

**Before the
LIBRARY OF CONGRESS
United States Copyright Office**

**In the Matter of
Request for Comments
on United States Copyright Office
Section 512 Study**

Docket No. 2015-7

Submitted February 21, 2017

**Reply Comments of the Motion Picture Association of America, Inc.
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The MPAA appreciates the effort and attention that the Copyright Office has devoted to reviewing written comments and hosting public roundtables as part of its study of the effectiveness of the Section 512 limitations on liability. The MPAA welcomes the opportunity to submit further comments regarding the important follow-up questions that the Copyright Office has asked.

Characteristics of the Current Internet Ecosystem

- 1. As noted above, there is a great diversity among the categories of content creators and ISPs who comprise the Internet ecosystem. How should any improvements in the DMCA safe harbor system account for these differences? For example, should any potential new measures, such as filtering or stay-down, relate to the size of the 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?**

The MPAA agrees that there is no “one-size-fits-all” system that will function perfectly for the entire range of copyright owners and service providers. At the same time, creating distinct rights and obligations for different categories of copyright owners and service providers likely would be a confounding and ultimately counter-productive exercise. Any improvements to the DMCA limitations on liability must therefore have as their highest priority incentivizing copyright owners and service providers—regardless of their size—to take measures that effectively reduce online piracy.

Different copyright owners and service providers face different challenges in attempting to work within the current safe-harbor system. For example, larger copyright owners (like the MPAA’s members) must send notices with respect to millions of items of infringing content each

year.¹ Smaller copyright owners (such as individual filmmakers or photographers) generally send smaller numbers of notices. But these individuals often lack the resources necessary to efficiently locate infringing material and send notifications about the material they do identify. In some cases, their inability to combat internet piracy makes it difficult, if not impossible, for them to continue creating content.²

Similarly, different types of service providers face different realities with respect to the Section 512 limitations on liability. Many service providers that host user-generated audio-visual content (“UGC”), for example, must deal with greater quantities of infringing material on their sites than do service providers that host only content they generate themselves. “Conduit” service providers do not have to satisfy any notice-and-takedown obligations to qualify for Section 512(a), whereas service providers seeking to qualify for one of the other sections do have to follow those requirements.³

Given the variation in copyright owners and service providers, solutions that may work in certain contexts will not necessarily work in others. For example, a service provider that hosts only content that it creates may not need to employ the same technological measures to deal with infringing material as the UGC-hosting service.

That said, the MPAA believes that legislation distinguishing among various types of copyright owners and service providers is unnecessary and likely would cause more problems than it would solve.

First, it would be difficult practically to create a taxonomy of different entities and assign corresponding sets of different obligations to those entities. The comments submitted by the Wikimedia foundation are a good example of this problem. If the Section 512 provisions expressly imposed more stringent requirements on larger service providers than smaller ones, Wikimedia could be included in the category of “large” service providers. Wikipedia, after all, has millions of users.⁴ We understand that Wikimedia relies on a comparatively small staff to remove the relatively small number of images and other files that may infringe third-party rights. Wikimedia could have difficulty complying with requirements appropriate for sites that host significant amounts of audio-visual content.

On the other hand, sites that have user bases smaller in number than Wikimedia’s often host or link to large amounts of infringing material. Were the law to draw distinctions based on the size of a service provider’s user base or its staff—and require less of “smaller” service

¹ See *Comments of the MPAA* (Apr. 1, 2016) at 2 (noting that in 2015 alone, the MPAA’s members sent notices with respect to more than 104.2 million URLs just to search operators and hosting sites).

² See, e.g., *Comments of the Directors Guild of America* (Apr. 1, 2016) at 5-7; *Comments of the Copyright Alliance* (Apr. 1, 2016) at 8-11; see also *Comments of the Contents Creators Coalition* (Apr. 1, 2016) at 22.

³ Compare 17 U.S.C. § 512(a) with 17 U.S.C. §§ 512(b)-(d).

⁴ *Comments of the Wikimedia Foundation* (Apr. 1, 2016) at 4, 6.

providers in dealing with infringing material on its site—such a “small” service might have only minimal obligations to deal with a very large problem.

Second, if the DMCA limitations on liability are to operate as Congress intended, *all* service providers—large and small—must assume greater responsibility for combatting infringement facilitated by their sites. Although some service providers claim they lack the resources necessary to do more than they do now, these concerns do not appear to be well-founded. Again taking Wikimedia as an example, this provider says that it has a small staff to discharge its responsibilities under the DMCA.⁵ But Wikimedia reports that it received only several dozen takedown notices in 2015. It also says that its volunteers “rigorously enforce [Wikimedia’s copyright] policies,” such that, “in the vast majority of cases where a work may be uploaded to a Wikimedia project in violation of copyright law, the work is removed before the copyright owner can become aware of it and send [Wikimedia] a takedown notice.”⁶

Hence, if courts were to interpret the Section 512 requirements as Congress intended, this would be unlikely to have any appreciable effect on Wikimedia or comparable services. Other service providers whose sites feature more infringing works would likely have to do more than Wikimedia, but that is exactly the point: The service providers that host or link to the greatest amount of infringing material *should* be required to do more to deal with that infringement than sites that host or link to relatively little infringing material.

In sum, the variation among copyright owners and service providers does not require amending Section 512 to create a matrix of rights and responsibilities. The variation instead can and should be addressed by following Congress’s intent in applying the provisions that now exist.

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

When considering the public interest, the Copyright Office should keep in mind that the “public” consists of many different constituencies, including not only consumers and internet users, but also large and small content creators. Many of the comments submitted by public interest groups purport to reflect the views only of one segment of the public. The commenters that fall into this category are correct that there are some shortcomings in the current safe harbor

⁵ *Id.* at 3-6; *see also id.* at 8-10.

⁶ *Id.* at 1, 6-7.

system.⁷ The solution, however, is not to implement rules that create greater impediments to combatting and reducing online piracy.

The MPAA believes the public has an interest both in the continuing creation of content that audiences want as well as a vibrant internet ecosystem. Congress recognized both of these interests when it passed the DMCA. Congress intended the limitations on liability to encourage service providers to work with copyright owners to further both goals.⁸ Through provisions such as the counter-notification procedures, Congress also sought to protect the rights of individual users whose content may be taken down.⁹

As noted in the MPAA's opening comments, the members of the MPAA have been working to provide an ever increasing number of options to allow consumers to access content how they want and when they want, and consumers have benefitted greatly from those efforts.¹⁰ Anti-piracy efforts, including the DMCA's notice-and-takedown system, are critical to their ability to continue to do so. The DMCA's provisions, properly interpreted, *do* further the perspectives and interests of the general public.

