



LIBRARY OF CONGRESS

U.S. Copyright Office

Docket No. 2015-7

Section 512 Study: Request for Additional Comments

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of Inquiry.

SUMMARY: The U.S. Copyright Office seeks further comments on the impact and effectiveness of the Digital Millennium Copyright Act (“DMCA”) safe harbor provisions. This request provides an opportunity for interested parties to reply or expand upon issues raised in written comments submitted on or before April 1, 2016, and during the public roundtables held May 2–3, 2016 in New York, and May 12–13, 2016 in San Francisco. The Copyright Office also invites parties to submit empirical research studies assessing issues related to the operation of the safe harbor provisions on a quantitative or qualitative basis.

DATES: Written responses to the questions outlined below must be received no later than 11:59 p.m. Eastern Time on [INSERT 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Empirical research studies providing quantitative or qualitative data relevant to the subject matter of this study must be received no later than 11:59 p.m. Eastern Time on [INSERT 120 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are available on the Copyright Office website at

<http://copyright.gov/policy/section512/comment-submission/>. To meet accessibility standards, all comments must be provided in a single file not to exceed six megabytes (MB) in one of the following formats: Portable Document File (PDF) format containing searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The form and face of the comments must include the name of the submitter and any organization the submitter represents. The Office will post all comments publicly in the form that they are received. If electronic submission of comments is not feasible due to lack of access to a computer and/or the Internet, please contact the Office, using the contact information below, for special instructions.

FOR FURTHER INFORMATION CONTACT: Cindy Abramson, Assistant General Counsel, by email at *ciab@loc.gov* or by telephone at 202–707–8350; Kevin Amer, Senior Counsel for Policy and International Affairs, by email at *kamer@loc.gov* or by telephone at 202–707–8350; or Kimberley Isbell, Senior Counsel for Policy and International Affairs, by email at *kisb@loc.gov* or by telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

In order to evaluate key parts of the copyright law as it pertains to the digital copyright marketplace, the U.S. Copyright Office is conducting a study to evaluate the impact and effectiveness of the DMCA safe harbor provisions contained in 17 U.S.C. 512. To aid its work in this area, the Office published an initial Notice of Inquiry on December 31, 2015 (“First Notice”), seeking written comments to 30 questions covering eight categories of topics. These included questions about the general efficacy of the DMCA provisions enacted in 1998, as well

as the practical costs, and burdens, of the current DMCA environment.¹ The Office received a combination of more than 92,000 written submissions and form replies in response to the First Notice, which can be found on the *regulations.gov* website at <https://www.regulations.gov/docket?D=COLC-2015-0013>.

In May 2016, the Copyright Office convened roundtables in New York and San Francisco, each for a two day period. The roundtables provided participants with the opportunity to share their views on the topics identified in the First Notice, as well as any other issues relating to the operation of the DMCA safe harbors.² Transcripts of the proceedings at each of the roundtables are available on the Copyright Office website at <http://copyright.gov/policy/section512/> under “Public Roundtables.”³

Based on the initial round of written submissions and the results of the roundtable discussions, the Copyright Office believes a number of themes merit additional consideration. Many of these relate to questions of balance, *i.e.*, how to weigh the diverse interests and needs of affected stakeholders, including individual authors and their small businesses, publishers and producers of all sizes, Internet service providers (“ISPs”) of all sizes, and members of the public who may seek to access the Internet on any given day for any number of reasons. The Office is also interested in feedback regarding how to continue to propel the DMCA’s underlying public interest objectives, that is, its twin goals of fostering a robust and innovative online environment while protecting the rights of content creators. Within these broad categories, the specific topics participants raised can be further grouped in the following general areas: (1) characteristics of the current Internet ecosystem; (2) operation of the current DMCA safe harbor system; (3)

¹ See Section 512 Study: Notice and Request for Public Comment, 80 FR 81862, 81868 (Dec. 31, 2015).

² See Section 512 Study: Announcement of Public Roundtables, 81 FR 14896 (Mar. 18, 2016).

³ References to the transcripts in this document are indicated by “Tr.,” followed by the page(s) and line(s) of the reference, the date of the roundtable, and the speaker’s name and affiliation.

potential future evolution of the DMCA safe harbor system, including possible legislative improvements; and (4) other developments.

