

Before the

**U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS**

In the Matter of
Section 512 Study: Request for Additional Comments

Docket No. 2015-7

Comments of Engine Advocacy



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INTRODUCTION

Engine is a non-profit advocacy and research organization that supports the growth of technology entrepreneurship through economic research, policy analysis, and advocacy on local and national issues. It works to promote the interests of the many entrepreneurs and innovators that have thrived precisely because of the safe-harbor protections provided by DMCA § 512. Engine submits these comments in response to the Copyright Office's request for additional comments in its Section 512 Study;¹ they supplement Engine's initial comments in the 512 Study submitted on April 1, 2016.²

Engine continues to believe that the principles of limited liability and cooperation built into § 512 are responsible for facilitating the growth of businesses, both small and large, and of the broader internet. Section 512 can continue to promote innovation, startup activity, and creative production, but only if we preserve the core policy of limited liability for service providers that is the bedrock of §512. Any shift towards increasing the burden on service providers of policing infringing activity or liability for third party infringements will make it harder for the next generation of startups and providers to innovate. Healthy innovation can also be enhanced by careful changes to §512 and the broader copyright regime, such as reform of statutory damages awards for secondary infringement claims, imposition of meaningful penalties to deter false takedown notices, and clarification of ambiguities inherent in § 512's safe harbor qualifications.

Question 1: [T]here 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?

A significant part of the internet's cultural and economic value lies in its capacity to sustain a vast ecosystem of websites of all sizes. Startups have long driven the growth of the internet sector and the broader economy. They are responsible for virtually all new net job growth in the U.S,³ and sluggish growth for startups is linked with sluggish growth for the U.S. economy.⁴ The internet's unique capacity to support startup growth is due in large part to the enactment of § 512 and its safe harbors, driving significant capital into the internet economy

¹ U.S. Copyright Office, Section 512 Study: Request for Additional Comments (Nov. 8, 2016) [hereinafter *Request for Additional Comments*]. 81 Fed. Reg. 78,636 (Nov. 8, 2016).

² Engine, GitHub, KickStarter, Medium & Redbubble, *Comments on Section 512 Study: Notice and Request for Public Comment* (Apr. 1, 2016) [hereinafter *Engine Initial Comments*].

³ Jason Wiens, *The Importance of Young Firms for Economic Growth*, Ewing Marion Kauffman Foundation (Sept. 14, 2015), <https://goo.gl/hmtjon>.

⁴ See, e.g., Steve Matthews, *American Economy Hamstrung by Vanishing Startups, Innovation*, Bloomberg (June 1, 2016, 4:00 AM), <https://www.bloomberg.com/news/articles/2016-06-01/record-low-for-u-s-startups-helps-spawn-productivity-slump>.

and enabling the creation, growth, and success of tens of thousands of internet-related startups, all while protecting the rights of content holders.⁵ The tremendous job growth and economic value the internet has created in barely two decades—much of it in small businesses and new entrepreneurs—would have been impossible without the DMCA’s limited liability and copyright protection regime.

The DMCA has been beneficial for startups and large players alike, and any potential changes to § 512 should be evaluated particularly closely in terms of their potential impact on current and future startups. While it is heartening that the Copyright Office recognizes that changes to the DMCA regime can have an outsized impact on small OSPs and seeks commentary on how to ensure that reforms do not unduly burden startups, the proposed reforms identified in Question 1 would irreparably harm OSPs of all sizes. As outlined in the response to Question 12 below, a content filtering or notice-and-staydown requirement would be particularly devastating for startups that host content uploaded by users.

Question 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?

It is difficult to overstate the negative consequences of modifying the DMCA to include any kind of “notice-and-staydown” system. A notice-and-staydown regime would change the DMCA from a law that effectively balances the interests and responsibilities of copyright owners and OSPs to one that shifts the burden of mitigating online infringement exclusively on OSPs. It would create an impossible task for service providers and platform companies: to continually monitor for additional postings of copyrighted works for which they have received a takedown in the past and to ensure that no future copies of those works ever get posted online again by any user. As there is no feasible way for an OSP to entirely prevent future uploads of previously noticed works, a notice-and-staydown regime would likely spell the end of websites that allow users to create and share content. The drag that this would have on OSPs, users, content creators, and the broader economy would be devastating.

1. *Any new proactive content monitoring mandate would dramatically affect the responsibilities of rights holders and service providers and fundamentally change the DMCA’s “balance.”*

A “notice-and-staydown” requirement would constitute a radical departure from the balanced bargain Congress created through the DMCA. It would shift onto service providers an unprecedented and highly burdensome amount of responsibility for identifying and policing

⁵ The Copyright Office’s “Designated Agents” directory indicates that more than 66,000 entities rely on § 512’s notice and takedown process and safe harbor protection. U.S. Copyright Office, Directory of OSP Designated Agents (the “old directory”), http://www.copyright.gov/onlinesp/list/a_agents.html

infringing material. A shift to a notice-and-staydown system would effectively repeal § 512(m) and impose an all-day, everyday monitoring obligation on all OSPs, no matter their size or available resources, and create an effective strict liability regime for failing to accomplish the impossible task of fully preventing user infringements. As described at the end of this section, any such changes would be especially harmful to startups and small entrepreneurs and their ability to innovate.