Operation of the Current DMCA Safe Harbor System

3. Participants expressed widely divergent views on the overall effectiveness of the DMCA safe harbor system. How should the divergence in views be considered by policy makers? Is there a neutral way to measure how effective the DMCA safe harbor regime has been in achieving Congress' twin goals of supporting the growth of the Internet while addressing the problem of online piracy?

Section 512 was intended to help copyright owners as well as service providers, but only the latter group believes the system is achieving those goals.¹¹ It is clear that the current

⁷ See, e.g., *Comments of Public Knowledge* (Apr. 1, 2016) (raising concerns about inaccurate takedown notices); *Comments of the Electronic Frontier Foundation* (Apr. 1, 2016) (raising concerns about inaccurate takedown notices and burdens on service providers); *Comments of Organization for Transformative Works* (Apr. 1, 2016) (raising concerns about inaccurate takedown notices).

⁸ See H.R. Rep. No. 105-551 (II), at 49-50, 105th Cong., 2d Sess. (July 22, 1998) (the DMCA was intended both to "preserve strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment" and to "provide[] greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities").

⁹ See 17 U.S.C. § 512(g).

¹⁰ See *Comments of the MPAA* at 9-10.

¹¹ One of Congress's primary goals in enacting Section 512 was to encourage copyright owners and service providers to cooperate in combatting online piracy so that content creation and internet development could flourish in the digital age. See H.R. Rep. No. 105-551 (II), at 49, 105th Cong., 2d Sess. (July 22, 1998).

framework favors services providers, but that is not an indication of whether it is *working*. That copyright owners in these proceedings overwhelmingly believe that the system is broken itself demonstrates that Section 512 is not working the way Congress wanted it to.

Another neutral measure that demonstrates that the system is not working as Congress envisioned is that both the number of takedown notices *and* internet piracy have increased dramatically over time. As the MPAA noted in its opening comments, members of the MPAA sent 22 million notices to sites devoted to search from March 2013 to February 2014; in the 2015 calendar year, that number had grown to 57.7 million.¹² And yet, the ever-increasing number of takedown notices are not keeping pace with the massive growth of online piracy relevant to the notice and takedown system.

Despite the substantial number of takedown notices, the system has not been effective at achieving its stated goal: incentivizing a system of shared responsibility that meaningfully reduces the quantity of online infringement.

4. Several public comments and roundtable participants noted practical barriers to effective use of the notice-and-takedown and counter-notice processes, such as differences in the web forms used by ISPs to receive notices or adoption by ISPs of additional requirements not imposed under the DMCA (e.g., submission of copyright registration or creation of certain web accounts). What are the most significant practical barriers to use of the notice-and-takedown and counter-notice processes, and how can those barriers best be addressed (e.g., incentives for ISPs to use a standardized notice/counter-notice form, etc.)?

One of the most significant practical barriers to the use of the notice-and-takedown process is that Courts have read the “representative list” provision out of the DMCA. As the MPAA discussed in more detail in its opening comments,¹³ Section 512’s notice-and-takedown provisions make clear that a copyright owner can notify a service provider of infringement by identifying “the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.”¹⁴ A number of courts, however, have effectively ignored Congress’s authorization for copyright owners to use such a “representative list.” They have instead required copyright owners to list not only the name of every work claimed to be infringed, but also each individual URL where material that infringes that work may be located.¹⁵ Requiring separate identification of each URL—rather than the representative list that Congress authorized—is highly burdensome and significantly reduces the effectiveness of the notice-and-

¹² *Comments of the MPAA* at 16.

¹³ *See id.* at 23-25.

¹⁴ 17 U.S.C. § 512(c)(3)(A)(ii).

¹⁵ *See, e.g., Perfect 10, Inc. v. Giganews, Inc.*, 993 F. Supp. 2d 1192, 1200-01 (C.D. Cal. 2014). *But see ALS Scan, Inc. v. RemarQ Cmty., Inc.*, 239 F.3d 619, 622-25 (4th Cir. 2001) (correctly applying the representative list requirement).

takedown process. As soon as one URL is removed, another can be immediately substituted in its place. Interpreting the representative list provision as Congress intended it to operate would reduce a significant practical impediment to the effective use of the notice-and-takedown process.

Another practical barrier is that some service providers require copyright owners to include information in takedown notices that goes well beyond the information required by the DMCA, such as copyright registration information. Complying with these extra requirements is unduly burdensome. Service providers should be required to accept all takedown notices that comply with the DMCA, and should not be allowed to reject notices that comply with the statute, but not the service provider's extra (and arbitrary) criteria.

The MPAA does not believe that the lack of a standardized form for notice-and-takedown is a significant problem at this time. Although the MPAA does not object to standardized forms in theory, service providers should not be required to use a standardized form to the exclusion of other, more efficient measures. Different service providers use a variety of methods to make sending and receiving takedown notices more efficient. Some, for example, have their own (often electronic) format that allows copyright owners to send notifications in bulk, rather than having to send thousands of individual notices that must all be processed individually. The MPAA's members recognize that for smaller copyright owners, having the option of using a standardized form that would be presumed to be sufficient under the DMCA could be helpful. But such forms should not be required of all service providers or copyright owners, in lieu of other, more effective systems.

Further, there could be significant practical difficulties in attempting to create and implement standardized forms. Efforts to standardize the forms used for sending notices and counter-notices have been made in the past, including a multi-stakeholder forum organized by the PTO, and they have largely failed.¹⁶ As noted, a number of service providers already have their own notice-and-takedown systems, and it could be challenging to revise all of those systems to satisfy a single form of notice.