A. *Characteristics of the Current Internet Ecosystem*

One of the key themes that emerged from the first round of public comments and the roundtable discussions was the diversity of the current Internet ecosystem and the importance of factoring such diversity into any policymaking in the online space. Participants noted that there is a wide variety of experiences and views even within particular stakeholder groups.

For example, study participants pointed out that differences in the characteristics of content creators result in different experiences with the operation of the DMCA safe harbors.⁴ They noted that the burden of addressing online infringement without an in-house piracy team is especially great for smaller content creators and businesses, and that some of the tools available to larger content owners are unavailable to smaller creators as a result of cost or other considerations.⁵ Similarly, some expressed the view that the quality of takedown notices often varies depending on the identity and size of the content creator, with notices from individuals and smaller entities often being less sophisticated and/or accurate than notices sent by large corporations employing automated processes.⁶ Other study participants highlighted the

⁴ See, e.g., Tr. at 174:13–17 (May 3, 2016) (Andrew Deutsch, DLA Piper) (“[T]he world of creators runs from individual singer-songwriters to gigantic studios and record producers. They have different needs, different problems, and it really is impossible to create a system that does everything for everyone.”).

⁵ See, e.g., Dirs. Guild of Am., Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 6 (Apr. 1, 2016) (“To utilize the DMCA notice and takedown mechanism, a rights holder must first prepare notices in exact accordance with the complicated legal requirements of Section 512. Sending these notices to a designated agent of the service provider requires a level of legal expertise that larger rights holders may possess but which smaller creators do not have at their disposal.”); Kernochan Ctr. for Law, Media & the Arts, Columbia Law Sch., Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 7 (Apr. 1, 2016) (“The process is burdensome for individuals and entities of any size. Larger entities, which may hold or manage numerous copyrighted works, may use technological tools and many employees or consultants to search for infringing files on the [I]nternet and to file notices in an attempt to get them removed. Independent creators, however, often have to face this issue alone.”).

⁶ See Tr. at 146:8–20 (May 2, 2016) (Brianna Schofield, Univ. of Cal., Berkeley Sch. of Law) (“[W]e looked at notices sent to Google Images search and these notice senders tended to be individuals, smaller businesses and we saw a much different dynamic here in that these were targeting sites that we might be more fearful would

importance of taking into consideration the experiences of non-professional creators who rely on the platforms enabled by the DMCA safe harbors to disseminate and receive remuneration for their works.⁷

Likewise, a heterogeneous picture of ISPs emerged from the first round of comments and the public roundtables, with large deviations in terms of functions, size, resources, and business models, as well as the volume of DMCA takedown notices received on an annual basis. While some of the larger platforms⁸ like Google, Facebook, SoundCloud, and Pinterest have devoted resources to implementing automated filtering systems and other tools to remove significant amounts of infringing content,⁹ there appear to be many more ISPs that are continuing to operate manual DMCA takedown processes for a lower volume of notices.¹⁰ Some commenters

compromise legitimate expression, so blogs, message board threads. . . . Fifteen percent weren't even copyright complaints to start with. They were submitted as a DMCA complaint but they were actually complaining about privacy or defamation, this sort of thing.”); Tr. at 36:3–37:9 (May 12, 2016) (Jennifer Urban, Univ. of Cal., Berkeley Sch. of Law). *But see* Jonathan Bailey, Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 2 (Feb. 16, 2016) (“With this automation has come increased mistakes. Machines are simply not as good at detecting infringement and fair use issues as humans.”).

⁷ *See, e.g.*, Tr. at 282:21–283:6 (May 13, 2016) (Cathy Gellis, Dig. Age Def.); Tr. at 324:1–15 (May 2, 2016) (Ellen Schrantz, Internet Ass’n).

⁸ Larger both in terms of the amount of content that appears on the site, and the technological and monetary resources available to address DMCA notices.

⁹ *See, e.g.*, Audible Magic Corp., Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 4 (Mar. 21, 2016) (“[U]ser-generated-content sharing and cloud file sharing networks [including Facebook, Dailymotion, SoundCloud, and Twitch] . . . dramatically reduce copyright-infringing media sharing using Audible Magic software and hosted services [to] . . . detect[] registered audio and video content in the user upload stream.”); Pinterest Inc., Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 3 (Apr. 1, 2016) (“[O]ur engineering team built a tool that allowed us to . . . attach the author’s name to [an] image. . . . Pinterest has also developed tools to help content owners prevent certain content from being saved to Pinterest, and to enable the quick removal of their content if they so wish.”).

