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## **LIBRARY OF CONGRESS**

### **U.S. Copyright Office**

**[Docket No. 2015-7]**

#### **Section 512 Study: Notice and Request for Public Comment**

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

**ACTION:** Notice of Inquiry.

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**SUMMARY:** The United States Copyright Office is undertaking a public study to evaluate the impact and effectiveness of the DMCA safe harbor provisions contained in 17 U.S.C. 512. Among other issues, the Office will consider the costs and burdens of the notice-and-takedown process on large- and small-scale copyright owners, online service providers, and the general public. The Office will also review how successfully section 512 addresses online infringement and protects against improper takedown notices. To aid in this effort, and to provide thorough assistance to Congress, the Office is seeking public input on a number of key questions.

**DATES:** Written comments must be received no later than 11:59 p.m. Eastern Time on March 21, 2016. The Office will be announcing one or more public meetings to discuss issues related to this study, to take place after initial written comments are received, by separate notice in the future.

**ADDRESSES:** All comments should be submitted electronically. Specific instructions for the submission of comments will be posted on the Copyright Office website at <http://www.copyright.gov/policy/section512> on or before February 1, 2016. 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, please contact the Office using the contact information below for special instructions.

**FOR FURTHER INFORMATION CONTACT:** Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, by email at [jcharlesworth@loc.gov](mailto:jcharlesworth@loc.gov) or by telephone at 202-707-8350; or Karyn Temple Claggett, Director of the Office of Policy and International Affairs and Associate Register of Copyrights, by email at [kacl@loc.gov](mailto:kacl@loc.gov) or by telephone at 202-707-8350.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

Congress enacted section 512 in 1998 as part of the Digital Millennium Copyright Act (“DMCA”).<sup>1</sup> At that time, less than 5% of the world’s population used the internet,<sup>2</sup> and bulletin board services were the popular online platforms.<sup>3</sup> Even then, however, Congress recognized that “the [i]nternet . . . made it possible for information—including valuable American copyrighted works—to flow around the globe in a matter of hours,”

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<sup>1</sup> Pub. L. No. 105-304, 112 Stat. 2860 (1998).

<sup>2</sup> See *Internet Users*, INTERNET LIVE STATS (Dec. 1, 2015), <http://www.internetlivestats.com/internet-users/#trend> (In 1998, there were only 188 million internet users; today, there are over 3.25 billion.).

<sup>3</sup> See *The History of Social Networking*, DIGITAL TRENDS (Aug. 5, 2014), <http://www.digitaltrends.com/features/the-history-of-social-networking/> (providing a timeline for the development of social networks).

and, as a consequence, copyright law needed to be “set . . . up to meet the promise and the challenge of the digital world.”<sup>4</sup>

In enacting section 512, Congress created a system for copyright owners and online entities to address online infringement, including limitations on liability for compliant service providers to help foster the growth of internet-based services.<sup>5</sup> The system reflected Congress’ recognition that the same innovative advances in technology that would expand opportunities to reproduce and disseminate content could also facilitate exponential growth in copyright infringement. Accordingly, section 512 was intended by Congress to provide 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,” as well as to offer “greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.”<sup>6</sup>

Congress was especially concerned about the liability of online service providers for infringing activities of third parties occurring on or through their services. To address this issue, Congress created a set of “safe harbors”—*i.e.*, limitations on copyright infringement liability—“for certain common activities of service providers.”<sup>7</sup> But the safe harbors are not automatic. To qualify for protection from infringement liability, a service provider must fulfill certain requirements, generally consisting of implementing measures to expeditiously address online copyright infringement.

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<sup>4</sup> 144 CONG. REC. S11,889 (daily ed. Oct. 8, 1998) (statement of Sen. Orrin Hatch).

<sup>5</sup> *See* H.R. REP. NO. 105-551, pt. 2, at 21 (1998) (noting that the DMCA, including section 512 of title 17, “balance[s] the interests of content owners, on-line and other service providers, and information users in a way that will foster the continued development of electronic commerce and the growth of the [i]nternet”).

<sup>6</sup> *Id.* at 49-50.

<sup>7</sup> S. REP. NO. 105-190, at 19 (1998).

Recent research suggests that the volume of infringing material accessed via the internet more than doubled from 2010 to 2012, and that nearly one-quarter of all internet bandwidth in North America, Europe, and Asia is devoted to hosting, sharing, and acquiring infringing material.<sup>8</sup> While Congress clearly understood that it would be essential to address online infringement as the internet continued to grow, it was likely difficult to anticipate the online world as we now know it—where, each day, users post hundreds of millions of photos, videos and other items, and service providers receive over a million notices of alleged infringement.

As observed by the House Judiciary Committee’s Ranking Member in the course of the Committee’s ongoing multi-year review of the Copyright Act, and consistent with the testimony of the Register of Copyrights in that hearing, the operation of section 512 poses policy issues that warrant study and analysis.<sup>9</sup> Section 512 has also been a focus of the U.S. Department of Commerce in recent years, which has noted ambiguities in the application of the safe harbor and encouraged service providers and rightsholders to discuss and pursue voluntary improvements.<sup>10</sup>

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<sup>8</sup> See DAVID PRICE, *SIZING THE PIRACY UNIVERSE* 3 (2013), <http://www.netnames.com/digital-piracy-sizing-piracy-universe> (infringing bandwidth use increased by 159% between 2010 to 2012 in North America, Europe, and [the] Asia-Pacific, which account for more than 95% of global bandwidth use).

<sup>9</sup> *Register’s Perspective on Copyright Review: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 6 (2015) (statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office) (“We are . . . recommending appropriate study of section 512 of the DMCA. . . . [T]here are challenges now that warrant a granular review.”); *id.* at 49 (statement of Rep. John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary) (“[T]here are policy issues that warrant studies and analysis, including section 512, section 1201, mass digitization, and moral rights. I would like the Copyright Office to conduct and complete reports on those policy issues . . . .”).

<sup>10</sup> U.S. DEP’T OF COMMERCE INTERNET POLICY TASK FORCE, *COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY* 54, 56 (Jul. 2013), <http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf> (“COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY”); DEP’T OF COMMERCE INTERNET POLICY TASK FORCE, *DMCA MULTISTAKEHOLDER FORUM, DMCA NOTICE-AND-TAKEDOWN PROCESSES: LIST OF GOOD, BAD, AND SITUATIONAL PRACTICES* 3 (2015),

The present study will review the statutory requirements of section 512 and evaluate its current effectiveness and impact on those who rely upon it. The key aspects of section 512 that are the subject of this review, including notable legal and practical developments, are summarized below.