¹⁶ See USPTO, *Agenda For Second Multistakeholder Forum on the DMCA Notice and Takedown System*, available at <https://www.uspto.gov/learning-and-resources/ip-policy/copyright/2nd-multistakeholder-forum-dmca-notice-and-takedown> (May 8, 2014) (describing the discussion as a "technical discussion where representatives can exchange information on current standardization practices and begin identifying issues for consideration by the working group"); USPTO, *DMCA Notice-and-Takedown Processes: List of Good, Bad, and Situational Practices*, available at <https://www.uspto.gov/learning-and-resources/ip-policy/copyright/multistakeholder-forum-dmca-notice-and-takedown-system> (Apr. 2015) (discussing best practices but not creating a sample form).

5. **A number of study participants identified the timelines under the DMCA as a potential area in need of reform. Some commenters expressed the view that the process for restoring access to material that was the subject of a takedown notice takes too long, noting that the material for which a counter-notice is sent can ultimately be inaccessible for weeks or months before access is restored. Other commenters expressed the view that the timeframe for restoring access to content is too short, and that ten days is not enough time for a copyright holder to prepare and file litigation following receipt of a counter-notice. Are changes to the section 512 timeline needed? If so, what timeframes for each stage of the process would best facilitate the dual goals of encouraging online speech while protecting copyright holders from widespread online piracy?**

Based on current information, the timeline specified in Section 512's takedown and put-back procedures appears to be working well.¹⁷ The evidence submitted in this proceeding does not justify changing that timeline. In theory, the requirement that a content owner file a federal lawsuit within 10 days of receiving a counter-notice could allow for improper use of the put-back system.¹⁸ Thus far, however, the MPAA's members have not experienced widespread abuse of the counter-notice system. Only when there is evidence of abuse on a large scale would it become appropriate to reconsider the ten-day clock.

Likewise, the MPAA does not believe the anecdotal evidence submitted to the Copyright Office regarding the amount of time content remains down justifies a change to the clock (10-14 days for material subject to a takedown notice to remain offline after a service provider has received a counter-notice).¹⁹

First, the number of counter-notices is relatively small. The members of the MPAA received fewer than 210 counter-notices in calendar year 2015, after sending notices with respect to more than 104.2 million URLs—a mere .0002% of cases. This and other evidence show that only a minuscule percentage of material or links that are removed are even the subject of challenge.

Second, the reality is that, for most users whose material is taken down by mistake, a period of 10-14 days is not particularly long to wait. As discussed in response to Question 6 below, it appears from the evidence presented that many users who claim an urgent need to have material reposted have not had difficulty with obtaining that result in a significantly shorter timeframe. Some commenters cited a small number of instances where users whose material

¹⁷ See *Comments of the MPAA* at 44-45.

¹⁸ 17 U.S.C. § 512(g)(2)(C).

¹⁹ *Id.*

was removed did not have the opportunity to monetize their content during this period. These anecdotes do not suggest a problem so significant in this regard that it requires a statutory fix.²⁰

For content owners, on the other hand, having a modest ten-day period within which to decide whether to file suit is very important. Ten days, it must be noted, is itself a very short period within which to file a lawsuit. Were the period to be shortened, copyright owners would be put to an intolerable choice of having to file lawsuits with very little time to spare or seeing their material reposted. Given that reposted material can be disseminated worldwide in a matter of minutes, the latter alternative has significant and potentially devastating consequences.

To the extent that users have complained that their material is not actually restored within the 10-14 days required by the DMCA, that is not a problem with the statute: The statute specifies that the service provider must “replace[] the removed material and cease[] disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice.”²¹ Accordingly, certain service providers may need to do more to comply with their statutory obligations, but that does not mean that the timeline as specified in the statute should be re-visited.

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?

Counter-notices

Based on the evidence presented in these proceedings, the purported disincentives to filing a counter-notice do not currently cause significant problems. The instances of alleged abuse of the notice-and-takedown system have been largely anecdotal. Participants did not present evidence of widespread abuse. Further, the notice-and-takedown system depends on copyright owners having sufficient information to file a lawsuit against the user responsible for infringing content. Lowering the requirements for sending counter-notices would deprive copyright owners of their ability to effectively analyze and respond to them, rendering the entire takedown-and-putback system unworkable.

The DMCA’s requirements for the contents of counter-notices are not onerous. The counter-notice must include (1) a signature; (2) an identification of the material removed and the location at which it previously appeared; (3) a statement under penalty of perjury that the subscriber has a good faith belief that the material was wrongfully removed; and (4) the

²⁰ See Roundtable Tr. 153:8 (May 2, 2016) (Ms. Prince)(discussing loss of revenue); Tr. at 75:4–8 (May 12, 2016) (Alex Feerst, Medium) (discussing the effect of a takedown notice on the launch of a magazine).

²¹ 17 U.S.C. § 512(g)(2)(C).

subscriber's name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of the appropriate federal district court.²²

All of those requirements are necessary if a content owner is to enforce her rights. In enacting Section 512, Congress envisioned a system where (1) service providers would not be liable for their users' infringement in certain circumstances, and (2) copyright owners could request material be taken down, but (3) the user could have it put back up if the copyright owner were not willing to pursue the user for copyright infringement. That system does not work, however, if the copyright owner lacks sufficient information to actually sue the user (as would be the case if the user could send counter-notices anonymously), did not have to provide her contact information, or did not consent to federal court jurisdiction. It is understandable that individuals may fear being sued, but if their content is not actually infringing, a lawsuit is unlikely. And if their content is infringing, then the copyright owner has the right to seek a court judgment against them.

The members of the MPAA share certain commenters' concerns that some individuals or organizations may be abusing the Section 512 system by sending takedown notices for purposes other than having infringing material taken down.²³ But again, the evidence here is largely anecdotal, and is not indicative of a widespread problem. The Electronic Frontier Foundation ("EFF"), for example, lists fewer than 20 examples in its opening comments.²⁴ And many of those examples actually show that the counter-notification process works. The EFF lists as an example of supposed "takedown abuse" a takedown notice directed to an official campaign ad for Mitt Romney that included a line from an Al Green song. The EFF neglects to mention, however, that the advertisement was restored just two days after it was taken down.²⁵ The EFF also describes a takedown notice sent regarding a video clip of an interview with a politician. The very article that the EFF cites, however, makes clear that the sender retracted the takedown notice, and the clip was put back up within three days.²⁶

Several commenters have relied on the Urban et al. study²⁷ to suggest that abuse of the takedown process is widespread. That study revealed no such thing. First, the study focused almost entirely on takedown notices sent to Google web search and Google image search, and its

²² 17 U.S.C. § 512(g)(3).