¹⁰ *See, e.g.*, Tr. at 111:17–21 (May 12, 2016) (Lila Bailey, Internet Archive) (“The Internet Archive definitely falls into the DMCA Classic [category]. They have a tiny staff . . . and they review every notice they get by a human being.”); Tr. at 157:3–10 (May 12, 2016) (Joseph Gratz, Durie Tangri LLP) (“[T]he Internet from 1998 is still all there . . . it’s small OSPs, small content creators, small copyright holders needing remedies for small infringements.”); Tr. at 100:10–15 (May 12, 2016) (Charles Roslof, Wikimedia Found.) (“We operate Wikipedia and . . . despite the large amount of content we host, we receive very few takedown notices.”).

expressed concern that promulgation of rules designed for the former could place an undue burden on the operations of the latter.¹¹

In addition, several study participants highlighted the importance of taking into consideration the needs of individual Internet users when developing recommendations for possible changes to the DMCA safe harbor system.¹² Participants emphasized that the DMCA counter-notice process is an important mechanism to protect the legitimate online speech of individual Internet users, and that the proliferation of diverse platforms and services made possible by the DMCA safe harbors provides a critical benefit for the public.

B. Operation of the Current DMCA Safe Harbor System

While some study participants asserted that the section 512 safe harbors are currently operating effectively and as Congress intended, a number of participants identified various shortcomings and barriers for content creators, ISPs, and individual Internet users. These differing views were especially stark when comparing the experiences of content creators (large and small) with the experiences of online service providers.¹³ ISPs generally painted a picture of a thriving and vibrant Internet ecosystem that was largely the result of the safeguards and

¹¹ See Internet Ass'n, Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 15 (Mar. 31, 2016) ("[S]tartups and small businesses lack the sophisticated resources of larger, more established businesses in responding to takedown requests.").

¹² See Pub. Knowledge, Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 4 (Apr. 1, 2016) ("Section 512 appropriately balances the interests of online platforms and copyright owners Where the balance is acutely in need of recalibration, though, is with respect to user rights."); Tr. at 101:4–10 (May 13, 2016) (Daphne Keller, Stanford Law Sch. Ctr. for Internet & Soc'y).

¹³ Compare Tr. at 92:6–11 (May 12, 2016) (Jordan Berliant, Revelation Mgmt. Grp.) ("I'm very concerned about even our biggest client's ability to earn a living under the current copyright protection system, which, in effect, sanctions the infringement of their rights and is devastating to the revenue that they can earn from recording music."), and Tr. at 119:1–5 (May 2, 2016) (Jennifer Pariser, Motion Picture Ass'n of Am.) ("[T]his is where on the content side we feel the imbalance comes, that [processing takedown notices is] a cost of doing business for an online service provider that is relatively manageable for them, whereas on the creation side, we're being killed by piracy."), with Facebook, Inc., Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 4 (Apr. 1, 2016) ("It is quite effective. . . . [W]hile the DMCA by necessity imposes some burden on the respective parties, its procedures unquestionably result in the effective and consistent removal of infringing content from the Internet."), and Amazon.com, Inc., Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 3–4 (Apr. 1, 2016) (discussing the role of section 512 in fostering a balanced copyright regime that allows Internet creativity and innovation).

protections of the DMCA safe harbors.¹⁴ While ISP participants acknowledged the ever-increasing volume of takedown notices that are now being sent, they viewed the ability of larger ISPs to accommodate the increased volume as an example of the overall success of the system.¹⁵ In stark contrast, many content creators of all sizes bemoaned what they saw as the inefficiency and ineffectiveness of the system.¹⁶ These participants complained about the time and resources necessary to police the Internet and viewed the ever-increasing volume of notices as an example of the DMCA notice-and-takedown regime's failure to sufficiently address the continued proliferation of online infringement.¹⁷

ISPs, civic organizations, and content creators also expressed differing views regarding the extent to which false or abusive notices are a problem under the current system, and the effectiveness of the counter-notice process for ensuring access to legitimate content. Several ISPs and civic groups pointed to abusive notices as one of the primary shortcomings of the safe harbor regime. They pointed to the length of time required to have material replaced after a counter-notice,¹⁸ and argued that having non-infringing content removed even for a few days can

¹⁴ See Intel Corp., Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 4–5 (Apr. 1, 2016) (“As stated in the House Report, the goal of the [Digital Millennium Copyright] Act was to lubricate the legitimate distribution of creative content. When measured by these Congressional yardsticks, Section 512 has been a stunning success. . . . At the same time, Congress desired to preserve ‘strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.’ Intel believes that the Act has done just that.”).