Such a change, as Bridy and Keller acutely noted, would be similar to a “demolition” of the DMCA’s existing structure.⁶ This notice and staydown system would shift the burden and cost of identifying infringing material from copyright holders to service providers. The providers would no longer be required to cooperate with copyright owners, as Congress wisely intended with the DMCA. Instead, providers would be substituted for the owners as the responsible party for actively policing owners’ rights. There is a world of difference between requiring a service provider to comply with notices when they receive them and requiring the provider to attempt to actively monitor for copyright infringement and continually block or remove material that may be infringing;⁷ Congress chose the former over the latter for good reason.

This fundamental shift of responsibility is unwise and dangerous, whether it takes the form of a notice-and-staydown requirement, as Question 12 envisions (in which an OSP will be held secondarily liable for future user uploads of previously noticed content, regardless of whether or not the OSP actually knew of the infringing upload or exercised reasonable efforts to prevent future uploads of noticed content), or the form of a “filtering” requirement as articulated in Question 1 (in which an OSP’s qualification for § 512’s safe harbor would be contingent on “reasonably” deploying a content filtering system).⁸

2. *A content filtering mandate would impose an expensive, uncertain, and largely impractical content monitoring obligation on service providers.*

Cost. For most OSPs, the costs of deploying a content filtering technology would greatly outweigh the benefits of mitigating infringements. A great majority of OSPs do not experience enough infringing activity to make a content filtering technology worthwhile. Simply put, that an OSP hosts a large amount of user-uploaded content does not necessarily mean that an OSP hosts a large amount of *infringing* content. For example, Kickstarter (a rewards-based crowdfunding portal that allows user to raise money to fund creative projects) has hosted more than 300,000 projects since its launch⁹—most of which contain a multitude of associated media

⁶ Annemarie Bridy & Daphne Keller, *Comments on Section 512 Study: Request for Additional Comments* 17 (Mar. 30, 2016), available at <https://www.regulations.gov/document?D=COLC-2015-0013-86005>.

⁷ Wikimedia Foundation, *Comments on Section 512 Study: Notice and Request for Public Comment* 9 (Apr. 1, 2016) [hereinafter *Wikimedia Comments*].

⁸ Hereafter, references to “notice-and-staydown” refer to proposals in which an OSP would be held strictly liable for repeated uploads of previously noticed content and “filtering” requirements refer to proposals in which the implementation of a “reasonable” content filtering system would be a prerequisite for obtaining the protections of the DMCA’s current safe harbors.

⁹ *Stats*, Kickstarter, <https://www.kickstarter.com/help/stats> (last updated Feb. 21, 2017 1:39 PM PST).

content. Yet in 2015, it received copyright infringement claims targeting only 215 projects.¹⁰ But, of those 215 projects, Kickstarter only disabled access to 78, meaning 64 percent of copyright infringement claims were invalid.¹¹ Considering how expensive filtering systems can be—YouTube famously spent years and \$60 million developing its Content ID fingerprinting system—requiring a company like Kickstarter to employ such tools to prevent 78 infringements per year is wildly inefficient. Such a requirement would raise the cost of launching or operating startups that host user-posted content to untenable levels and would make it incredibly difficult and expensive for these startups to obtain funding.

Effectiveness. Notice-and-staydown requirements and filtering systems are not only expensive and time-consuming to develop, but they also are limited in their effectiveness. They can never entirely remove infringement on a website, since much infringing material will take different forms and users can often find ways to circumvent such systems. For example, filtering systems typically can only detect exact copies of allegedly infringing material. That means that such systems will identify an exact copy of a song or a video that is reposted, but will be less likely to identify the same part of that song or video in a modified form or different medium. This includes both copies that might constitute fair use, like fan art, and potentially infringing uses, like an unauthorized remix of a music track. In practice, infringing content is often not an exact copy of the original, and remixed or altered content is not necessarily an infringement.

Automated filtering systems are technically incapable of accurately identifying and removing many types of copyrighted content. Such tools are only available for a narrow range of media (e.g., video and music). For sites that allow users to sell physical goods, distribute remixed content, or publish blogs, no filtering tool will accurately identify alleged infringements. For example, Patreon, an internet-based platform that allows content creators to build their own subscription content service, has indicated that the vast majority of DMCA notices that it receives are based on remixed or fan art content, not wholly copied content.¹² These types of content are “almost impossible to detect automatically,” and yet this is exactly what a staydown regime would require to remain within the DMCA’s safe harbors.¹³

In its initial comments, Warner Music Group acknowledges the limitations of even YouTube’s \$60 million filtering tool: “Content ID does not do a sufficient job in identifying videos incorporating recordings that are in the Content ID system [Furthermore], video creators knew how to defeat detection by Content ID. In addition, Content ID [does] not identify live versions of performances by WMG artists.”¹⁴ If a state-of-the art filtering system that cost \$60 million to develop is inadequate to prevent infringement at a level acceptable to

¹⁰ Michal Rossen, *Kickstarter Transparency Report 2015*, The Kickstarter Blog (Apr. 25, 2016), <https://www.kickstarter.com/blog/kickstarter-transparency-report-2015>.