²³ See *Comments of New Media Rights* (Apr. 1, 2016) at 16; *Comments of the Electronic Frontier Foundation* at 9-12.

²⁴ *Comments of the Electronic Frontier Foundation* at 11-12.

²⁵ See Jon Healey, *Mitt Romney Wins a Battle for Free (Political) Speech*, L.A. Times (July 19, 2012), available at <http://articles.latimes.com/2012/jul/19/news/la-ol-mitt-romney-barack-obama-sings-al-green-resinstated-20120719>.

²⁶ See Corynne McSherry, *For Shame: Gannett Abuses DMCA to Take Down Political Speech*, EFF DeepLinks Blog (Oct. 10, 2014; updated Oct. 13, 2014), available at <https://www.eff.org/deeplinks/2014/10/shame-gannett-abuses-dmca-take-down-political-speech>.

²⁷ See Jennifer M. Urban, et al., *Notice and Takedown in Everyday Practice* (2016) (Samuelson Law, Technology & Public Policy Clinic).

findings are therefore specific to those services.²⁸ Second, even with respect to those services, the study did *not* find widespread evidence of abuse. The study instead claimed to find instances where the copyrighted work identified did not correspond to the material at issue in the takedown notice; where the notice did not contain sufficient information to identify the material to be removed; or where the notice was said not to have complied with all of the statutory requirements. The study does not demonstrate that any of these problems resulted in the removal of authorized uses of copyrighted works; rather, it suggests that content owners failed to successfully remove as many works as they could have. With respect to notices that supposedly raised questions of “potential fair use defenses,” the study did not evaluate whether the claimed defenses actually had merit or the sender lacked a good faith belief in their validity.²⁹ At most, therefore, the Urban study presents evidence of some mistaken notices or notices that did not comply with all of the statute’s requirements. The Urban study does not present evidence of *abusive* notices or show any widespread or systematic errors in the process. In this regard, it is important to note that the counter-notification system was enacted precisely to address mistaken notices.

While some commenters speculate that the small number of counter-notices is partially due to intimidation or abuse,³⁰ the reality is that counter-notices are rarely sent because virtually all takedown notices target actual copyright infringement. Further, to the extent the takedown system is abused, the DMCA already provides a remedy: anyone who “knowingly materially misrepresents” that material is infringing can be held liable for damages.³¹ There is, therefore, no reason to revisit the requirements for sending a counter-notice at this time.

Takedown Notices

The main disincentives to filing takedown notices is that monitoring the internet for infringement and then sending notices with respect to *each* infringing URL requires a significant amount of resources and often does not actually result in the copyrighted work being removed from the internet; as the DMCA is currently interpreted by most courts, even if that specific URL is removed, other copies of the exact same work do not need to be taken down, and another URL can simply be substituted in the place of the link that was removed. That is why, as discussed in more detail below,³² the DMCA’s representative list and red flag knowledge provisions must be interpreted the way that Congress actually intended, so that content that is taken down is more likely to stay down.

²⁸ *Id.* at 11, 78-79.

²⁹ *Id.* at 88-96.

³⁰ *See, e.g., Comments of the Electronic Frontier Foundation* at 16.

³¹ *See* 17 U.S.C. § 512(f).

³² *See* Response to Topic 12.

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 MPAA does not believe that the penalties for false notices or counter-notices should be changed at this time. As noted above, in the MPAA members' experience, there is not currently a widespread problem with abusive notices or counter-notices. Given that our members are forced to send millions of takedown notices each year, however, a small percentage of notices may be sent by mistake. The counter-notice system was designed to address exactly that possibility: If a mistaken takedown notice gets sent, and the user sends a counter-notice, the copyright owner will not file a lawsuit and the content will be put back up in 10-14 days.

Amending Section 512 to penalize notices that are incorrect but not intentionally so would increase the already significant burdens on copyright owners and further diminish the effectiveness of the notice-and-takedown system. Copyright owners shoulder significant burdens under the current system as interpreted, including having to search for infringing material and send URL-by-URL takedown notices. Many large content owners, including MPAA member companies, have developed high-quality processes that combine automated systems with human review. All of this is done to try to keep up with mass infringement of our members' works while maintaining a high level of accuracy. Relaxing the Section 512(f) standard so that copyright owners could not use automated tools, or to impose liability for non-knowing mistakes, would make it unduly burdensome and costly for copyright owners to use the notice-and-takedown system. The statute's imposition of liability only in the case of knowingly false takedown notices provides legitimately aggrieved users a meaningful remedy and does not overly deter the good faith use of the notice-and-takedown system.

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

"Conduit" service providers seeking the benefit of Section 512(a)—like all service providers trying to claim the benefit of any of the limitations on liability—must adopt, reasonably implement, and inform subscribers and account holders of a policy for terminating repeat infringers.³³ Eligibility for the Section 512(a) safe harbor does not include a notice-and-takedown obligation. It is therefore critical that service providers claiming eligibility for that safe harbor satisfy their repeat-infringer obligations.

³³ See 17 U.S.C. § 512(i)(1)(A).

The MPAA disagrees strongly with the commenters who argued that the repeat-infringer requirement is unclear, onerous, or unwarranted for other reasons.³⁴

First, the repeat-infringer obligations that apply to all service providers seeking the benefit of a safe harbor—including those seeking the benefit of the Section 512(a) safe harbors—are clear. As the MPAA explained in its opening comments, recent case law has for the most part correctly construed the repeat-infringer requirement in accordance with the statute’s plain language and to further Congress’s purposes.³⁵

The most significant recent decision in this regard is *BMG Rights Mgmt. v. Cox Commc’ns*. The *Cox* court correctly held that service providers (including those seeking the benefit of Section 512(a)) must provide effective mechanisms for copyright owners to notify them of infringement occurring through their services; must not work to prevent copyright owners from providing notice; and must actually terminate repeat infringers, rather than simply applying some “lesser consequence.”³⁶ The court also correctly held that notices from copyright owners are at least “powerful evidence” of a service provider’s knowledge of infringement.³⁷

The *Cox* court is not alone in imposing such requirements on conduits. In *Ellison v. Robertson*,³⁸ the Ninth Circuit also held that a service provider’s failure to have a working notification system could disqualify it from the DMCA’s limitation on liability for conduit service providers due to the lack of a reasonably implemented repeat infringer policy.³⁹

Second, contrary to the claims of some commenters, the absence of a notice-and-takedown obligation in Section 512(a) does not mean that Congress intended for service providers seeking the benefits of that section to be able to ignore evidence of repeat infringement.⁴⁰ Construing Section 512 in that way would drain Section 512(i)(1)(A) of

³⁴ See *Comments of the American Cable Association* (Apr. 1, 2016) at 4-5 (expressing confusion as to the requirements that a conduit service provider must follow); *Comments of Verizon Commc’ns* (Apr. 1, 2016) at 20-31 (arguing that service providers should not be obligated to have repeat infringer policies).