¹⁵ See, e.g., New Am.'s Open Tech. Inst., Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 3 (Apr. 1, 2016); Tr. at 77:7–13 (May 13, 2016) (Fred von Lohmann, Google, Inc.) (“I disagree with people who think that a large volume of notices is a sign of failure; in fact, quite the contrary. If the notices weren't doing any good, if it was too expensive to send, we would expect the numbers to be falling, not rising. And in fact, we see them rising because the systems are more efficient.”).

¹⁶ See, e.g., Am. Ass'n of Indep. Music et al., Joint Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 21 (Apr. 1, 2016); T Bone Burnett et al., Joint Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 2 (Apr. 1, 2016).

¹⁷ See, e.g., Tr. at 108:2–5 (May 13, 2016) (Dean Marks, Motion Picture Ass'n of Am.).

¹⁸ See, e.g., Jill Doe, Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 2 (Mar. 21, 2016); Verizon Commc'ns, Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 18 (Apr. 1, 2016).

severely impact a business.¹⁹ Several groups cited recent data released by researchers at the University of California, Berkeley School of Law as evidence of the scope of the problem.²⁰ Some content creators, on the other hand, expressed the view that abusive notices are in fact quite rare²¹ and that the number of improper notices pales in comparison to the overwhelming volume of infringing content. They argued that the counter-notice process sufficiently protects legitimate material,²² and pointed out that the financial burden of bringing a federal court case to prevent the reposting of infringing material within days of receiving a counter-notice makes the provision unusable in practice.²³

Both content creators and ISPs identified shortcomings in their abilities to efficiently process notices under the current system. ISPs identified the difficulty of receiving notices through multiple channels (*e.g.*, email, web form, fax, etc.),²⁴ as well as incomplete or unclear notices,²⁵ as barriers to efficient processing of takedown requests. Several ISPs have reported moving to the use of web forms for receipt of takedown notices in order to overcome some of these difficulties.²⁶

¹⁹ *See, e.g.*, Tr. at 153:3–17 (May 2, 2016) (Rebecca Prince, Becky Boop); Tr. at 75:4–8 (May 12, 2016) (Alex Feerst, Medium); Tr. at 164:9–16 (May 12, 2016) (Joseph Gratz, Durie Tangri LLP).

²⁰ *See, e.g.*, Engine et al., Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 9 (Apr. 1, 2016); Internet Commerce Coal., Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 3 (Apr. 1, 2016).

²¹ *See, e.g.*, Tr. at 155:9–13 (May 2, 2016) (Steven Rosenthal, McGraw-Hill Educ.); Tr. at 183:21–184:1 (May 12, 2016) (Gabriel Miller, Paramount Pictures Corp.).

²² *See* Copyright All., Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 20–21 (Apr. 1, 2016).

²³ *See, e.g.*, Dig. Media Licensing Ass’n, Inc. et al., Joint Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 7 (Apr. 1, 2016); Sony Music Entm’t, Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 16 (Apr. 1, 2016) (citing the cost of litigation as accounting for the fact that “since 2008, thousands of videos infringing Sony’s copyrights have been reinstated on YouTube due to counter notifications not being contested by Sony” even though “[i]n the vast majority of those instances, there was no legitimate question that the use infringed Sony’s exclusive rights”).

²⁴ *See* Tr. at 54:22–55:11 (May 3, 2016) (Matthew Schruers, Comput. & Commc’ns Indus. Ass’n).

²⁵ *See* Internet Archive, Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 3 (Mar. 22, 2016).

²⁶ *See* Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown in Everyday Practice* 37 (UC Berkeley Pub. Law Research, Paper No. 2755628, 2016), <http://ssrn.com/abstract=2755628>.