### **A. Overview of Section 512 Safe Harbors**

Section 512 provides safe harbors from infringement liability for online service providers that are engaged in qualifying activities and that also meet certain eligibility requirements. There are four distinct safe harbors, detailed in sections 512(a), (b), (c), and (d), respectively. These safe harbors are available when a service provider engages in one or more of the following corresponding activities: (a) serving as a conduit for the automatic online transmission of material as directed by third parties; (b) caching (*i.e.*, temporarily storing) material that is being transmitted automatically over the internet from one third party to another; (c) storing (*i.e.*, hosting) material at the direction of a user on a service provider's system or network; or (d) referring or linking users to online sites using information location tools (*e.g.*, a search engine).

A service provider that meets the relevant eligibility requirements for one or more of the safe harbors is not liable for monetary relief and is subject only to limited injunctive relief for infringing activities conducted on or through its system or network.<sup>11</sup> In the case of a service provider that qualifies for a safe harbor under 512(b), (c), or (d), this injunctive relief is limited to: (1) disabling access to infringing material; (2) terminating the infringer's account(s); and (3) providing such other relief as may be

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[http://www.uspto.gov/sites/default/files/documents/DMCA\\_Good\\_Bad\\_and\\_Situational\\_Practices\\_Document-FINAL.pdf](http://www.uspto.gov/sites/default/files/documents/DMCA_Good_Bad_and_Situational_Practices_Document-FINAL.pdf) ("DEP'T OF COMMERCE MULTISTAKEHOLDER FORUM RECOMMENDED PRACTICES").

<sup>11</sup> 17 U.S.C. 512(a)-(d).

necessary to address infringement at a particular online location; provided, however, that the relief is “the least burdensome [form of relief] to the service provider.”<sup>12</sup> For a service provider that qualifies for the 512(a) safe harbor, the court may order only termination of an infringer’s account(s) or blocking of access to a “specific, identified, online location outside the United States.”<sup>13</sup>

In order to qualify for the limitation on liability provided under section 512(a), (b), (c), or (d), the service provider must comply with certain threshold requirements. Two of these requirements apply to all four safe harbors: (1) the adoption and reasonable implementation of a policy to terminate “repeat infringers”;<sup>14</sup> and (2) the accommodation of “standard technical measures” that identify or protect copyrighted works and have been developed according to broad consensus between copyright owners and service providers, to the extent any such measures exist.<sup>15</sup> A service provider that acts as a mere conduit for online transmissions qualifies for the limitation on liability provided by section 512(a) if the provider satisfies these two threshold requirements.

Service providers seeking protection under the safe harbors in section 512(b), (c), or (d), however, must, in addition, maintain a compliant notice-and-takedown process by responding expeditiously to remove or disable access to material claimed to be infringing upon receipt of proper notice from a copyright owner or the owner’s authorized agent.<sup>16</sup>

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<sup>12</sup> *Id.* at 512(j)(1)(A).

<sup>13</sup> *Id.* at 512(j)(1)(B).

<sup>14</sup> A service provider must adopt, “reasonably implement[],” and inform subscribers and account holders of a policy “that provides for the termination in appropriate circumstances of . . . repeat infringers.” *Id.* at 512(i)(1)(A).

<sup>15</sup> *Id.* at 512(i)(1)(B), (i)(2).

<sup>16</sup> *Id.* at 512(b)(2)(E), (c)(1)(C), (d)(3). The process for notification under the 512(c) and (d) safe harbors is set out in 512(c)(3); the process differs somewhat under the 512(b) safe harbor in that, in addition to following the requirements of 512(c)(3), the complaining party must also confirm that the content or link

A service provider seeking to avail itself of the section 512(c) safe harbor for user-posted content is further required to designate an agent to receive notifications of claimed infringement and provide contact information for the agent on its website and to the Copyright Office, which, in turn, is to maintain a public directory of such agents.<sup>17</sup>

The statute prescribes that a copyright owner's takedown notice must include "substantially the following": (i) the signature of the copyright owner or an authorized agent (*i.e.*, the complaining party); (ii) identification of the copyrighted work claimed to have been infringed, or, if multiple works are on a single site, "a representative list of such works"; (iii) identification of the infringing material or activity (or the reference or link to such material) and "information reasonably sufficient" to permit the service provider to locate the material (or the reference or link); (iv) contact information for the complaining party; (v) a statement that the complaining party has "a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law"; and (vi) a statement that the information is accurate and, under penalty of perjury, that the complaining party is authorized to act on behalf of the copyright owner.<sup>18</sup> A copyright owner's communication that does not substantially comply with these criteria will not serve as effective notice for purposes of the statutory process.<sup>19</sup> Further, under section 512(f), as discussed more fully below, "[a]ny person

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has been removed or disabled by the originating site or that a court has ordered that it be removed or disabled.

<sup>17</sup> *Id.* at 512(c)(2). Although section 512(d) does not itself expressly require service providers to designate an agent to receive notifications of infringement, it incorporates the notice provisions of section 512(c)(3), which require that notices be sent to "the designated agent of the service provider." The statutory scheme thus indicates that service providers operating under section 512(d) would also designate agents to receive takedown notices. *See id.* at 512(c)(3).

<sup>18</sup> *Id.* at 512(c)(3)(A)(i)-(vi).

<sup>19</sup> *See id.* at 512(c)(3)(B)(i) ("[A] notification . . . that fails to comply substantially . . . shall not be considered . . . in determining whether a service provider has actual knowledge or is aware of facts or

who knowingly materially misrepresents . . . that material or activity is infringing” can be held liable for any damages, including costs and attorneys’ fees, incurred by an alleged infringer who is injured by the misrepresentation.