¹¹ *Id.*

¹² Collin Sullivan, *Creators and Tech Companies Can Be Friends*, Patreon (Jan. 19, 2017), <https://patreonhq.com/creators-and-tech-companies-can-be-friends-c18a8508c60d#ko3bf2lkj>

¹³ *Id.* See also *infra* at 6.

¹⁴ Warner Music Group, *Comments on Section 512 Study: Notice and Request for Public Comment 5* (Mar. 31, 2016) [hereinafter *Warner Comments*].

copyright owners, it seems impossible that any startup would be able to deploy a filtering system up to copyright owner standards.

Uncertainty. One critical benefit of § 512 and its current notice and takedown requirements is that it provides relative certainty for service providers in what they must do to comply. Imposing a filtering obligation would introduce tremendous uncertainty for service providers regarding what type of monitoring they must undertake, how reliable and thorough such monitoring must be, what constitutes reasonable efforts to monitor, etc. Those fundamental questions will greatly erode the certainty startups and their investors need to create new businesses and services and will dramatically reduce innovation.¹⁵

Requiring OSPs to implement a “reasonable” filtering system¹⁶ to qualify for the safe harbor renders the safe harbor of little value, since what is “reasonable” is generally a question of fact for a jury to decide.¹⁷ As such, service providers will not know whether their chosen content monitoring/filtering tools are legally adequate—and consequently whether they will benefit from the safe harbor—until after fact finding in a trial, rendering the safe harbor of no value. And even if they have survived such a jury trial, any subsequent change at all in their systems or behaviors might invite new trials and new liability risks.

What constitutes a reasonable filtering or monitoring mechanism will be regularly and highly contested. For example, Warner Music Group has argued that YouTube’s Content ID is insufficient.¹⁸ The system, for all its sophistication and the massive resources of the company that developed it, has numerous problems. These include, for example, Content ID mistakenly matching a 12 second loop of a user’s cat purring to content owned by EMI Publishing and PRS.¹⁹ Or, in 2012, YouTube automatically blocking a NASA video of the Curiosity landing on

¹⁵ For an example of the disruptive impact of uncertainty on investment, in 2015, Engine co-wrote a study that surveyed early stage investors in eight countries regarding their investment activity in digital content intermediaries (DCIs). The survey revealed the following statistics: 85% of investors were disinclined to invest in DCIs because of the threat of large statutory damages; 78% said they would be deterred from investing in DCIs that offer user generated content in new anti-piracy regulations that would expose such companies to increased second infringement liability; and overall, 89% of surveyed investors said they would be uncomfortable investing in DCIs altogether because of the ambiguous regulatory framework surrounding content distribution enterprises. Matthew Le Merle, Tallulah Le Merle & Evan Engstrom, *The Impact of Internet Regulation on Early Stage Investment*, Fifth Era, Nov. 2014.

¹⁶ Some initial commenters have suggested that a “notice-and-staydown” regime should similarly include a reasonableness carveout for liability. See Association of American Publishers, *Comments on Section 512 Study: Notice and Request for Public Comment*, (Apr. 1, 2016) available at <https://presspage-production-content.s3.amazonaws.com/uploads/1508/final04012016aapcommentsinusco512study.pdf?10000>; Intellectual Property Owners Association, *Comments on Section 512 Study: Notice and Request for Public Comment*, (Apr. 1, 2016) available at <http://www.ipo.org/wp-content/uploads/2016/04/IPO-Comments-to-Copyright-Office-on-Sec-512.pdf>.

¹⁷ See *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007); *EMI Christian Music Group, Incorporated v. MP3tunes, LLC*, 844 F.3d 79 (Dec. 13, 2016).

¹⁸ *Warner Comments*, supra note 14, at 5.

¹⁹ See *YouTube Flags Cat Purring as Copyright Infringing Music*, Torrent Freak (Feb. 11, 2015), available at <https://torrentfreak.com/youtube-flags-cat-purring-as-copyright-infringing-music-150211/>; YouTube’s Content - ID

Mars²⁰ and Michelle Obama’s highly praised speech at the 2012 Democratic National Convention—both were blocked erroneously due to alleged copyright infringement.²¹ Other types of filters that some service providers use pose problems as well. For example, during the Hugo Awards, Ustream’s automated software, which is designed to detect the unauthorized posting of copyrighted material, was triggered when the ceremony showed clips from “Doctor Who” prior to creator Neil Gaiman’s speech. The feed of the awards show subsequently went dark.²² These filters are intended to lower the need for human review, but the numerous errors show that this aspiration has not been realized.

Even where filters are more accurate—for instance, in matching exact copies of a work that has previously been noticed for removal—it is not clear that the technology will ever reach a point that is satisfactory or “reasonable” to rightsholders. For example, after Napster was sued for infringement, it was forced to shut down even after it implemented a filtering system that blocked 99% of previously-noticed infringements on the site, because the court had imposed a “zero tolerance” policy.²³ As no such filtering technology can remove all infringements, such an exacting standard would be unachievable for any OSPs.