³⁵ See *Comments of the MPAA* at 40-43.

³⁶ 149 F. Supp. 3d 634, 653-54 (E.D. Va. 2015).

³⁷ *Id.* at 671-72.

³⁸ As noted in the MPAA’s opening comments, the *Ellison* court misinterpreted the DMCA limitations on liability in many respects. See *Comments of the MPAA* at 6-7. That court nevertheless correctly construed the requirement for service providers to have a repeat infringer policy.

³⁹ See 357 F.3d 1072, 1080 (9th Cir. 2004).

⁴⁰ See *Comments of Verizon Commc’ns* at 30-31; *Comments of CTIA* (Apr. 1, 2016) at 11-12.

meaning for an important class of service providers. It also would undermine the system of shared responsibility that Congress intended to incentivize through all the safe harbors.⁴¹

Third, there is no merit to some commenters' argument that a subscriber or account holder must first be *adjudicated by a court* to be an infringer before a service provider has an obligation under a qualifying repeat-infringer policy to terminate that subscriber.⁴² Nothing in Section 512 or its legislative history justifies imposing an adjudication requirement. Given the scale of internet piracy, it is simply impossible for copyright owners to sue every individual who infringes their copyrights online, or even those who do so repeatedly. One of the fundamental premises of Section 512 is that copyright owners should *not* have to take every infringer to court to protect their rights.

Fourth, concerns that subscribers will be terminated wrongfully are overstated.⁴³ Termination is not required unless the subscriber "repeatedly or flagrantly infring[es] copyrights."⁴⁴ Thus, there would have to be numerous mistaken takedown notices before a subscriber would be terminated, and there is simply no evidence that wrongful termination is actually a problem. Moreover, if a service provider receives notice that a subscriber is infringing, the provider can and should, before termination, take further steps to determine whether the subscriber is in fact a repeat infringer. Indeed, given service providers' financial incentives *not* to terminate users, it would be surprising if service providers did not want to investigate further.⁴⁵ Nothing in *Cox* or any other case forbids service providers from having a reasonable mechanism for individuals, either before or after they have been terminated as repeat infringers, to show that termination is inappropriate.

Fifth, having a reasonably implemented repeat infringer policy is not unduly burdensome. As noted above, the requirements for reasonably implementing a repeat infringer policy are straightforward. Although services that facilitate widespread infringement may be required to track numerous takedown notices and terminate numerous infringers, that is entirely appropriate: The point of the DMCA is that service providers and copyright owners should share the responsibility for combatting online infringement. With respect to *all* service providers, but particularly with respect to conduits, the repeat-infringer policy requirement is one of the primary ways that service providers shoulder their share of the burden.

⁴¹ See S. Rep. 105-190 at 20, 105th Cong., 2d Sess. (May 11, 1998) (stating that the DMCA "preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements").

⁴² See *Comments of Verizon Commc'ns* at 25, 28-30; *Comments of the Electronic Frontier Foundation* at 21-22.

⁴³ See *Comments of Verizon Commc'ns* at 25-27.

⁴⁴ *Cox*, 149 F. Supp. 3d at 661.

⁴⁵ See, e.g., *id.* at 657-58 (discussing internal emails where Cox noted that subscribers should not be terminated because "[w]e need the customers" and "we don't want to loose [sic] the revenue").

Finally, repeat infringement must ultimately result in termination and not some other sanction; that is *particularly* true for conduit services, given the absence of notice-and-takedown obligations for service providers seeking the benefit of the Section 512(a) limitation on liability. Termination is reserved only for those who repeatedly use a service to infringe. Because termination is required only for “repeat” infringers, it is within the control of the infringing user to avoid the penalty—by not infringing repeatedly.

In sum, the repeat-infringer obligations are a critical component of the Section 512 system. That requirement should not be watered down, and especially not for those service providers seeking the benefit of the Section 512(a) limitation on liability.

Potential Future Evolution of the DMCA Safe Harbor System

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

The members of the MPAA have found that voluntary industry and educational initiatives, like those discussed in the MPAA’s opening comments,⁴⁶ can be effective in helping to combat copyright infringement. One educational resource that the MPAA believes could be particularly helpful would be a guide, published by the Copyright Office, about how to send and respond to takedown notices—including information about service providers’ takedown obligations and the counter-notice procedure. Although there are guides available from various organizations, the MPAA believes that a neutral guide from the Copyright Office would be useful to small content owners, service providers, individual users and others who are confused about their rights and obligations under the Section 512 system.

It would also be helpful for the Copyright Office to include in its report a discussion of the relevant case law, and the ways that that case law has departed from Congress’s intent in passing the Section 512 limitations on liability.⁴⁷ While courts do not always follow the Copyright Office’s recommendations, the MPAA believes that a Copyright Office report would be helpful in educating courts, copyright owners, service providers and the public about the proper scope of Section 512.

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

In enacting Section 512, Congress intended to incentivize not just notice-and-takedown procedures, but also broader cooperation between service providers and copyright owners to

⁴⁶ See *Comments of the MPAA* at 25-27.

⁴⁷ See also Response to Topic 13, *infra*.

combat online piracy. As noted in our opening comments,⁴⁸ voluntary, cross-industry measures are one of the few ways that this type of cooperation actually is happening. Copyright owners and service providers agree that voluntary initiatives can result in targeted, effective measures that work for all participants involved. Although internet piracy remains a massive problem because of the limited scope of these voluntary measures, a number of them are making a meaningful difference in combatting the problem.⁴⁹ Voluntary measures also allow copyright owners and service providers to tailor their approach based on the circumstances (and to vary their approach over time) to be as effective as possible.