In addition to responding to takedown notices, service providers that seek protection under the section 512(c) and (d) safe harbors must also act expeditiously to remove or disable access to material when they have “actual knowledge” of infringement or, in the absence of such actual knowledge, when they have “aware[ness] of facts or circumstances from which infringing activity is apparent”—the “awareness” standard often referred to as “red flag” knowledge.<sup>20</sup> But, while service providers are not free to ignore infringement of which they have actual or red flag knowledge, section 512 at the same time provides that an online entity has no duty to “monitor[] its service or affirmatively seek[] facts indicating infringing activity, except to the extent consistent with a standard technical measure.”<sup>21</sup>

Finally, to qualify for the section 512(c) and (d) safe harbors, a service provider must not “receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.”<sup>22</sup> The statutory financial benefit/right to control test does not incorporate a knowledge element.<sup>23</sup>

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circumstances from which infringing activity is apparent.”); *see also Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1112-14 (9th Cir. 2007) (“*CCBill LLC*”) (“[A] service provider will not be deemed to have notice of infringement when ‘the notification . . . fails to comply substantially with all the provisions of [17 U.S.C. 512(c)(3)(A)].”).

<sup>20</sup> *See* 17 U.S.C. 512(c), (d).

<sup>21</sup> *Id.* at 512(m)(1).

<sup>22</sup> *Id.* at 512(c)(1)(B), (d)(2).

<sup>23</sup> *See id.* at 512(c)(1)(B), (d)(2).



In addition to the general limitations on infringement liability, the statute provides specific protections for service providers that remove material in response to takedown notices, as well as for users who post material that is claimed to be infringing. Under section 512, a service provider is not liable for the good-faith removal or disabling of access to material “claimed to be infringing or based on facts or circumstances from which infringing activity is apparent”—even material not ultimately found to be infringing—so long as the provider takes reasonable steps to promptly notify the user who posted the material that it has been removed and also complies, as applicable, with a statutory counter-notification process.<sup>24</sup>

Section 512(g) allows a user whose content has been removed in response to a takedown notice to submit a counter notification to a service provider’s designated agent requesting that the content be reposted. The counter notification must include: (i) the signature of the subscriber (*i.e.*, the counter-notifying party); (ii) identification of the material that was removed or to which access was disabled, as well as the location where it previously appeared; (iii) a statement under penalty of perjury that the subscriber has a “good faith belief” that the material “was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled”; and (iv) the subscriber’s contact information, as well as a statement that the subscriber consents to the jurisdiction of the federal district court for the relevant judicial district and agrees to accept service of process from the party who provided the takedown notice (or that party’s agent).<sup>25</sup> To preserve its safe harbor immunity, the service provider must repost the content within 10 to 14 business days of receiving the counter notification unless the service provider first

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<sup>24</sup> *Id.* at 512(g)(1).

<sup>25</sup> *Id.* at 512(g)(3).

receives notice from the party who provided the takedown notice that a judicial action has been filed “seeking . . . to restrain the subscriber from engaging in infringing activity relating to the material on the service provider’s system or network.”<sup>26</sup> As in the case of misrepresentations in takedown notices, under section 512(f), any person who knowingly materially misrepresents that “material or activity was removed or disabled by mistake or misidentification” may be held liable for monetary damages, including costs and attorneys’ fees.<sup>27</sup>

## **B. Key Developments**

Since the enactment of section 512, stakeholders have adopted practices and systems to implement it, and courts have been called upon to interpret its provisions—from eligibility for safe harbors to the requirements for valid takedown notices to the standards that govern misrepresentations in the notification process. Some stakeholders have created best practices, entered into voluntary agreements to streamline enforcement procedures, and/or pursued other non-judicial approaches. Notwithstanding these developments, many on both sides of the equation express significant frustration with the process. A brief overview of the most salient issues follows.

### *Notice-and-Takedown Process*

Today, copyright owners send takedown notices requesting service providers to remove and disable access to hundreds of millions of instances of alleged infringement each year.<sup>28</sup> The number of removal requests sent to service providers has increased

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<sup>26</sup> *Id.* at 512(g)(2)(C).

<sup>27</sup> *Id.* at 512(f).

<sup>28</sup> See *Section 512 of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 3 (2014) (“*Section 512 Hearing*”) (written statement of Rep. Jerrold Nadler) (noting that in 2013, Google received notices requesting removal of approximately 230

dramatically since the enactment of section 512. For example, one search engine now “receive[s] removal requests for more URLs every week than [it] did . . . from 1998 to 2010 combined.”<sup>29</sup> Technology has come to play a significant role in the notice-and-takedown process, as automated processes that use fingerprinting, hash values, and keyword/metadata searches can identify movies, sound recordings, and other types of content that is being posted and disseminated.<sup>30</sup> But regardless of increasing technological capabilities, stakeholders frequently voice concerns about the efficiency and efficacy—not to mention the overall sustainability—of the system.<sup>31</sup>

Many smaller copyright owners, for example, lack access to third-party services and sophisticated tools to monitor for infringing uses, which can be costly, and must instead rely on manual search and notification processes<sup>32</sup>—an effort that has been likened to “trying to empty the ocean with a teaspoon.”<sup>33</sup> In addition to the burden of

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million items); Joe Mullin, *Google Handled 345 Million Copyright Takedowns in 2014*, ARS TECHNICA (Jan. 6, 2015), <http://arstechnica.com/tech-policy/2015/01/google-handled-345-million-copyright-takedowns-in-2014>.

<sup>29</sup> GOOGLE, HOW GOOGLE FIGHTS PIRACY 15 (2013), <https://docs.google.com/file/d/0BwxyRPFduTN2dVFqYml5UENUeUE/edit?pli=1#!>.

<sup>30</sup> See, e.g., TheFlo, *White Paper: Audio Fingerprinting*, MAXIMUM PC (Apr. 3, 2009), <http://www.maximumpc.com/white-paper-audio-fingerprinting/> (explaining the use of algorithms to create unique “audio fingerprints” to identify sound recordings); *What is a Hash Value?*, PINPOINT LABS (Dec. 10, 2010), <http://pinpointlabs.com/2010/12/what-is-a-hash-value/> (explaining use of hash values for text, audio, and video); DEP’T OF COMMERCE MULTISTAKEHOLDER FORUM RECOMMENDED PRACTICES (discussing use of automated tools to identify infringing material).

<sup>31</sup> See, e.g., *Section 512 Hearing* at 9 (written statement of Sean M. O’Connor, Entrepreneurial Law Clinic, University of Washington (Seattle)) (“[T]here are takedown notices now filed on millions of posts every month. That is clearly unsustainable.”); COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 56 (“[R]ight holders and ISPs alike have identified respects in which [the notice-and-takedown system’s] operation can become unwieldy or burdensome.”).