Filtering and monitoring tools have made significant strides after years of development and considerable investment, but some groups view them as inadequate. If a tool is insufficient, can the system still be reasonable? No service provider can know whether it qualifies for the safe harbor until a jury rules on the reasonableness of its filter. This uncertainty wholly undermines the protection of the safe harbor, creates crippling uncertainty, and stymies investment. These harms will fall most heavily on new innovators, startups and smaller tech companies and will threaten their very survival and their ability to compete with entrenched incumbents who have greater resources.

3. A notice-and-staydown mandate would impose an expensive, uncertain, and largely impractical content monitoring obligation on service providers.

While creating a new obligation for OSPs to implement “reasonable” content filtering technology as prerequisite for the safe harbor would be incredibly damaging to the startup ecosystem, a notice-and-staydown requirement that held OSPs liable for repeated user uploads of previously noticed content regardless of the OSP’s monitoring activities would implicate all of

Piracy Filter Wreaks Havoc, *Torrent Freak* (Sept. 8, 2011), *available at* <https://torrentfreak.com/youtubes-content-id-piracy-filter-wreaks-havoc-110908/>

²⁰ Heavyweight Bots in the Clouds: The Wrong Incentives and Poorly Crafted Balances That Lead to the Blocking of Information Online, Anjanette H. Raymond, 11 *Nw. J. Tech. & Intell. Prop.* 473 (2013).

²¹ Geeta Dayal, *The Algorithmic Copyright Cops: Streaming Video’s Robotic Overlords*, *Wired* (Sept. 6, 2012), <https://www.wired.com/2012/09/streaming-videos-robotic-overlords-algorithmic-copyright-cops/>

²² *Id.*; Doug Gross, *Ustream apologizes for killing Hugo Awards Broadcast*, *CNN* (Sept. 4, 2012), <https://www.wired.com/2012/09/streaming-videos-robotic-overlords-algorithmic-copyright-cops/> <http://www.cnn.com/2012/09/04/tech/web/hugo-awards-gaiman-ustream/>

²³ *Billboard*, *U.S. Judge Keeps Napster Shuttered* (July 12, 2001), <http://www.billboard.com/articles/news/79147/us-judge-keeps-napster-shuttered>; *Am Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1097-98 (9th Cir. 2002) (upholding injunction).

the foregoing problems and punish OSPs for failing to comply with an impossible standard. In effect, under a notice-and-staydown regime, any provider that did not have a perfect system for monitoring and blocking content—a practical impossibility—would be at grave risk of crippling lawsuits and liability. Consequently, any notice-and-staydown mandate would drastically raise the cost of launching or operating an online platform startup, would greatly reduce investment capital for new companies and would threaten to bankrupt even the largest and most successful existing portals. The harm to the thriving and innovative online ecosystem would be extreme.

Congress was well aware of the impossibility of such monitoring in its legislative process of the DMCA. During the relevant Senate hearings, a representative of various internet intermediaries explained, in the analogous context of ISPs monitoring content that moved over their networks, that:

We have no way of knowing what those trillions of bits of information are flowing over our networks. We simply cannot do it, and to be held liable for those transmissions is simply nonsense and it will tie us up in court, create more litigation and more work for lawyers, but won't do anything to advance the construction and deployment of the internet, nor will it protect copyright owners to any significant degree.²⁴

As described above, new filtering technologies have not changed this fundamental reality. Given how easy it is to circumvent even the most sophisticated filters, OSPs cannot rely on technology to avoid liability under a notice-and-staydown regime. The alternative—manual human review—is equally impossible for startups. Warner Music Group estimates that “it would take at least 20-30 people, at a fully-loaded cost in excess of \$2 million per year, and probably the use of an outside content monitoring contractor at additional expense, to meaningfully affect (but not entirely block) just WMG’s top 25 album releases on YouTube.”²⁵ If this realistically reflects the cost for a large and highly resourced company just to “meaningfully affect” infringement on one site, it simply is not possible for a small business, startup or nascent innovator to afford to remove all copyrighted material from its website, as would be required under notice-and-staydown.

Considering the massive statutory damages for secondary infringement and the inevitability that previously noticed content will get re-uploaded despite an OSP’s best efforts, it is likely that a notice-and-staydown mandate would simply put OSPs hosting user content out of business.

²⁴ Copyright Infringement Liability of Online and Internet Service Providers: Hearing Before the S. Judiciary Comm. on S. 1146, S. Hrg. 105-366, 105th Cong. 24 (1997), at 29 (testimony of Roy Neel, United States Telephone Association); *see also id.* at 30 (“ISPs risk being held liable for massive damages for copyright infringement perpetrated by individuals without the knowledge of the ISP”).

²⁵ *Warner Comments*, *supra* note 14, at 8.

4. *“Potential new measures, such as filtering or stay-down,” would be harmful to the Internet ecosystem as a whole but particularly devastating to small and startup service providers. [Response to Question 1:]*

Returning to the specifics of Question 1, any of the attempts analyzed above to shift onto OSPs the burden of policing infringing activity, such as requirements that service providers implement “staydown” measures for content for which a previous takedown notice has been sent, would be particularly devastating to startup service providers and the many creators that rely on these OSPs to reach an audience. Such measures would impose significant new costs and burdens on companies as they tried to comply, costs that would be all but impossible for small service providers and innovative new startups to sustain. Such measures also would weaken the safe-harbor protections that have allowed a vast array of service providers to flourish. They would introduce uncertainty about whether providers are in compliance or are at risk of ruinous infringement liability. For small businesses and startups, the cost and uncertainty such obligations would impose would drive away investment capital and users.