Voluntary measures are also good for consumers. Consumers have an interest in a well-functioning internet ecosystem, one that fosters both the growth of a variety of online services and the creation of new and innovative content. Voluntary measures can further both of those goals, ultimately benefitting not only service providers and copyright owners, but the public as a whole. They can also make accessing legitimate content easier for consumers. Many consumers may be looking for ways to access content legally, but they may not know how. Voluntary measures that include an educational component can help direct consumers to the content that they are looking for, and decrease consumer confusion about what content is legitimate.

In the MPAA members' experience, the most effective voluntary measures are those that involve collaboration between copyright owners and service providers to work towards common goals and to implement a system that can be used effectively by all stakeholders. A good example is the UGC Principles that the MPAA discussed in its opening comments.⁵⁰ The copyright owners and service providers that have signed on to the UGC Principles recognize a shared interest in combatting services that foster infringing conduct, and encouraging the creation and dissemination of original user-generated content. Voluntary measures are less successful, however, if they do not have buy-in from all necessary parties.

The Intellectual Property Enforcement Coordinator ("IPEC") is already working to encourage inter-industry cooperation, which has resulted in such voluntary measures as the Payment Processor Best Practices.⁵¹ The members of the MPAA believe that it would also be helpful for the Copyright Office to play a similar role, potentially in conjunction with IPEC, in providing incentives for and facilitating cooperation among service providers and content creators.

⁴⁸ *Comments of the MPAA* at 25-27.

⁴⁹ *See, e.g., Comments of Google, Inc.* (Apr. 1, 2016) at 8 (voluntary measures are "exactly what Congress envisioned the DMCA safe harbors would encourage");

⁵⁰ *See Comments of the MPAA* at 27.

⁵¹ The Payment Processor Best Practices established a process for payment processors, including credit card payment processing companies and PayPal, to work with content owners to reduce copyright infringement.

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

There are currently a number of widely available technologies, such as a variety of audio and video fingerprinting technologies, that can help prevent the upload and dissemination of pirated content online.⁵² Some service providers, such as YouTube,⁵³ have voluntarily adopted some of these technologies and have found them to be an effective tool for combatting infringement. This voluntary adoption has been critical in reducing infringement on those sites.

While there is no one technology that will work for all content owners and all service providers, it makes sense for the Copyright Office to encourage service providers to adopt such technologies when appropriate. To be sure, the technologies are not perfect. For some service providers, certain technological measures may be cost-prohibitive in comparison to a relatively small amount of infringing material available through their sites.⁵⁴ In addition, some technologies will be more effective at detecting infringements of certain types of content than others. The fact that existing technologies do not operate perfectly, however, should not be an excuse for service providers not to use them. It also should not be an excuse for refraining from developing (or supporting the development of) new and more effective technologies.

Several commenters raised concerns with the use of existing technologies.⁵⁵ In general, those concerns were overstated and do not account for the existence of mechanisms that can rectify mistakes if and when they happen. The DMCA's put-back procedures, for example, mitigate the risk that fingerprinting technologies cause the removal of non-infringing content. Business rules programmed into the software—such as the business rules that the MPAA's members have used—also reduce the risk of mistaken identification. Notably, service providers that have voluntarily adopted such technologies report that such technologies are effective for many types of content.⁵⁶ Service providers can and should be encouraged to adopt such technologies.

That said, the MPAA does not believe that, at this time, a legislative mandate is the appropriate mechanism to encourage the adoption of such technologies. The critical question with respect to technological measures is not whether any particular service provider should have

⁵² See *Comments of the MPAA* at 44.

⁵³ See *Comments of Google, Inc.* at 3.

⁵⁴ See *Comments of Public Knowledge* at 6.

⁵⁵ See, e.g., *Comments of the Electronic Frontier Foundation* at 13-14.

⁵⁶ See *Comments of Google, Inc.* at 3; see also *Comments of Facebook, Inc.* (Apr. 1, 2016) at 6-7 (stating that Facebook is beta testing a “copyright management tool” that “flags uploaded videos that match the rights owners’ content and allows those rights owners to quickly and efficiently report the videos to Facebook for removal”).

to adopt any particular technology, but rather whether service providers are using *effective* measures to reduce online infringement. The use of particular technological measures should not be required simply for the sake of using technology. Where widely available technologies are effective and where adopting such technologies is feasible—as in the case of fingerprinting technology—service providers should be encouraged to adopt such measures. Even if effective technologies are unavailable or inaccessible, service providers still should be incentivized to take steps that effectively reduce infringements on or through their sites. Providing incentives to institute effective measures (using technology or otherwise) was one of Congress’s central goals in enacting Section 512.

The MPAA believes that this is another area where the Copyright Office can and should play a useful role in facilitating voluntary, inter-industry cooperation to combat online piracy effectively.

- 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?**

Because the MPAA already discussed the need for a notice-and-staydown system in its opening comments,⁵⁷ it will do so only briefly here. In short, once infringing material appears online, it can be distributed widely in a matter of minutes, and even if one link to that content is removed, another can be instantly substituted in its place. Thus, the Section 512(c) and (d) notice-and-takedown system, as currently interpreted by the courts, creates a near-endless game of “Whac-A-Mole,” with no meaningful reduction in online piracy. The only way to significantly reduce online copyright infringement is for the system to ensure that material that is taken down, stays down.

The benefits of a notice-and-staydown system far outweigh the drawbacks. Indeed, a number of service providers (such as YouTube) have implemented technologies that help ensure that content that is removed from the internet is not immediately re-uploaded. As discussed above and in the MPAA’s opening comments, commercially available technology (when used in combination with human review) allows service providers to determine whether a work that is about to be uploaded matches a work that has previously been identified as infringing. In the vast majority of situations, it is obvious that a copy of a work that a user is seeking to upload is infringing. It is highly unlikely, for example, that a movie studio would authorize an individual subscriber to upload full copies of its most popular movies, for free, online. Through the use of business rules, copyright owners and service providers can target those instances where infringement is most likely occurring. Although such a system would not be 100% effective, it would go a long way in reducing the availability of infringing material online. Further, a combination of the DMCA put-back procedures and service providers’ own feedback systems could prevent abuses and correct for material that is mistakenly blocked.

⁵⁷ See *Comments of the MPAA* at 17-18.