In contrast, many content creators identified ISP-specific web forms as a barrier to effective use of the notice-and-takedown process, increasing the amount of time required to have the same material taken down across multiple platforms.²⁷ Other barriers to use of the notice-and-takedown process identified by content creators included additional ISP-created requirements that some claimed go far beyond the requirements of the DMCA,²⁸ and privacy concerns stemming from the public release of personal information about the notice sender.²⁹

Study participants noted similar barriers that discourage users from submitting counter-notices, even in response to what some consider to be erroneous or fraudulent takedown notices. The identified barriers included a similar lack of standardization for filing counter-notices, a lack of education regarding the counter-notice process, privacy concerns, and the threat of potential legal proceedings.³⁰

In addition to noting practical barriers that may make utilization of the safe harbor system difficult, several commenters pointed to court opinions that they argue have decreased the effectiveness of the statutory scheme created by Congress. These developments include judicial interpretations of the actual and red flag knowledge standards, the right and ability to control and financial benefit tests, section 512's references to "representative lists," and section 512's requirement that ISPs implement a repeat infringer policy. Some content creators and others

²⁷ See Ass'n of Am. Publishers, Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 7 (Apr. 1, 2016); Tr. at 19:5–11 (May 12, 2016) (Devon Weston, Digimarc).

²⁸ See, e.g., Ellen Seidler, Fast Girl Films, Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 2 (Apr. 1, 2016) ("Because the email address for Google's DMCA Agent is not posted on its websites, rights holders must jump through various hoops and navigate through a series of questions in order to arrive at the correct form. Once there it takes additional time to complete the 9-part form. Before one can actually send it one must be sure to create a Google account, then login and send."); Tr. at 59:14–19 (May 2, 2016) (Lisa Shaftel, Graphic Artists Guild).

²⁹ See, e.g., Arts & Entm't Advocacy Clinic at George Mason Univ. Sch. of Law, Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 11 (Apr. 1, 2016) ("[P]ublicly revealing personal information about a notice sender may endanger the artist's property and safety.").

³⁰ See, e.g., Rodrigo Adair, Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 1–2 (Mar. 18, 2016); New Media Rights, Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 16–17 (Apr. 1, 2016); Tr. at 253:5–7 (May 13, 2016) (Michael Michaud, Channel Awesome, Inc.).

expressed concern that the first three developments, taken together, have systematically changed the application of section 512, tipping it in favor of ISPs,³¹ while a number of ISPs expressed concerns about the ongoing impact of recent repeat infringer jurisprudence.³²

One other debate between content creators and ISPs relates to the fact that section 512 sets forth a variety of differing safe harbor requirements for ISPs depending upon the function they are performing (*i.e.*, mere conduit, hosting, caching, or indexing). Thus, several telecommunications providers asserted that section 512 imposes no obligation on ISPs either to accept or act upon infringement notices when they are acting as a mere conduit under section 512(a).³³ Some content creators, however, expressed concern that failure to accept such notices, even if not part of a formal notice-and-takedown process, would weaken the requirement that ISPs adopt and reasonably implement a section 512(i) repeat infringer policy.³⁴

C. Potential Future Evolution of the DMCA Safe Harbor System

Study participants have suggested a number of potential solutions to the issues raised above, though it should be understood that these solutions stem only from the subset of stakeholders who suggest or acknowledge in the first instance that the current regime requires or could benefit from changes. These solutions included both non-legislative solutions (such as education, the use of technology, or voluntary and standard technical measures) and legislative

³¹ See, e.g., Matthew Barblan et al., Joint Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 1 (Apr. 1, 2016); Tr. at 196:25–197:12 (May 3, 2016) (June Besek, Kernochan Ctr. for Law, Media & the Arts) (“[I]n the last 18 years or so, I think courts have often placed a lot of emphasis on the ability of service providers to flourish and grow and perhaps less emphasis on the concerns of right holders. And you can see that in a lot of different ways—defining storage very broadly, defining red flag knowledge very narrowly, reading representative lists out of the statute, basically, leaving right holders with little recourse other than sending notice after notice after notice to prevent reposting of their material. And they can never really prevent it.”).

³² See, e.g., Am. Cable Ass’n, Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 5 (Apr. 1, 2016); CTIA – The Wireless Ass’n, Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 11–12 (Apr. 1, 2016).

³³ See, e.g., Tr. 65:24–67:21 (May 2, 2016) (Jacqueline Charlesworth, U.S. Copyright Office; Patrick Flaherty, Verizon Commc’ns).