This uncertainty and risk stifles innovation and forecloses valuable outlets and alternative models for creators. As Patreon has explained, if such a staydown model were in place, it would not have reached its current level of innovation and success:

Patreon just announced that we have sent \$100 million to creators. If a law like takedown staydown existed three years ago, we never would have received funding to start as a company because of the massive liabilities associated with user generated content, and that would be \$100 million out of the pockets of creators.²⁶

In practice, a filtering or staydown requirement would create insurmountable burdens for most or all new platform providers that host content uploaded by users. It would discourage investment in new companies and would prevent many valuable and innovative services from ever launching. And companies that were able to find significant early-stage capital would be unlikely to survive the inevitable legal threats arising from their inability to sufficiently filter content on behalf of copyright owners. The results would be harmful to the economy, job creation, free expression, and even creators, who would lose important avenues for reaching their audiences.

Many of the internet’s largest and most successful companies—YouTube, Facebook, Twitter—were able to emerge and thrive because of the safe harbors of § 512. If filtering or stay-down requirements are imposed, however, the next great company, the next revolutionary technology, or the next great innovation will never be able to get off the ground. As a result, requiring filtering or staydown measures would only serve to further entrench established incumbent service providers, since these established service providers are the only

²⁶ Sullivan, *supra* note 12.

OSPs that could even theoretically tolerate the risk that imperfect technology would lead to liability for infringement if copyrighted material is not blocked.²⁷

Question 6: Participants also noted disincentives to filing both notices and counter-notices, such as safety and privacy concerns, intimidating language, or potential legal costs. How do these concerns affect use of the notice-and-takedown and counter-notice processes, and how can these disincentives best be addressed?

The Request for Additional Comments indicates that some parties have suggested there are disincentives for content owners to file takedown notices under § 512.²⁸ It is unclear, however, what these disincentives are, since the requirements for sending a takedown notice are significantly less burdensome than what a copyright owner would have to do to effectuate the removal of infringing content in the absence of the DMCA (i.e., file a lawsuit). In this sense, complaints about “disincentives” for filing takedown notices appear to be nothing more than complaints that copyright owners should have to take any steps to enforce their copyrights. As explained below, there is functionally no penalty for sending even clearly invalid takedown notices. As the system currently operates, content owners can send millions of notices in an automated fashion to successfully remove millions of pieces of possibly-infringing content with virtually no repercussions for misidentifying non-infringing content. The minimal “disincentive” of needing to actually send those notices is not a meaningful consideration.

On the other hand, there are definite and significant disincentives for filing a counter-notice under § 512(g). Assertions in some initial comments that the counter-notice and put-back procedures are not “onerous” and that there is “no evidence” that the counter-notice procedures are “inadequate to deal with the concerns of people who post content who believe that their material does not infringe copyright,”²⁹ are erroneous. Arguments from initial commenters that the relative scarcity of counter-notices proves that § 512(g) is sufficient to deter improper notices beg the question.³⁰ Rather, considering the heavy burden that § 512(g) imposes on users, the infrequency of counter-notices demonstrates that § 512(g) does not adequately protect users’ rights.

First, submitting a counter-notice under § 512(g) is likely to be intimidating to all but the most informed and risk-tolerant uploaders. To restore access to a single piece of content, a user must publicly invite a copyright lawsuit that could cost them a considerable amount for legal representation, plus up to \$150,000 in statutory damages and potentially attorney’s fees. This

²⁷ See Bridy & Keller, *supra* note 6, at 18-22.

²⁸ See, e.g., Transcript (“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.); Copyright All., Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015 Notice of Inquiry at 20-21 (Apr. 1, 2016).

²⁹ Motion Picture Association of America, *Comments on Section 512 Study: Notice and Request for Public Comment* 20 (Apr. 1, 2016) [hereinafter *Comments of MPAA*].

³⁰ *Id.* at 48. (“[D]uring one six-month period, the MPAA and its members received counter-notifications in response to only .00003 percent of the takedown notices that it sent. The MPAA and its members therefore believe that sections 512(f) and (g) adequately address any issues of erroneous takedown notices.”)

“here I am, sue me” approach and the huge monetary exposure created by statutory damages are bound to deter most who consider sending a counter-notice. Considering many cases of wrongful takedowns will involve fair-use claims, which are difficult to evaluate even for experienced copyright lawyers, the risk of challenging a takedown notice is simply too great for most users. Even in cases where users are confident that they used the material fairly and lawfully or that the takedown is a flat-out mistake, most users will not feel they have the financial resources or other means to obtain legal representation to defend themselves if they are ultimately sued.³¹ The costs of sending a counter-notice are potentially massive; the benefits of doing so are relatively minimal. Because there are effectively no real penalties for false notices,³² the best a counter-notice sender can hope for is to have their content restored. Monetary compensation is extremely unlikely if not impossible in almost all cases, even if the improper deletion caused real harm to the user.