Although a notice-and-staydown system is crucial to reducing online copyright infringement, the DMCA does not have to be amended in order to achieve those results: If properly interpreted, the DMCA as written would encourage such a system.

First, if courts properly interpreted the “red flag knowledge” requirement in Section 512(c) and (d), service providers would be required to act if they knew that their services were being used for widespread copyright infringement. However, courts have largely read the red flag knowledge requirement out of the statute, thereby encouraging service providers to do no more than respond to takedown notices.⁵⁸

Second, if courts properly interpreted the “representative list requirement,” so that copyright owners no longer had to provide notice on a URL-by-URL basis, that would also help address the issue of many infringing copies of the same work being available online—often at (or through links to) the same site.

A proper interpretation of Section 512 would incentive greater cooperation between service providers and copyright owners to prevent the re-upload of infringing materials. Currently, copyright owners are shouldering almost all of the burden in combatting piracy. Service providers therefore have very little incentive to cooperate with copyright owners to prevent infringing material from being re-uploaded on their sites. If, however, service providers had to share in the responsibility for addressing online piracy—as Congress intended—they would likely be more willing to work with content owners to develop effective solutions, including solutions that help ensure that material that is taken down stays that way.

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

The members of the MPAA do not believe that legislative changes are necessary at this time. The fundamental Section 512 system is sound, and if interpreted as Congress intended, it would be an effective tool in combatting online infringement. The weaknesses in the current system are therefore largely due to courts’ and stakeholders’ failure to follow Congress’s intent. While it would be helpful for the Copyright Office to clarify how the Section 512 limitations on liability should be interpreted and to encourage cooperation among service providers and content owners, amending the DMCA is unnecessary.

⁵⁸ See, e.g., *UMG Recordings v. Shelter Capital Partners*, 718 F.3d 1006, 1023 (9th Cir. 2013); *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 30-32 (2d Cir. 2012); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007); see also *Comments of the MPAA* at 31-36.

Other Developments

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

The two cases that the Copyright Office has identified— *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*⁵⁹ and *Capitol Records, LLC v. Vimeo, LLC*⁶⁰—have continued the judicial trends that the MPAA identified in its opening comments. *Cox* continues courts' growing (and correct) consensus that service providers must have effective repeat infringer policies. *Vimeo*, on the other hand, follows what the MPAA believes to be erroneous interpretations of the red flag knowledge provision in earlier Second Circuit decisions.

We note that a case originally decided just a week before the Copyright Office's request for additional comments, *EMI v. Christian Music Grp. v. MP3tunes, LLC*,⁶¹ represents a step in the right direction on the question of red flag knowledge.

In *Cox*, a district court for the Eastern District of Virginia upheld a substantial jury verdict against Cox Communications, which held Cox liable for willful, contributory infringement based on the infringing activities of its users. Further, after the Copyright Office issued its call for further comments, the district court awarded the plaintiffs more than \$8 million in fees, after concluding that Cox needed “a proper financial incentive to change its policies and procedures.”⁶² As discussed in more detail both above and in the MPAA's opening comments, the court had previously found that Cox did not qualify for the limitation on liability for conduit service providers because it had not reasonably implemented a repeat infringer policy, a holding that the court reiterated in its most recent decision.⁶³ *Cox* continues the recent judicial trend of correctly interpreting repeat infringer requirements, and held Cox properly accountable for its provision of material support for the infringing activities of its users.⁶⁴ The case therefore makes

⁵⁹ No. 14-CV-1661, - F. Supp. 3d -, 2016 WL 4224964 (E.D. Va. Aug. 8, 2016).

⁶⁰ 826 F.3d 78 (2d Cir. 2016).

⁶¹ 844 F.3d 79 (2d Cir. 2016). *MP3tunes* was originally issued on October 25, 2016, and was amended on December 13, 2016.

⁶² See *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, No. 14-CV-1611, 2017 WL 600093, at *5 (E.D. Va. Feb. 14, 2017).

⁶³ See Response to Topic 8; *Comments of the MPAA* at 41-42.

⁶⁴ *Cox*, 2016 WL 4224964, at *13 (noting that there was a “significant amount of evidence of Cox's general knowledge of infringement on its network,” which, combined with Cox's decision

clear to service providers what they must do to qualify for the DMCA's limitations on liability, and that they must take this obligation seriously. By requiring service providers to assume more responsibility for combatting infringement, the court's decision will also incentivize service providers to work with copyright owners to develop effective, voluntary measures to combat infringement.

The *Cox* case was about conduit service providers, but it is one in a line of cases that recognizes the importance of repeat infringer policies for *all* service providers, not just conduits.⁶⁵ For example, some hosting providers both (1) mask the true IP and provider of a website, thereby impeding copyright enforcement and (2) refuse to take action when service providers notify them that their services are being used to facilitate copyright infringement. Repeat infringer policies are no less crucial for these service providers than the conduits discussed in *Cox*.

The *Vimeo* decision, in contrast, is less encouraging. There, the Second Circuit again misinterpreted the red flag knowledge provision to require that the service provider "must have actually known facts that would make the specific infringement claimed objectively obvious to a reasonable person."⁶⁶ The court unfortunately went further than preceding cases by holding that the viewing by the service provider's employees of user-generated videos containing "all or virtually all" of recognizable or famous songs did not constitute facts that would give rise to red flag knowledge; this was so, the court said, because the "ordinary person" for the purpose of the red flag knowledge provision is one "not endowed with specialized knowledge or expertise concerning music or the laws of copyright." *Id.* at 94. It does not take any specialized knowledge, however, to know that a user-generated video, uploaded to an internet site like Vimeo, that contains the entirety of a well-known work is highly likely to be infringing. The court also held that the service provider had not been willfully blind to infringement even though its employees "*actively encouraged* users to post videos containing infringing material" because the plaintiffs' evidence did not relate to the specific songs at issue in the case.⁶⁷ In sum, *Vimeo* continues the Second Circuit's erroneous construction of the red flag knowledge.

Fortunately, the Second Circuit's recent decision in *MP3tunes* represents an interpretation of the red flag knowledge standard that is more consistent with the statute's purposes.⁶⁸

In *MP3tunes*, the Second Circuit held that evidence presented to the jury was sufficient to show that the service provider (MP3tunes) had red flag knowledge of infringements of major

to "continuously ignore and take no action in response to the 1.8 million notices, weekly letters, and dashboard from Rightscorp," was sufficient to support a finding of liability).