³⁴ See Tr. 257:12–15 (May 2, 2016) (David Jacoby, Sony Music Entm’t).

fixes (either through changes to section 512 itself or passage of legislation to address issues not directly addressed by section 512).

The non-legislative solution that appeared to have the broadest approval was the idea of creating governmental and private-sector educational materials on copyright and section 512. Participants recommended the creation of targeted educational materials for all participants in the Internet ecosystem, including content creators,³⁵ users,³⁶ and ISPs.³⁷

A number of study participants noted that technology can help address some of the inefficiencies of the current notice-and-takedown process. Some participants cited increased efficiencies to be had from both automated notices and takedowns, as well as other technological tools.³⁸ Other participants, however, cautioned against over reliance on technology. Several reasons for questioning the ability of technology to resolve problems with the current system were mentioned, including the expense of developing systems capable of handling notice-and-takedown processes, concerns that automated processes may be more vulnerable to false positives, and the limited capabilities of even the most advanced current technology.³⁹

Another potential non-legislative solution that was suggested was the development and adoption of industry-wide, or sub-industry-specific, voluntary measures⁴⁰ and standard technical

³⁵ See Tr. at 73:23–74:8 (May 2, 2016) (Lisa Hammer, independent film director).

³⁶ See Tr. at 52:6–10 (May 2, 2016) (Janice Pilch, Rutgers Univ. Libraries); Tr. at 279:21–281:8 (May 12, 2016) (Brian Willen, Wilson Sonsini Goodrich); Tr. at 253:22–254:11 (May 13, 2016) (Michael Michaud, Channel Awesome, Inc.).

³⁷ See Future of Music Coal., Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 18 (Apr. 1, 2016).

³⁸ See, e.g., Universal Music Grp., Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 18 (Apr. 1, 2016); Tr. at 97:17–98:4 (May 13, 2016) (Betsy Viola Zedek, The Walt Disney Co.).

³⁹ See, e.g., Wikimedia Found., Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 7 (Apr. 1, 2016); Tr. at 312:16–20 (May 2, 2016) (Sarah Feingold, Etsy, Inc.).

⁴⁰ While many of the voluntary measures discussed by study participants were technological in nature (such as Google’s Content ID system), there were other programs that some participants pointed to as potential blueprints for private action to improve the operation of the safe harbor processes, including development of industry best practices guidelines; initiatives like the Copyright Alert System; cooperative arrangements between content owners and payment processors, advertisers, and domain name registries; and voluntary demotion of infringing results by search engines. Although many participants expressed optimism that voluntary agreements could help improve the

measures,⁴¹ and/or the standardization of practices for notice and takedown.⁴² A number of study participants pointed to the failure to adopt standard technical measures under section 512(i), nearly two decades after passage of the DMCA, as a demonstrable failure of the current section 512 system.⁴³ Some study participants suggested that there may be a role for the government generally, or the U.S. Copyright Office in particular, to play in encouraging or supporting the adoption of such standard technical measures by convening groups of relevant stakeholders.⁴⁴

Another potential solution proposed by some of the participants was legislative action to improve the section 512 safe harbor system, either by amending the statute itself, or adopting ancillary legislative reform proposals. The most frequently discussed potential legislative change was adoption of a notice-and-stay-down requirement.⁴⁵ Although many participants suggested a pressing need for such a requirement, they have not defined what is meant by “stay-down,” or what specific mechanisms might be utilized to comply with such a requirement. Some participants equated a notice-and-stay-down system with the use of a content filtering system

efficacy of the safe harbor system, other participants cautioned that voluntary measures should be viewed as supplements to reform, rather than replacements for it. *See* Content Creators Coal., Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 27–30 (Apr. 1, 2016). Still others objected to the idea of voluntary agreements as unrepresentative and potentially undemocratic. *See, e.g.*, Elec. Frontier Found., Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 15 (Apr. 1, 2016); Tr. at 177:17–22 (May 13, 2016) (Michael Masnick, Copia Institute); Tr. at 171:8–13 (May 13, 2016) (T.J. Stiles, author).

⁴¹ *See* Tr. at 173:18–174:16 (May 13, 2016) (Sean O’Connor, Univ. of Washington (Seattle)) (“[O]ne-size-fits-all can’t work . . . [but] if you create a taxonomy that [covers the] different kinds of content industry and also different kind[s] of service providers . . . you can . . . [c]ome up with . . . standard technical measures for that particular subdivision area.”).