Second, § 512(g)’s requirement that senders of counter-notices consent to jurisdiction where they are located and agree to accept service of process can be intimidating to many users. Similarly intimidating is the requirement for the counter-notifier to state under penalty of perjury that they believe the material was removed or disabled “as a result of mistake or misidentification of the material.” Even users who strongly (and correctly) believe their use is fair or otherwise lawful may lack the legal sophistication to feel confident about making such a sworn commitment. Finally, for users outside the United States, the requirement that they submit to jurisdiction not just in the United States, but in any district where the provider may be found, is likely to be perceived as a substantial and risky undertaking to have a single piece of content restored.³³

Third, and often most significantly, filing a counter-notice requires that users whose material has been taken down publicly identify themselves by providing their name, address, and phone number to have the material restored.³⁴ In many cases, the poster of the material will have done so anonymously for valid and important reasons. For example, an employee may be posting to share a public news broadcast or otherwise critique his or her employer—quintessential fair uses that are likely to be subject to retaliatory takedown notices or erroneous automated takedowns, and/or where revealing the poster’s identity would subject them to potential retaliation. Posts criticizing a politician or powerful business figure can draw improper takedown notices. In such cases, the ability to post critical material anonymously may be essential to speaking out while avoiding retaliation, harassment, or political and employment consequences.

In cases such as these, the wrongful takedown notice is not just a mistake or the result of an overinclusive identification system. It is instead an attempt to misuse the takedown process for illegitimate purposes: to hamper a political opponent, silence an online critic, avoid

³¹ *Wikimedia Comments*, *supra* note 7, at 11-12.

³² *See infra* at 12.

³³ *Wikimedia Comments*, *supra* note 7, at 12

³⁴ Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 *Santa Clara Computer & High Tech. L. J.* 621 (2005).

unflattering but accurate and lawful commentary, protect against a whistleblower, etc. If the party aggrieved by such a posting can misuse § 512 to remove it from the internet, the poster's only recourse to restore their legitimate speech is to sacrifice the important protection of anonymity and subject themselves to the risks of speaking openly they were trying to avoid.

The Supreme Court has recognized that expression on the internet is entitled to the same First Amendment protection as other forms of speech,³⁵ and that the internet plays a crucial role in disseminating such speech.³⁶ The Court has also found a First Amendment right in the ability to speak anonymously,³⁷ and numerous lower courts have held that the right to anonymous speech extends to the internet.³⁸ Yet internet users must forego this right if they wish to have their speech reposted after it was the subject of a clearly wrongful takedown. In many cases where the censored speech is of most societal importance, this requirement to give up the protections of anonymity will act as a very strong disincentive to using the counter-notice mechanisms of § 512(g).

The Copyright Office and Congress should seek solutions that make the use of § 512(g) counter-notices less intimidating, burdensome, and risky for senders, recognizing that those who are subject to wrongful takedowns are typically less sophisticated and less well-resourced than those sending the takedowns. For example, changes could be made to 512(g) to preserve the possibility of anonymity for a user who counter-notices and is ultimately vindicated, either through further review by the rightsholder or by a court. Other changes could expand the list of valid good-faith reasons for counter-noticing. Currently, the only reasons specified in 512(g)(3)(c) are that the removal was "a result of mistake or misidentification of the material," a standard that is both overly narrow and opaque. The reasons notably do not explicitly include *deliberate* overreach by a rightsholder attempting to suppress speech, harass a critic or breach a critic's anonymity.³⁹ Counter-notices could also be given more value by reducing the time before material is put back in place, given that lawsuits following counter-notices are rare, but the weeks that pass between takedown and put-back can significantly erode the relevance and value of valuable, noninfringing speech.

Another important change would be to create meaningful penalties for wrongful or illegitimate takedown notices in order to discourage bad notices and diminish the need for § 512(g) in the first place. As explained below in answer to Question 7, the penalties for erroneous takedown notices under § 512 are nominal at best and rarely invoked. Senders of

³⁵ See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870, 885 (1997)

³⁶ *Id.*; see also 47 U.S.C. §230(a)(1) (Congressional finding that "[t]he rapidly developing array of Internet and other interactive computer services available to Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens").

³⁷ See, e.g., *Watchtower Bible & Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995).

³⁸ See, e.g., *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005); *Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. App. Div. 2001).

³⁹ While such improper reasons may *implicitly* fall within 512(g)(3)(c), that fact is likely to be lost on many legally unsophisticated users who see only the much more limited language about "mistake or misidentification."

takedown notices need only provide an unsworn statement specifying the allegedly infringing work that is to be removed.⁴⁰ Users sending counter-notices, on the other, must swear under penalty of perjury that they have a good faith belief that the material was removed or disabled “as a result of mistake or misidentification.”⁴¹

Users whose postings are targeted by abusive takedown notices can at best receive actual damages—which are rarely possible to prove—and possibly attorneys’ fees. This creates a massive imbalance in the risk/reward calculus between rightsholders issuing takedowns and those considering counter-noticing. In the vast majority of cases, the only risk to the rightsholder is that *if* the user counter-notices, and *if* the rightsholder sues, and *if* the alleged infringer decides to invest enough money to defend the suit, and *if* the alleged infringer ultimately prevails, then the rightsholder will be on the hook for the user’s attorneys’ fees. A user who counter-notices, however, is at risk of perjury, statutory damages, and paying attorneys’ fees. And if the user ultimately invests the money to defend a suit and prevails, the only upside is that his or her content might ultimately be reposted and the money he or she risked to achieve that result might be returned. If rightsholders had more at stake when they issued a takedown notice and if users had more potential upside, users would face fewer unreasonable and abusive takedown notices, making the high standard for invoking § 512(g) more reasonable. By strengthening § 512(f) as described below, the disparity between the risks taken by noticers and counter-noticers will be reduced, and a more rational and fair system will emerge.