<sup>32</sup> See *Section 512 Hearing* at 100 (statement of Rep. Doug Collins) (“[I]ndividual songwriters and the independent filmmakers . . . often have limited or no technical expertise or software at their disposal . . .”); *id.* at 88-89 (2014) (written statement of Sandra Aistars, Copyright Alliance) (Independent authors and creators “lack the resources of corporate copyright owners” and instead issue “takedown notices themselves, taking time away from their creative pursuits.”).

<sup>33</sup> Trevor Little, *Google and Microsoft Outline the Challenges Facing Online Intermediaries*, WORLD TRADEMARK REV. (Mar. 1, 2013), <http://www.worldtrademarkreview.com/blog/detail.aspx?g=DFE24612-D6F7-4ED2-BFDB-383724E93D57> (quoting symposium comments by a vice president at Fox Group Legal).

policing infringement across the internet, copyright owners complain that material they succeed in having taken down is often promptly reposted on the same site—the so-called “whack-a-mole” problem.<sup>34</sup> Under section 512 as it has been interpreted, providers are not required to filter out or prevent the reposting of copyrighted content through the use of content identification technologies or other means.<sup>35</sup>

Accordingly, some have proposed that the notice-and-takedown procedure be revised to become a “notice-and-stay-down” procedure—that is, once a service provider receives an effective and uncontested takedown notice for a particular work, the provider should be required to make commercially reasonable efforts to keep that work from reappearing on its site.<sup>36</sup> Others, however, pointing to the very substantial efforts—especially of larger service providers—to respond promptly to takedown notices, are of the view that the existing system has “scaled well” over time to address the large volume of takedown notices, and does not need to be changed.<sup>37</sup>

Of course, the burdens of the notice-and-takedown process do not fall on copyright owners alone. Service providers must devote the time and resources necessary to respond to the increasing number of takedown notices sent each day. Smaller providers,

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<sup>34</sup> *Section 512 Hearing* at 35 (written statement of Paul Doda, Elsevier) (The “*same books* are repeatedly re-uploaded on the same sites hundreds of times after being taken down . . . .”); *id.* at 57 (written statement of Maria Schneider, musician) (“As fast as I take my music down, it reappears again on the same site—an endless whac-a-mole game.”).

<sup>35</sup> 17 U.S.C. 512(m); see *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1024 (9th Cir. 2013) (rejecting plaintiffs’ argument that service provider should have “taken the initiative to use search and indexing tools to locate and remove from its website any other content by the artists identified in . . . notices”); *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500, 525 (S.D.N.Y. 2013) (“512(m) and attendant case law make clear that service providers are under no affirmative duty to seek out infringement . . . [and t]his remains the case even when a service provider has developed technology permitting it to do so.”).

<sup>36</sup> See *Section 512 Hearing* at 14-15, 39, 58 (written statements of Sean M. O’Connor, Entrepreneurial Law Clinic, University of Washington (Seattle); Paul Doda, Elsevier; and Maria Schneider, musician).

<sup>37</sup> *Id.* at 16 (statement of Annemarie Birdy, University of Idaho College of Law) (“The notice and takedown regime in [s]ection 512(c) has scaled well for enforcing copyrights in the voluminous content hosted by online service providers.”).

in particular, may find the task to be a daunting one.<sup>38</sup> In addition, service providers complain that some notices do not meet the statutory requirements or, as discussed below, concern materials and activities that are not in fact infringing.

Since the passage of the DMCA, courts have been called upon to address the elements required for an “effective”—*i.e.*, valid—takedown notice. Looking to section 512’s requirement to provide “information reasonably sufficient to permit the service provider to locate the material,” courts have generally required a high degree of specificity, such as the particular link, or uniform resource locator (“URL”), where the infringing material is found.<sup>39</sup> Likewise, service providers often request that the specific URL for each allegedly infringing use be included in a notice.<sup>40</sup> Such a requirement can be burdensome in the case of a notice that references a large number of infringements at multiple locations throughout the same site. Additionally, copyright owners question whether this level of specificity is in conflict with the statute’s express language allowing

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<sup>38</sup> See U.S. Dep’t of Commerce, *Multistakeholder Forum: Improving the Operation of the DMCA Notice and Takedown Policy: Second Public Meeting*, Tr. 63:03-05 (May 8, 2014), [http://www.uspto.gov/sites/default/files/ip/global/copyrights/2nd\\_forum\\_transcript.pdf](http://www.uspto.gov/sites/default/files/ip/global/copyrights/2nd_forum_transcript.pdf) (Fred von Lohmann, Google) (“[W]hat large service providers are capable of doing is very different from what smaller service providers are doing.”); U.S. Dep’t of Commerce, *Multistakeholder Forum: Improving the Operation of the DMCA Notice and Takedown Policy: First Public Meeting*, Tr. 34:16-38:06 (Mar. 20, 2014), [http://www.uspto.gov/ip/global/copyrights/First\\_Public\\_Meeting-Improving\\_Operation\\_of\\_DMCA\\_Notice\\_and\\_Takedown\\_Policy.pdf](http://www.uspto.gov/ip/global/copyrights/First_Public_Meeting-Improving_Operation_of_DMCA_Notice_and_Takedown_Policy.pdf) (Ron Yokubaitis, Giganeews) (describing burden of processing non-standardized notices for a “small company [of] fifty-something people”).

<sup>39</sup> See, e.g., *Wolk v. Kodak Imaging Network, Inc.*, 840 F. Supp. 2d 724, 747 (S.D.N.Y. 2012), *aff’d sub nom.*, *Wolk v. Photobucket.com, Inc.*, 569 F. App’x 51 (2d Cir. 2014) (noting that an example of sufficient information in a notice allowing a service provider to locate the infringing material “would be a copy or description of the allegedly infringing material and the so-called ‘uniform resource locator’ (URL) (*i.e.*, web site address)”) (citing *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 521 (S.D.N.Y. 2010), *vacated in part on other grounds*, 676 F.3d 19 (2d Cir. 2012)).