⁴² *See, e.g.*, Info. Tech. & Innovation Found., Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 5 (Mar. 21, 2016) (“[T]he tools . . . used by online service providers to prevent and stop infringement vary widely. To address this problem, the U.S. Copyright Office should launch a multi-stakeholder working group to identify . . . [ways] to reduce infringement and lower compliance costs for all parties. For example . . . standardize[d] notice-and-takedown processes across multiple service providers”); Tr. at 164:12–165:13 (May 13, 2016) (Dave Green, Microsoft) (suggesting a “summit attended primarily by engineers,” potentially including “government support or encouragement . . . to come up with ways to make it easy to report . . . a single work to multiple ISPs without having to send notices multiple times”).

⁴³ *See, e.g.*, Tr. 68:22–69:12 (May 3, 2016) (Lisa Willmer, Getty Images); Tr. 18:10–21:6 (May 13, 2016) (Karyn Temple Claggett, U.S. Copyright Office; Keith Kupferschmid, Copyright All.).

⁴⁴ *See* Tr. 250:23–251:1 (May 3, 2016) (Todd Dupler, Recording Acad.).

⁴⁵ *See, e.g.*, Indep. Film & Television All., Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 4 (Apr. 1, 2016); Tr. at 230:11–23 (May 3, 2016) (Matthew Barblan, Ctr. for the Prot. of Intellectual Prop.).

like Content ID to pre-screen user uploads.⁴⁶ Other participants seemed to equate a notice-and-stay-down system with a requirement for the ISP to search its site for identical files upon receipt of a takedown notice from a rightsholder.⁴⁷ Many study participants, however, raised concerns about the possible adoption of a notice-and-stay-down requirement, citing both policy and practical/technological concerns.⁴⁸

D. Other Developments

The Copyright Office is also seeking comments on three additional topics: judicial opinions that were not covered by the initial round of public comments, the disposition of Internet safe harbors under foreign copyright laws, and empirical research into the effectiveness, impact, and utilization of the current section 512 safe harbors.

The Copyright Office is interested in hearing from the public about judicial decisions issued since the first round of public comments closed in April 2016, and how they may impact the workings of one or more aspects of the section 512 safe harbors. These include, in particular, recent decisions from the Eastern District of Virginia and the Second Circuit. In *BMG Rights Management (US) v. Cox Communications, Inc.*, currently on appeal to the Fourth Circuit, the Eastern District of Virginia upheld a jury verdict that the defendant ISP was liable for willful contributory infringement based on its subscribers' use of BitTorrent to download and share

⁴⁶ See Council of Music Creators et al., Joint Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 3 (Apr. 1, 2016).

⁴⁷ See Authors Guild, Inc., Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 14 (Apr. 1, 2016) ("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 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.").

⁴⁸ See, e.g., Facebook, Inc., Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 6 (Apr. 1, 2016); Internet Archive, Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 2 (Mar. 22, 2016).

copyrighted material.⁴⁹ The court found that the defendant was not able to invoke the section 512(a) safe harbor as a result of its failure to reasonably implement a repeat infringer policy.⁵⁰ In *Capitol Records, LLC v. Vimeo LLC*, the Second Circuit found that (1) the section 512(c) safe harbor extends to claims for infringement of pre-1972 sound recordings, which are protected under state, rather than federal, copyright laws, and (2) the fact that a defendant ISP’s employee viewed a video that “contains all or virtually all of a recognizable copyrighted song” is insufficient to provide the ISP with actual or red flag knowledge of infringement.⁵¹

Similarly, while some of the initial written responses and roundtable discussions touched upon Internet safe harbor regimes outside the United States,⁵² the Copyright Office welcomes additional information about foreign approaches to the questions of ISP safe harbors, Internet piracy, and other relevant topics.