Question 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?

The penalties for false or erroneous takedown notices under § 512 should be strengthened. As detailed in Engine’s initial comment, there is currently a dramatic imbalance in the penalties service providers face if they don’t expeditiously remove access to every bit of content identified as infringing by the owner—statutory damages of up to \$150,000 plus perhaps attorney’s fees. On the other hand, the penalties content owners face for sending takedown notices that are erroneous or even fraudulent are trivial, since they are limited to usually small and hard-to-establish actual damages. Moreover, courts have effectively required users bringing § 512(f) actions to prove that the sender subjectively knew that it sent a false takedown notice before liability can attach.⁴² The result is that even an objectively unreasonable takedown notice targeting clearly non-infringing material will not be enough to establish a § 512(f) claim unless either of two unlikely things happen: the defendant admits that

⁴⁰ See, e.g., § 512(c)(3)(A). No part of the takedown notice is required to be made under penalty of perjury except for a statement, if any, that the sender is authorized to act on behalf of the owner of allegedly infringed work. See also § 512(c)(3)(A)(vi).

⁴¹ Section 512(g)(3)(C).

⁴² See, e.g., *Rossi v. Motion Picture Ass’n of Am.*, 391 F.3d 1000 (9th Cir. 2004)

it knew it sent a false notice, or the plaintiff is somehow able to locate some “smoking gun” evidence demonstrating the sender’s bad faith.⁴³ The combination of very limited potential damages and an impossibly high legal standard means that § 512(f) provides little or no deterrence against the sending of false or fraudulent takedown notices.

The system incentivizes content owners to send as many notices as possible as quickly as possible (often automated on a vast scale), while the limits of § 512 give providers little ability to push back against wrongful notices.⁴⁴ Contrary to the assertions of some initial commenters, there simply is no proper balance between the interests of internet posters who “genuinely believe their material does not infringe” and “the overwhelming need of copyright owners to obtain expeditious relief in response to millions upon millions of pieces of indisputably infringing content available through service providers.”⁴⁵

The current system disproportionately favors copyright owners over the users of copyrighted works and the platform providers that host the material users upload. In practice, the protections of § 512(f) do little or nothing to deter or hold accountable copyright owners that send false, unfounded, or mistaken takedown notices.⁴⁶ This imbalance is not what Congress intended when the DMCA was enacted. As the Senate Report on § 512(f) notes:

The [Judiciary] Committee was acutely concerned that it provide all end-users with appropriate procedural protections to ensure that material is not disabled without proper justification. The provisions in the bill balance the need for rapid response to potential infringement with the end-users legitimate interests in not having material removed without recourse.⁴⁷

The current state of § 512(f) jurisprudence reveals that these concerns are not adequately addressed. Copyright owners can quickly take down content on a huge scale, but service providers and users are left with little recourse when non-infringing material they host or post is taken down. Because § 512(f) provides few meaningful consequences for sending false notices, and courts have largely insisted on an unrealistically high legal standard for holding senders of such notices liable, notices that are deficient, fraudulent, or ultimately mistaken have become commonplace.

As detailed by Urban & Quilter in their 2006 study, almost a third of the takedown notices in a 2006 study had problems with the underlying claim: flaws such as non-copyrightable material, material that was not under the control of the claimant, or material that was non-infringing as a result of legitimate fair use claim.⁴⁸ Similarly, data from blogging

⁴³ *Engine Initial Comments*, *supra* note 2, at 8-10.

⁴⁴ *Id.* at 5.

⁴⁵ *Comments of MPAA*, *supra* note 29, at 19-20.

⁴⁶ Wikimedia Foundation, *Comments on Section 512 Study: Notice and Request for Public Comment 23* (Apr. 1, 2016).

⁴⁷ S. Rep. No. 105-190, at 21 (1998).

⁴⁸ Urban & Quilter, *supra* note 34, at 667.

platform WordPress shows that it removes “some or all content” in response to only 60% of DMCA notices, while the remaining 40% are rejected as incomplete or abusive.⁴⁹ In 2015, Kickstarter rejected approximately 60% of the 336 notices it received.⁵⁰ The most recent academic study of takedown notices reviewed a 30 million takedown notice sample and found that nearly 30 percent were of questionable validity.⁵¹ And while some OSPs like Kickstarter that receive small numbers of notices and have the capacity to voluntarily review them in order to help their users avoid wrongful takedowns, this is not a feasible approach for most small OSPs. Such a requirement would only increase the cost to and burden on OSPs, reduce the already-low incentives for rightsholders to ensure quality, and result in more lawful content being taken down pursuant to erroneous claims.