⁶⁵ See, e.g., *See Disney Enters., Inc. v. Hotfile Corp.*, No. 11-20427-CIV, 2013 WL 6336286, at *4, 8 (S.D. Fla. Sept. 20, 2013) (holding that the "cyberlocker" service Hotfile had not reasonably implemented a repeat infringer policy).

⁶⁶ *Vimeo*, 826 F.3d at 93, 96.

⁶⁷ *Id.* at 99 (emphasis added).

⁶⁸ *MP3tunes*, 844 F.3d 79.

label content released before 2007. The court found that the jury was entitled to rely on evidence that MP3tunes “knew that major music labels generally had not even authorized their music to be distributed in the format most widely available on [the relevant website], let alone authorized it to be shared on the internet . . . until 2007.”⁶⁹ The Second Circuit also reversed the district court’s finding that MP3tunes lacked red flag knowledge with respect to all songs by *The Beatles*. The Second Circuit held that MP3tunes knew that “there had been no legal online distribution of Beatles tracks before 2010.”⁷⁰ Significantly, the court held that the jury’s finding of red flag knowledge did not conflict with Section 512(m)’s instruction that service providers have no general duty to monitor their sites for infringement. As the court held, “a time-limited, targeted duty” to “disable access to the pre-2007 songs . . .—even if encompassing a large number of songs—does not give rise to an ‘amorphous’ duty to monitor in contravention of the DMCA.”⁷¹ The Second Circuit also held that the jury could rely on evidence that MP3 tunes “actively encourage[d] infringement.”⁷²

Like the Second Circuit decisions preceding it, *MP3tunes* held that the difference between red flag and actual knowledge is the difference between so-called objective and subjective knowledge. As the MPAA explained, that is not a correct interpretation of the statute. That said, the court did give the red flag knowledge provision some meaning; the court also correctly clarified that a service provider has a duty to act on red flag knowledge, and that doing so does not create an “amorphous” duty to monitor.

Because the major weaknesses of the current Section 512 system are with judicial interpretations of the statute—and not with the statute itself—it is appropriate for the shortcomings to be addressed by the courts (as in *MP3tunes*) and through voluntary cooperation between copyright owners and service providers. That said, it would be helpful for the Copyright Office to make clear that courts have misinterpreted some of Section 512’s key provisions, including the red flag knowledge and representative list provisions. The MPAA believes that guidance from the Copyright Office on these issues could assist courts in future cases to interpret the law as Congress intended.

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

Outside of the United States, countries have implemented a number of strategies aimed at intermediaries (e.g., not those who actually infringe, but those whose sites and services facilitate infringement) that have helped to reduce copyright infringement.

⁶⁹ *Id.* at 92.

⁷⁰ *Id.* at 93.

⁷¹ *Id.*

⁷² *Id.*

First, as the MPAA noted in its opening comments,⁷³ European countries have allowed courts to require internet services providers to block sites that are devoted almost entirely to copyright infringement, even if the service provider is not itself liable for infringement.⁷⁴ A number of countries in Asia have similarly authorized injunctions requiring internet service providers to block access to pirate websites.⁷⁵ These injunctions can be highly effective at combatting piracy by blocking access to websites devoted to copyright infringement. They also have limited adverse impact on consumers, as the injunctions target the most notorious pirate sites, not sites featuring any meaningful volume of legitimate content. It can also help service providers, who can block an entire website rather than having to respond to thousands of takedown notices about that site.

Second, some European countries have implemented initiatives to reduce the flow of advertising revenue to infringing websites. For example, in the UK, the Police Intellectual Property Crime Unit (PIPCU) of the City of London Police is partnering with the UK advertising industry in “Operation Creative.” Operation Creative allows rights holders to identify and report infringing websites (and provide appropriate evidence of the site’s infringing activities), and, if PIPCU determines that they are infringing, imposes several graduated responses.⁷⁶ The site’s owner is first contacted by PIPCU and warned to stop its infringing activity. If it does not comply, PIPCU can contact domain registrars asking them to suspend the site. It can also try to disrupt its advertising revenue by including it on Infringing Website List (“IWL”). The IWL identifies infringing sites, with the hope that advertisers and other intermediaries will voluntarily stop placing advertisements or otherwise doing business with that site.

In the MPAA members’ experience, strategies targeting intermediaries (like those discussed above) can be effective in combatting copyright infringement without overly burdening the public, internet service providers or other stakeholders. Operation Creative, for example, helps to reduce the profitability of infringing sites, while allowing legitimate sites to continue to earn revenues. And allowing content owners to secure injunctions that require ISPs

⁷³ *Comments of the MPAA* at 47-48.

⁷⁴ See <http://www.lexology.com/library/detail.aspx?g=ea5408e8-5327-4cbb-96f3-f23f1bcc1077> (German Supreme Court upholding legality of such injunctions in Germany); EU Information Society Directive, Art. 8(3) (members shall ensure that copyright owners can seek an injunction “against intermediaries whose services are used by a third party to infringe a copyright or related right”)

⁷⁵ See, e.g., Stanford Internet and Society Blog, *Singapore’s Amended Anti-Piracy Copyright Act Enables Streamlined Site-Blocking* (July 29, 2014), available at <http://cyberlaw.stanford.edu/blog/2014/07/singapore%E2%80%99s-amended-anti-piracy-copyright-act-enables-streamlined-site-blocking>; Aneesha Mathur, The Indian Express, *Delhi High Court Wants 73 Websites Banned For Streaming Pirated Videos* (Aug. 2, 2016), available at <http://indianexpress.com/article/india/india-news-india/delhi-high-court-wants-websites-steaming-pirated-content-banned-2948459/>.

⁷⁶ See City of London Police, *Operation Creative and IWL*, available at <https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/Pages/Operation-creative.aspx>.

to block sites that have been determined by a court to be devoted almost entirely to piracy reduces the availability of infringing content online while continuing to allow access to sites that feature legitimate content.

16. Please identify any other pertinent issues that the Copyright Office may wish to consider in conducting this study.

The Copyright Office's list of topics is thorough. The MPAA appreciates the Copyright Office's continued attention to the important issues addressed in these proceedings.

Respectfully submitted,



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