<sup>40</sup> See, e.g., *Digital Millennium Copyright Act (DMCA) Notice*, AUTOMATTIC, <https://automattic.com/dmca-notice> (last visited Dec. 17, 2015); *DMCA Copyright Notifications*, TUMBLR, <https://www.tumblr.com/dmca> (last visited Dec. 17, 2015); *Copyright Infringement Notification*, YOUTUBE, [https://www.youtube.com/copyright\\_complaint\\_form](https://www.youtube.com/copyright_complaint_form) (last visited Dec. 17, 2015).

complaining parties to submit a “representative list” of works alleged to be infringed “at a single online site.”<sup>41</sup>

In addition, there is debate about whether search engine services must disable access to (*e.g.*, “de-list”) entire sites that copyright owners report as consisting largely of infringing material.<sup>42</sup> While the legislative history of section 512(d) observes that “safe harbor status for a provider that views [a pirate] site and then establishes a link to it would not be appropriate,”<sup>43</sup> service providers assert that de-listing could lead to censorship, and yet still not effectively address infringement, because the site would remain online.<sup>44</sup>

### *Knowledge Standards*

A good deal of litigation relating to section 512 to date has focused on the legal standards for determining when a service provider has sufficient knowledge or awareness to require it to remove or disable infringing material in order to remain eligible for the safe harbor protections of section 512(c) or (d). Courts have held “actual knowledge” to require evidence that the service provider subjectively knew that specific material on its site infringed copyright.<sup>45</sup> Alternatively, actual knowledge can be demonstrated with

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<sup>41</sup> 17 U.S.C. 512(c)(3)(A)(ii).

<sup>42</sup> *Compare* MPAA, Comments on Office of Intellectual Property Enforcement Coordinator Development of the Joint Strategic Plan on Intellectual Property Enforcement 17 (Oct. 16, 2015), <http://www.regulations.gov/#!documentDetail;D=OMB-2015-0003-0058> (“Search engines should delist sites based on court orders or other comparable judicial determinations of infringement . . . [meaning that] no results from a particular site would appear in any search results.”) *with* Google, Comments on Office of Intellectual Property Enforcement Coordinator Development of the Joint Strategic Plan on Intellectual Property Enforcement 7-8 (Oct. 16, 2015), <http://www.regulations.gov/#!documentDetail;D=OMB-2015-0003-0061> (“Google, IPEC Comments”) (“[W]hole-site removal is ineffective and can easily result in censorship of lawful material . . . [and] would jeopardize free speech principles, emerging services, and the free flow of information online globally and in contexts far removed from copyright.”).

<sup>43</sup> S. REP. NO. 105-190, at 48 (1998).

<sup>44</sup> Google, IPEC Comments, at 7-8.

<sup>45</sup> *See, e.g., UMG Recordings, 718 F.3d at 1025* (quoting *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012) (“*Viacom*”)).

evidence that a service provider received information about specific infringing material through a statutorily effective takedown notice, *i.e.*, a notice that includes “substantially” all of the information required under section 512(c)(3).<sup>46</sup>

Courts have also recognized the common law doctrine of willful blindness in addressing whether a service provider has actual knowledge of infringement.<sup>47</sup> A service provider is considered to have engaged in willful blindness when it is “aware of a high probability” of infringement and has “consciously avoided confirming that fact.”<sup>48</sup> Accordingly, courts have held that a service provider’s willful blindness to infringement on its site and failure to remove or disable access to infringing material can disqualify it from the protections of a section 512 safe harbor.<sup>49</sup>

As also noted above, sections 512(c) and (d) require a service provider to disable access to material or activity if it has “red flag” knowledge, *i.e.*, is aware of “facts or circumstances from which infringing activity is apparent.”<sup>50</sup> In enacting the statute, Congress explained that “a service provider [has] no obligation to seek out copyright infringement, but it [does] not qualify for the safe harbor if it . . . turn[s] a blind eye to ‘red flags’ of obvious infringement.”<sup>51</sup> The legislative history of section 512 also suggests Congress’ view that the red flag test “has both a subjective and an objective

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<sup>46</sup> See *UMG Recordings*, 718 F.3d at 1020 (“[T]he DMCA notice protocol . . . [is] the most powerful evidence of a service provider’s knowledge.”) (internal quotations omitted); *cf.* 17 U.S.C. 512(c)(3)(B)(i) (stating that a notice “that fails to comply substantially” with the 512(c) notice requirements “shall not be considered . . . in determining whether a service provider has actual knowledge.”).

<sup>47</sup> See, *e.g.*, *Viacom*, 676 F.3d at 35 (“[W]illful blindness doctrine may be applied, in appropriate circumstances, to demonstrate knowledge or awareness of specific instances of infringement under the DMCA.”).

<sup>48</sup> *Id.* at 35 (quoting *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003)). For example, a service provider was found to have “blinded itself” where it encouraged users to encrypt files so that the service provider could not know the contents of particular files. *In re Aimster Copyright Litig.*, 334 F.3d 643, 653 (7th Cir. 2003) (“*In re Aimster*”).

<sup>49</sup> See, *e.g.*, *Viacom*, 676 F.3d at 30, 35; see also *In re Aimster*, 334 F.3d at 653, 655.

<sup>50</sup> 17 U.S.C. 512(c)(1)(A)(ii), (d)(1)(B).

<sup>51</sup> H.R. REP. NO. 105-551, pt. 2, at 57 (1998).

element . . . the subjective awareness of the service provider of the facts or circumstances in question . . . [and the objective assessment of] whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances.”<sup>52</sup> With regard to information location tools, for example, Congress observed that if “an [i]nternet site is obviously pirate, then seeing it may be all that is needed for the service provider to encounter a ‘red flag.’”<sup>53</sup>

Copyright owners have argued that Congress’ intent in creating the red flag test was to “require[] less specificity than the actual knowledge” standard and to prevent service providers from qualifying for safe harbor protection when they are aware of widespread infringement.<sup>54</sup> Courts, however, have largely rejected the notion that a general awareness of infringement is sufficient to establish red flag knowledge.<sup>55</sup> Instead, courts have held that red flag knowledge requires “knowledge of specific and identifiable infringements” because, in order to retain the protection of the safe harbor, the service provider is required to expeditiously “remove or disable ‘the [infringing] material.’”<sup>56</sup>

In assessing these knowledge requirements, courts have also looked to the language of section 512(m), which states that “[n]othing” in section 512 conditions the availability of safe harbor protection on “a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent

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<sup>52</sup> *Id.* at 53; S. REP. NO. 105-190, at 44 (1998); *accord Viacom*, 676 F.3d at 31.