To help restore the appropriate balance, § 512(f) should be strengthened:

First, § 512(f) should include a repeat false sender standard, comparable to the § 512(i) obligation of service providers to develop a policy to terminate repeat infringers. As Engine explained in its initial comments, a service provider under this standard would be legally permitted to ignore notices sent from “repeat false senders” that regularly send false or unreasonably deficient notices without losing the protection of the § 512 safe harbor.⁵²

Adopting a “repeat false sender” standard would help deter false notices without imposing a significant financial risk that could deter small copyright owners from sending takedown notices. The only entities that would be dissuaded are those that abuse the takedown process by sending notices that are fraudulent, sent for improper purposes, or regularly sent through a process that does not provide at least some safeguards to ensure accuracy and validity, as contemplated by § 512. And, since copyright owners like the MPAA believe that the notices they send target “indisputably infringing” content, the risk of triggering the “repeat false sender” threshold should be minimal. By eliminating notices from bad actors who routinely bombard service providers with erroneous takedowns, the overall number of requests will be reduced, and the ability of providers to respond quickly to legitimate requests will be enhanced.

This system imposes huge burdens on small companies that have no choice but to comply immediately with often vast numbers of takedown requests, even where some of those requests are deficient, false, or even sent for anticompetitive or speech-restricting purposes. This lopsided approach to takedown notices has contributed substantially to the exponential increase in the number of notices and the rise in fraudulent and deficient notices. Sending a notice of any level of legitimacy is all upside.

⁴⁹ *Intellectual Property Transparency Report*, Word Press, <https://transparency.automattic.com/intellectual-property/> (last visited Feb. 21, 2017).

⁵⁰ Michal Rosenn, *Kickstarter Transparency Report 2015* (Apr. 25, 2016), <https://www.kickstarter.com/blog/kickstarter-transparency-report-2015>.

⁵¹ Jennifer Urban, Joe Karaganis, & Briana L. Schofield, *Notice and Takedown in Everyday Practice* (Mar. 29, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628.

⁵² *Engine Initial Comments*, *supra* note 2, at 12.

Thus, imposing meaningful penalties under § 512(f) for sending wrongful takedowns, including lowering the current near-impossible legal standard for establishing those damages, would provide important benefits to service providers, particularly startups and small businesses, and to the internet ecosystem generally. These risks of dissuading copyright owners from sending legitimate notices would be minimal; only fraudulent, erroneous or recklessly inaccurate notices would be deterred.

Second, statutory damages should be reduced or eliminated. The potential liability of up to \$150,000 per work for a service provider that loses the safe harbor protections, combined with the uncertainty and complexity of those protections in many cases under § 512, leaves service providers in an untenable position. It is simply too risky for them to try to identify and reject erroneous notices, since, if they turn out to be wrong on even a single notice, an infringement judgment would be enough to bankrupt them. If statutory damages were reformed, OSPs that host relatively small amounts of infringing content could help mitigate the problems with § 512(g) by serving as a first line of defense against bad notices.

Finally, returning to a specific inquiry in Question 1, efforts to improve the accuracy of takedown notices should take into account differences between individual senders and automated systems. As detailed above, Section 512(f) has been rendered largely toothless by the prevailing requirement that a 512(f) defendant subjectively knew that it sent a false takedown notice, even where that notice is objectively unreasonable and targets clearly non-infringing material. Even under this standard, though, both automated systems and human review must be required to continue to consider fair use before demanding the removal of content, in order to be able to argue that they acted with requisite “subjective good-faith belief.”⁵³ Errors from the operation of automated systems that do not include such consideration of fair use should be treated as knowing misrepresentations under § 512(f).

The Copyright Office should support initiatives that rebalance the incentives and penalties in § 512’s takedown structure through the following recommendations: by lowering the burden on service providers and users, creating meaningful deterrence for false notices that target legitimate content, and by reforming statutory damages. These efforts should be particularly sensitive to the impact on startups and small businesses.

CONCLUSION

Startups and small business make disproportionately large contributions to American innovation and the economy, but are disproportionately at risk from the imbalances in how the DMCA’s safe harbor and notice-and-takedown provisions currently function. To help ensure the continued ability of entrepreneurs to innovate on the internet, any consideration of changes to § 512 must avoid mandating costly, uncertain, and impossible-to-meet filtering or notice-and-

⁵³ See *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1129 (9th Cir. 2015) (“We hold that the statute requires copyright holders to consider fair use before sending a takedown notification, and that failure to do so raises a triable issue as to whether the copyright holder formed a subjective good-faith belief that the use was not authorized by law.”)

staydown requirements. It also must strengthen the remedies available when abusive or erroneous takedown notices are issued and reduce the burden on those wishing to counter-notice such takedown requests. In making or recommending any changes to how § 512 functions, the Copyright Office should consider the particularly harmful effects those changes might have on small companies and investment, and take special care to avoid hampering the ability of startups to create, explore, and thrive in new markets and bring competition to incumbents and economic value to society. Engine thanks the Copyright Office for continuing to explore the ways in which the DMCA can be improved and the safe harbors can continue to encourage innovation and growth.