Finally, the Copyright Office is asking for the submission of additional analyses and empirical data related to the effectiveness, impact, and utilization of the current section 512 safe harbors. While several participants referenced a trio of recent studies performed by researchers at the University of California, Berkeley School of Law, others noted that a nucleus of authoritative studies and evidence is still lacking, overall.⁵³ Given the economic importance of both the creative and technology industries to the U.S. economy, policymaking relating to the proper calibration of the costs and benefits of ISP safe harbors would benefit from a robust

⁴⁹ *BMG Rights Mgmt. (US) LLC v. Cox Commc’ns., Inc.*, No. 1:14-cv-1611, 2016 WL 4224964 (E.D. Va. Aug. 8, 2016), *appeal docketed*, No. 16-1972 (4th Cir. Aug. 24, 2016).

⁵⁰ *Id.* at *4.

⁵¹ *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 87–98 (2d Cir. 2016).

⁵² *See, e.g.*, Ctr. for Democracy & Tech. & R Street Inst., Joint Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 19 n.79 (Apr. 1, 2016); Tr. 114:24–115:6 (May 3, 2016) (Victoria Sheckler, Recording Indus. Ass’n of Am.); Tr. 325:16–20 (May 12, 2016) (Daphne Keller, Stanford Law Sch. Ctr. for Internet & Soc’y).

⁵³ *See, e.g.*, Tr. at 255:11–12 (May 13, 2016) (Sean O’Connor, Univ. of Washington (Seattle)) (“[O]n the empirical research side, I do think we need to do a lot more”); Tr. at 260:3–4 (May 13, 2016) (Fred von Lohmann, Google, Inc.) (“We need more and better data.”).

record of authoritative data. Potential subject matter for relevant submissions would include data relating to the number of improper takedown or counter-notices received by different classes of ISPs, information relating to the percentage of files that are re-uploaded following submission of a valid takedown notice, information regarding the effectiveness or ineffectiveness of takedown notices for combating different forms of piracy both here and abroad, the economic impact of policy choices relating to ISP safe harbors, and other topics.

II. *Subjects of Inquiry*

The Copyright Office seeks further public input in the form of written comments responsive to this Notice and the issues discussed above, as well as the submission of studies and empirical data relevant to the subject matter of this study. Parties may also take this opportunity to respond to positions or data raised in the first round of comments and/or at the roundtables. Participants should, however, refrain from simply restating positions taken at the roundtables or previously submitted in response to the First Notice; such comments have already been made part of the record. While a party choosing to respond to this Notice of Inquiry need not address every subject below, the Office requests that responding parties clearly identify and separately address each subject for which a response is submitted.

Characteristics of the Current Internet Ecosystem

1. As noted above, there is 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 ISP or volume of online material hosted by it? If so, how? 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. 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?

Operation of the Current DMCA Safe Harbor System

3. Participants expressed widely divergent views on the overall effectiveness of the DMCA safe harbor system. How should the divergence in 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?
4. Several public comments and roundtable participants noted practical barriers to effective use of the notice-and-takedown and counter-notice processes, such as differences in the web forms used by ISPs to receive notices or adoption by ISPs of additional requirements not imposed under the DMCA (*e.g.*, submission of a copyright registration or creation of certain web accounts). 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 (*e.g.*, incentives for ISPs to use a standardized notice/counter-notice form, etc.)?
5. A number of study participants identified the timelines under the DMCA as a potential area in need of reform. Some commenters expressed the view that the process for

restoring access to material that was the subject of a takedown notice takes too long, noting that the material for which a counter-notice is sent can ultimately be inaccessible for weeks or months before access is restored. Other commenters expressed the view that the timeframe for restoring access to content is too short, and that ten days is not enough time for a copyright holder to prepare and file litigation following receipt of a counter-notice. 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?

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?
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?
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?

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?

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?

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?

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.

Other Developments

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.

15. What approaches have jurisdictions outside the United States taken to address the question of ISP 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?
16. Please identify any other pertinent issues that the Copyright Office may wish to consider in conducting this study.

Submission of Empirical Research to Aid the Study

Many commenters expressed a desire for more comprehensive empirical data regarding the functioning and effects of the DMCA safe harbor system. The Copyright Office is providing an extended deadline for submissions of empirical research on any of the topics discussed in this Notice, or other topics that are likely to provide useful data to assess and/or improve the operation of section 512.

Dated: November 2, 2016.

Karyn Temple Claggett,
*Acting Register of Copyrights and
Director of the U.S. Copyright Office*

[BILLING CODE 1410-30-P]

[FR Doc. 2016-26904 Filed: 11/7/2016 8:45 am; Publication Date: 11/8/2016]