to those violations by eliminating the automatic association of the key words with the requested search terms, Google

³⁶ *Id.*

³⁷ Cour de cassation [Cass.][supreme court for judicial matters], 1e civ., July 12, 2012, Bull. Civ. I, No. 831 (Fr.). (Google France v. Bac films).
<https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000026181926&fastReqId=1570967128&fastPos=1>

³⁸ Cour de cassation [Cass.][supreme court for judicial matters], 1e civ., July 12, 2012, Bull. Civ. I, No. 832 (Fr.). (Syndicat national de l’édition phonographique v. Google France),
<https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000026181998&fastReqId=1399964264&fastPos=2>

could have contributed to remedying the infringements by making the finding of infringing sites more difficult, even though such measures would not totally have eliminated the violations.

The “systematic” orientation of users toward predominantly infringing sites, even if achieved through an “automatic” algorithm, thus implicated Google too closely in the infringements that its suggested keywords facilitated. In declining to equate “automated” with “neutral,” the French High Court determined that its “suggestions” made Google an active partner in the ensuing infringements and thus deprived it of the requisite neutrality.

The European Union Commission is currently endeavoring to redress the service provider/right owner balance in order to close the “value gap” that the service providers’ immunity has engendered. To this end, the Commission’s Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, introduced in September, 2016, in the areas pertinent to this questionnaire, observed:

In this new framework, rightholders face difficulties when seeking to license their rights and be remunerated for the online distribution of their works. This could put at risk the development of European creativity and production of creative content. It is therefore necessary to guarantee that authors and rightholders receive a fair share of the value that is generated by the use of their works and other subject-matter. Against this background, this proposal provides for measures aiming at improving the position of rightholders to negotiate and be remunerated for the exploitation of their content by online services giving access to user-uploaded content.³⁹

Article 13 of the Draft Directive concerns “use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users.”⁴⁰ It would require:

- Internet Service Providers which store and provide access to the public of copyrighted works uploaded by users (i.e. not conduit service providers) must conclude licensing agreements with the rightholders of these materials and use effective content recognition software.
- Rightholders should provide ISPs with the data needed to identify content and ISPs should clearly inform rightholders of the technologies in use to combat piracy.

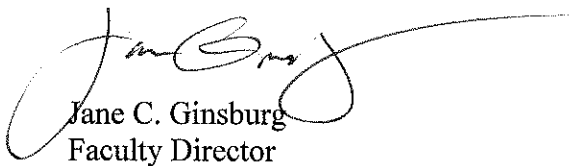
³⁹ *Commission Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market*, Explanatory Memorandum at 3, COM (2016) 593 final (Sep. 14, 2016). See also *id.* Recital 38.

⁴⁰ *Id.* at 29.

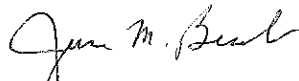
- ISPs must ensure that there are adequate mechanisms in place for users to dispute the removal of material.
- Member States must facilitate meetings between ISPs and rightholders to define best practices that should be adopted to curtail the presence of infringing material on the Web.⁴¹

Thank you for the opportunity to submit these comments. We would be happy to provide any further input requested.

Respectfully submitted,



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⁴¹ *Id.* at 29-30.