<sup>53</sup> H.R. REP. NO. 105-551, pt. 2, at 58 (1998); *see also Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1043 (9th Cir. 2013) (“*Fung*”) (finding that a service provider had red flag knowledge where “material in question was sufficiently current and well-known that it would have been objectively obvious to a reasonable person that the material . . . was both copyrighted and not licensed to random members of the public”).

<sup>54</sup> *See, e.g., Viacom*, 676 F.3d at 31-32 (internal quotations omitted).

<sup>55</sup> *See, e.g., UMG Recordings*, 718 F.3d at 1022-23; *Viacom*, 676 F.3d at 32.

<sup>56</sup> *Viacom*, 676 F.3d at 30-31 (emphasis omitted) (“[E]xpeditious removal is possible only if the service provider knows with particularity which items to remove.”).



with a standard technical measure.”<sup>57</sup> Based on this language, courts have concluded that “the DMCA . . . place[s] the burden of policing copyright infringement . . . squarely on the owners of the copyright.”<sup>58</sup>

### *Financial Benefit/Right to Control*

Litigation regarding the Section 512(c) and (d) safe harbors has also addressed what it means for a service provider to receive a “financial benefit directly attributable” to infringing activity where it has the “right and ability to control” such activity.

Like the traditional standard for vicarious liability under common law, the financial benefit/right to control test has been held not to turn on a service provider’s knowledge of infringement.<sup>59</sup> But courts have also indicated that “right and ability to control” in the context of section 512 means that the service provider “‘exert[s] substantial influence on the activities of users,’” *i.e.*, “‘something more than’” the basic ability to remove or block access to infringing materials.<sup>60</sup> Such control may include, for example, taking an active role in the listing of infringing material on a website, assisting users in locating infringing files, or encouraging the uploading or downloading of particular copyrighted works.<sup>61</sup> These courts have reasoned that because the takedown

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<sup>57</sup> 17 U.S.C. 512(m).

<sup>58</sup> *UMG Recordings*, 718 F.3d at 1022 (quoting *CCBill LLC*, 488 F.3d at 1113).

<sup>59</sup> *See Viacom*, 676 F.3d at 36-38 (2d Cir. 2012) (“[17 U.S.C.] 512(c)(1)(B) does not include a specific knowledge requirement” because to “import[] a specific knowledge requirement into [17 U.S.C.] 512(c)(1)(B) renders the control provision duplicative of [17 U.S.C.] 512(c)(1)(A).”); H.R. REP. NO. 105-551, pt. 1, at 25-26 (1998) (“The financial benefit standard in subparagraph (B) is intended to codify and clarify the direct financial benefit element of vicarious liability . . . . The ‘right and ability to control’ language in Subparagraph (B) codifies the second element of vicarious liability.”); 3 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 12.04[A][2] (Matthew Bender rev. ed.) (“Notably lacking from the foregoing two elements [of vicarious liability] is knowledge.”).

<sup>60</sup> *UMG Recordings*, 718 F.3d at 1029-31 (quoting *Viacom*, 676 F.3d at 38); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1173, 1181-82 (C.D. Cal. 2002) (“*Cybernet Ventures*”).

<sup>61</sup> *Fung*, 710 F.3d at 1043, 1046; *see also Viacom*, 676 F.3d at 38 & n.13 (“[C]ontrol may exist where the service provider is ‘actively involved in the listing, bidding, sale and delivery’ of items.”) (quoting *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1094 (C.D. Cal. 2001)); *Cybernet Ventures*, 213 F. Supp.

process itself requires the ability to remove or block access, Congress must have intended a greater degree of control than just this, or it would undermine the availability of the safe harbors.<sup>62</sup>

Sections 512(c) and (d) also exclude service providers from safe harbor protection when they “receive a financial benefit directly attributable to the infringing activity.”<sup>63</sup>

While the legislative history suggests that merely requiring a periodic payment for service does not constitute a direct financial benefit,<sup>64</sup> courts have found such a benefit when the service provider charges a subscription fee to its users and the “infringing activity constitutes a draw for subscribers, not just an added benefit.”<sup>65</sup> Financial benefit has also been found when a service provider’s “ability to attract advertisers” and the “amount of revenue” received from advertising are “tied directly to the infringing activity.”<sup>66</sup>

#### *Repeat Infringers*

Under section 512(i), a service provider seeking to avail itself of any of the safe harbors is required to “adopt[] and reasonably implement[]” a policy to terminate “repeat infringers” in “appropriate circumstances.”<sup>67</sup> Congress, however, did not define these terms in the statute, so it has been left to courts to determine whether a service provider’s

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2d at 1173 (finding that service provider had control where it required user websites to comply with “detailed instructions regard[ing] issues of layout, appearance, and content”).

<sup>62</sup> See, e.g., *Viacom*, 676 F.3d at 37.

<sup>63</sup> 17 U.S.C. 512(c)(1)(B), (d)(2).

<sup>64</sup> H.R. REP. NO. 105-551, pt. 2, at 54 (1998) (noting that financial benefit is not established through a “one-time set-up fee [or] flat, periodic payments for service from a person engaging in infringing activities”).

<sup>65</sup> *CCBill LLC*, 488 F.3d at 1117; *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004)).

<sup>66</sup> *Fung*, 710 F.3d at 1045-46.

<sup>67</sup> 17 U.S.C. 512(i)(1)(A); *BMG Rights Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, No. 1:14-cv-1611, 2015 WL 7756130, at \*14 (E.D. Va. Dec. 1, 2015) (“*BMG Rights Mgmt.*”) (denying 512(a) safe harbor protection to service provider because it did not reasonably implement a repeat infringer policy).

repeat infringer policy is sufficient to qualify the provider for safe harbor protection. In interpreting this aspect of the statute, courts have held that a repeat infringer is a user “who repeatedly or blatantly infringe[s] copyright,” and that such a determination may be based upon information from valid takedown notices and does not require a court determination.<sup>68</sup> Courts have further held that a reasonable policy, at a minimum, must provide a mechanism to identify and keep a record of users responsible for files referenced in takedown notices and, “under ‘appropriate circumstances,’” result in termination of “users who repeatedly or blatantly infringe copyright.”<sup>69</sup>

#### *Misuse of Takedown Process*

Service providers and advocacy groups have raised concerns about fraudulent and abusive section 512 notices that may restrain fair use, free speech, or otherwise misuse the notice-and-takedown process.<sup>70</sup> Some of the concerns arise from takedown notices for content that appears to constitute an obvious fair use of a copyright work.<sup>71</sup> Others relate to efforts to remove criticism or commentary—such as negative reviews—under the guise of copyright.<sup>72</sup> While the posting party can invoke the counter-notification procedure of section 512(g) to have the material reinstated, some believe that posters may

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<sup>68</sup> *CCBill LLC*, 488 F.3d at 1109; *Disney Enters., Inc. v. Hotfile Corp.*, No. 11–20427–CIV, 2013 WL 6336286, at \*20 (S.D. Fla. Sept. 20, 2013) (“*Hotfile*”); see also *BMG Rights Mgmt.*, No. 1:14-cv-1611, 2015 WL 7756130, at \*13.

<sup>69</sup> *CCBill LLC*, 488 F.3d at 1109 (internal citation omitted); see also *Hotfile*, No. 11–20427–CIV, 2013 WL 6336286, at \*21.

<sup>70</sup> See, e.g., *Section 512 Hearing* at 48, 63–67, 246–47 (written statements of Katherine Oyama, Google Inc.; Paul Sieminski, Automattic Inc.; and Library Copyright Alliance) (discussing misuse of takedown process).

<sup>71</sup> See, e.g., *id.* at 65 (written statement of Paul Sieminski, Automattic Inc.) (noting concern for “companies who issue DMCA notices specifically against content that makes use of their copyrighted material as part of a criticism or negative review – which is classic fair use”).

<sup>72</sup> See, e.g., *Automattic Inc. v. Steiner*, 82 F. Supp. 3d 1011, 1016 (N.D. Cal. 2015) (entering default judgment against the submitter of takedown notices for knowingly materially misrepresenting that a blog infringed its press release); *Online Policy Grp. v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1204 (N.D. Cal. 2004) (finding voting machine manufacturer liable under section 512(f) for “knowingly materially misrepresent[ing]” that publication of email archive discussing technical problems with voting machines was infringing).

not be aware of this, or may be too intimidated to pursue a counter notification.<sup>73</sup> A related concern is that the improper takedown of legitimate material, even if for a limited time, may harm important speech interests—for example, if a political advertisement is wrongly removed at a critical time in a campaign.<sup>74</sup>

As noted above, a takedown notice must include a statement that the complaining party has a “good faith belief” that the use is not authorized.<sup>75</sup> Similarly, a counter notification must include a statement that the sender has a “good faith belief” that the material in question was removed as a result of “mistake or misidentification.”<sup>76</sup> Section 512(f) provides for a cause of action and damages if a sender “knowingly materially misrepresents” in a takedown notice that material is infringing, or, in a counter notification, was wrongfully removed.<sup>77</sup>

In a number of cases challenging the validity of takedown notices, courts have fleshed out the meaning and application of section 512(f). For example, courts have held that the “good faith belief” requirement of section 512(c)(3)(A)(v) “encompasses a subjective, rather than objective standard”; that is, the sender is not responsible for an “unknowing mistake,” even if the sender’s assessment of infringement was objectively unreasonable.<sup>78</sup> But it has also been held that before sending a takedown notice, the

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<sup>73</sup> See, e.g., Brief for Org. for Transformative Works *et al.* as Amici Curiae Supporting Appellee and Cross-Appellant at 16, *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015) (Nos. 13-16106, 13-16107) (noting that creators worry about sending a counter notice because they may have to provide their real names and addresses or become subject to a lawsuit they cannot afford).

<sup>74</sup> See, e.g., CTR. FOR DEMOCRACY & TECH., CAMPAIGN TAKEDOWN TROUBLES: HOW MERITLESS COPYRIGHT CLAIMS THREATEN ONLINE POLITICAL SPEECH 1 (2010), [https://cdt.org/files/pdfs/copyright\\_takedowns.pdf](https://cdt.org/files/pdfs/copyright_takedowns.pdf).

<sup>75</sup> 17 U.S.C. 512(c)(3)(A)(v).

<sup>76</sup> *Id.* at 512(g)(3)(C).

<sup>77</sup> *Id.* at 512(f).

<sup>78</sup> *Rossi v. Motion Picture Ass’n of Am. Inc.*, 391 F.3d 1000, 1004-05 (9th Cir. 2004); accord *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1134 (9th Cir. 2015). The *Rossi* and *Lenz* courts reasoned that to

complaining party must “consider the existence of fair use” in forming the subjective good faith belief that the use is not authorized by the law.<sup>79</sup> The need to consider fair use may present challenges in the context of automated takedown processes relied upon by copyright owners to address large-volume infringements, including how such processes might be calibrated to accommodate this requirement and the necessity, if any, for human review.<sup>80</sup>

### *Voluntary Measures*

While interested parties continue to test and clarify aspects of section 512 in the courts, some stakeholders have chosen to work together to develop voluntary protocols and best practices to avoid litigation, improve online enforcement, and protect free speech and innovation. Several of these initiatives have been undertaken with the support of the U.S. government, including the Copyright Alert System, an effort supported by the U.S. Intellectual Property Enforcement Coordinator (“IPEC”),<sup>81</sup> and the DMCA Notice-and-Takedown Processes: List of Good, Bad, and Situational Practices, stemming from the efforts of the Internet Policy Task Force,<sup>82</sup> both of which seek to improve the efficiency and effectiveness of notice-and-takedown procedures, as well as the IPEC-led

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hold otherwise would conflict with Congress’ intent that a copyright owner only be penalized for “knowing” misrepresentations. *Rossi*, 391 F.3d at 1004-05; *accord Lenz*, 801 F.3d at 1134.

<sup>79</sup> *Lenz*, 801 F.3d at 1133.

<sup>80</sup> *See id.* at 1135-36. In *Lenz*, the Ninth Circuit was “mindful of the pressing crush of voluminous infringing content that copyright holders face,” and noted, “without passing judgment, that the implementation of computer algorithms appears to be a valid and good faith middle ground for processing a plethora of content while still meeting the DMCA’s requirements to somehow consider fair use.” *Id.* at 1135. The court further addressed how an algorithm might accommodate fair use, observing that it was “unaware of any [court] decision to date that actually addressed the need for human review.” *Id.*

<sup>81</sup> *See generally* CTR. FOR COPYRIGHT INFO., THE COPYRIGHT ALERT SYSTEM: PHASE ONE AND BEYOND (May 28, 2014), [http://www.copyrightinformation.org/wp-content/uploads/2014/05/Phase-One-And\\_Beyond.pdf](http://www.copyrightinformation.org/wp-content/uploads/2014/05/Phase-One-And_Beyond.pdf).

<sup>82</sup> *See generally* DEP’T OF COMMERCE MULTISTAKEHOLDER FORUM RECOMMENDED PRACTICES (list of recommended practices developed by a diverse group of copyright owners, service providers, and public interest representatives).

Payment Processor Best Practices, which seeks to cut off revenue to sites that promote infringement.<sup>83</sup> Other multistakeholder initiatives include the Trustworthy Accountability Group certification process, aimed at curbing ad revenue supporting piracy websites,<sup>84</sup> and the Principles for User Generated Content Services, which sets forth agreed principles for screening and addressing infringing content.<sup>85</sup>

## **II. Subjects of Inquiry**

The Copyright Office seeks public input, including, where available, empirical data on the efficiency and effectiveness of section 512 for owners and users of copyrighted works and the overall sustainability of the system if, as appears likely, the volume of takedown notices continues to increase. The Office invites written comments in particular on the subjects below. A party choosing to respond to this Notice of Inquiry need not address every subject, but the Office requests that responding parties clearly identify and separately address each numbered subject for which a response is submitted.

### ***General Effectiveness of Safe Harbors***

1. Are the section 512 safe harbors working as Congress intended?
2. Have courts properly construed the entities and activities covered by the section 512 safe harbors?

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<sup>83</sup> See INTELLECTUAL PROP. ENFORCEMENT COORDINATOR, 2011 U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR ANNUAL REPORT ON INTELLECTUAL PROPERTY ENFORCEMENT 46 (2012), [https://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec\\_annual\\_report\\_mar2012.pdf](https://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec_annual_report_mar2012.pdf) (describing a June 2011 agreement among American Express, Discover, MasterCard, PayPal, and Visa to abide by best practices to “stop sites distributing counterfeit and pirated goods from conducting financial transactions through payment processors”).

<sup>84</sup> See Press Release, Trustworthy Accountability Group, Advertising Industry Launches Initiative to Protect Brands Against Piracy Websites (Feb. 10, 2015), <https://www.tagtoday.net/advertising-industry-launches-initiative-to-protect-brands-against-piracy-websites>.

<sup>85</sup> See *Principles for User Generated Content Services*, <http://www.ugcprinciples.com> (last visited Dec. 16, 2015).

3. How have section 512's limitations on liability for online service providers impacted the growth and development of online services?
4. How have section 512's limitations on liability for online service providers impacted the protection and value of copyrighted works, including licensing markets for such works?
5. Do the section 512 safe harbors strike the correct balance between copyright owners and online service providers?

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

6. How effective is section 512's notice-and-takedown process for addressing online infringement?
7. How efficient or burdensome is section 512's notice-and-takedown process for addressing online infringement? Is it a workable solution over the long run?
8. In what ways does the process work differently for individuals, small-scale entities, and/or large-scale entities that are sending and/or receiving takedown notices?
9. Please address the role of both "human" and automated notice-and-takedown processes under section 512, including their respective feasibility, benefits, and limitations.
10. Does the notice-and-takedown process sufficiently address the reappearance of infringing material previously removed by a service provider in response to a notice? If not, what should be done to address this concern?
11. Are there technologies or processes that would improve the efficiency and/or effectiveness of the notice-and-takedown process?

12. Does the notice-and-takedown process sufficiently protect against fraudulent, abusive or unfounded notices? If not, what should be done to address this concern?
13. Has section 512(d), which addresses “information location tools,” been a useful mechanism to address infringement that occurs as a result of a service provider’s referring or linking to infringing content? If not, what should be done to address this concern?
14. Have courts properly interpreted the meaning of “representative list” under section 512(c)(3)(A)(ii)? If not, what should be done to address this concern?
15. Please describe, and assess the effectiveness or ineffectiveness of, voluntary measures and best practices—including financial measures, content “filtering” and takedown procedures—that have been undertaken by interested parties to supplement or improve the efficacy of section 512’s notice-and-takedown process.

### ***Counter Notifications***

16. How effective is the counter-notification process for addressing false and mistaken assertions of infringement?
17. How efficient or burdensome is the counter-notification process for users and service providers? Is it a workable solution over the long run?
18. In what ways does the process work differently for individuals, small-scale entities, and/or large-scale entities that are sending and/or receiving counter notifications?

### ***Legal Standards***

19. Assess courts’ interpretations of the “actual” and “red flag” knowledge standards under the section 512 safe harbors, including the role of “willful blindness” and section 512(m)(1) (limiting the duty of a service provider to monitor for infringing



activity) in such analyses. How are judicial interpretations impacting the effectiveness of section 512?

20. Assess courts' interpretations of the "financial benefit" and "right and ability to control" standards under the section 512 safe harbors. How are judicial interpretations impacting the effectiveness of section 512?
21. Describe any other judicial interpretations of section 512 that impact its effectiveness, and why.

### ***Repeat Infringers***

22. Describe and address the effectiveness of repeat infringer policies as referenced in section 512(i)(A).
23. Is there sufficient clarity in the law as to what constitutes a repeat infringer policy for purposes of section 512's safe harbors? If not, what should be done to address this concern?

### ***Standard Technical Measures***

24. Does section 512(i) concerning service providers' accommodation of "standard technical measures" (including the definition of such measures set forth in section 512(i)(2)) encourage or discourage the use of technologies to address online infringement?
25. Are there any existing or emerging "standard technical measures" that could or should apply to obtain the benefits of section 512's safe harbors?

### ***Remedies***

26. Is section 512(g)(2)(C), which requires a copyright owner to bring a federal lawsuit within ten business days to keep allegedly infringing content offline—and a counter-

- notifying party to defend any such lawsuit—a reasonable and effective provision? If not, how might it be improved?
27. Is the limited injunctive relief available under section 512(j) a sufficient and effective remedy to address the posting of infringing material?
28. Are the remedies for misrepresentation set forth in section 512(f) sufficient to deter and address fraudulent or abusive notices and counter notifications?

***Other Issues***

29. Please provide any statistical or economic reports or studies that demonstrate the effectiveness, ineffectiveness, and/or impact of section 512's safe harbors.
30. Please identify and describe any pertinent issues not referenced above that the Copyright Office should consider in conducting its study.

Dated: December 28, 2015.

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