EXECUTIVE SUMMARY

On November 8, 2016, the U.S. Copyright Office requested additional input on its Section 512 Study. In response to this request, over 78 comments weresubmitted by the February 21, 2017, deadline. Fifty-eight of those comments were responsive to the Copyright Office’s inquiry and are summarized below.

Because of the volume of questions and responses, we have added key takeaways for each of the questions.

The U.S. Copyright Office has also requested the submission of empirical research studies to aid its study by March 22, 2017. No further information regarding the release of the study has been made available.
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1. As noted above, there is great diversity among the categories of content creators and ISPs who comprise the Internet ecosystem. How should any improvements in the DMCA safe harbor system account for these differences? For example, should any potential new measures, such as filtering or stay-down, relate to the size of the ISP or volume of online material hosted by it? If so, how? Should efforts to improve the accuracy of notices and counter-notices take into account differences between individual senders and automated systems? If so, how? ........................................... 6

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? ........................................... 15

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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? ........................................................................................................ 21

4. Several public comments and roundtable participants noted practical barriers to effective use of the notice- and-takedown and counter-notice processes, such as differences in the web forms used by ISPs to receive notices or adoption by ISPs of additional requirements not imposed under the DMCA (e.g., submission of a copyright registration or creation of certain web accounts). What are the most significant practical barriers to use of the notice-and-takedown and counter-notice processes, and how can those barriers best be addressed (e.g., incentives for ISPs to use a standardized notice/counter-notice form, etc.)? ................................................................. 27

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? .... 33

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? .......................................................... 37
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? 

8. For ISPs acting as conduits under section 512(a), what notice or finding should be necessary to trigger a repeat infringer policy? 

POTENTIAL FUTURE EVOLUTION OF THE DMCA SAFE HARBOR SYSTEM 

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

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

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

12. Several study participants have proposed some version of a notice-and-stay-down system. Is such a system advisable? 

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

OTHER DEVELOPMENTS 

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

15. What approaches have jurisdictions outside the United States taken to address the question of ISP liability and the problem of copyright infringement on the Internet? 

16. Please identify any other pertinent issues that the Copyright Office may wish to consider in conducting this study.
SUMMARY OF SECTION 512 STUDY ADDITIONAL COMMENTS

COMMENTERS:

A2IM: American Association of Independent Music  
AAP: Association of American Publishers  
ACA: American Cable Association  
AG: Authors Guild  
AIPLA: American Intellectual Property Law Association  
Archive: Internet Archive  
Beikmann: Christopher Beikmann  
Bridy/Keller: Annemarie Bridy and Daphne Keller  
CA: Copyright Alliance  
CCIA: Computer & Communications Industry Association  
CDT/R Street: Center for Democracy & Technology (“CDT”) and the R Street Institute (“R Street”)  
Clinic: Arts and Entertainment Advocacy Clinic at Antonin Scalia Law School, George Mason University  
Copia: Floor64, Inc., d/b/a the Copia Institute  
Cox: Cox Communications  
CTIA: CTIA – The Wireless Association  
Digimarc: Digimarc Corporation  
DMLA: Digital Media Licensing Association  
EFF: Electronic Frontier Foundation  
Engine: Engine Advocacy  
Etsy: Etsy, Inc.  
FB: Facebook, Inc.  
FMC: Future of Music Coalition  
FWF: FreedomWorks Foundation  
Getty: Getty Images  
Google: Google, Inc.  
GPC: Gear Publishing Company  
i2Coalition: Internet Infrastructure Coalition  
IA: Internet Association  
ICC: Internet Commerce Coalition  
IFTA: Independent Film & Television Alliance  
IIPSJ: Institute for Intellectual Property & Social Justice  
KCLMA: Kernochan Center for Law, Media and the Arts Columbia Law School  
LaPolt: Dina LaPolt  
LCA: Library Copyright Alliance  
MA: Musicians Action  
MCNA: Music Creators North America
Minter: Kendall M. Minter, Esq. on behalf of several artists
Mozilla: Mozilla
MPAA: Motion Picture Association of America
Music Community: American Federation of Musicians; American Society of Composers, Authors and Publishers; Broadcast Music, Inc.; Content Creators Coalition; Global Music Rights; Living Legends Foundation; Music Managers Forum – United States; Nashville Songwriters Association International; National Academy of Recording Arts and Sciences; National Music Publishers’ Association; Recording Industry Association of America; Rhythm and Blues Foundation; Screen Actors Guild – American Federation of Television and Radio Artists; SESAC Holdings, Inc.; and SoundExchange
OSPs: Kickstarter, Makerbot, Meetup, Shapeways
OTW: Organization for Transformative Works
Pexeso: Pexeso Inc
Pilch: Janice T. Pilch
PK: Public Knowledge
Re:Create: Re:Create Coalition
Realtors: National Association of Realtors
RIPG: Ringtone Intellectual Property Group
Schneider: Maria Schneider
SME: Sony Music Entertainment
Tulane: Tulane University Copyright Research Lab
UMG: Universal Music Group
Urban: Jennifer M. Urban [Author of UC Berkeley Notice and Takedown Study]
USTA: United States Telecom Association
Verizon: Verizon
Visual Artists: American Photographic Artists (APA), joined by the American Society of Media Photographers (ASMP), the Graphic Artists Guild, and the National Press Photographers Association (NPPA).
Wiki: Wikimedia Foundation
CHARACTERISTICS OF THE CURRENT INTERNET ECOSYSTEM (GENERAL COMMENTS)

**Minter:** (video) [https://spaces.hightail.com/space/cktoB](https://spaces.hightail.com/space/cktoB)

**Re:Create:** “there is now a growing and important class of “new creators” that have not yet caught up to their traditional counterparts in understanding either the need for or the value they would add to public policy debates”

1. **As noted above, there is great diversity among the categories of content creators and ISPs who comprise the Internet ecosystem. How should any improvements in the DMCA safe harbor system account for these differences?** For example, should any potential new measures, such as filtering or stay-down, relate to the size of the ISP or volume of online material hosted by it? If so, how? **Should efforts to improve the accuracy of notices and counter-notices take into account differences between individual senders and automated systems?** If so, how?

There were a wide range of responses to this question. Several respondents, many of which are ISPs, do not see a need to further differentiate between ISPs and believe that the current framework functions as it should. Many of the organizations representing content owners suggest that such differentiation should not be limited to the size of the ISP, while others emphasize the importance of the DMCA applying to all ISPs regardless of size.

**AAP:** Speaking on notice-and-stay-down provisions and standard technical measures: “one-size-fits-all solutions will be impractical, not only because of the different sizes of ISPs but also because of the wide variety of activities and services that ISPs conduct and provide.”

**ACA:** The different capabilities and needs of different sized ISPs should be taken into account, especially considering the large amount of automated notices. One-size-fits-all policy is not a sustainable approach to conduit safe harbor.

**AG:** While some smaller companies might experience difficulties, filtering technology is not beyond the reach of most ISPs. It might be useful to give smaller ISPs more time to act expeditiously but that would not require a change in law. Smaller, low-risk ISPs could also be exempted from notice and take-down provisions. Any differentiation should be based on risk, not size of the ISP.

**Archive:**
- “The DMCA safe harbor system should apply to all ISPs equally.”
- “regulatory parsing of ISPs in this manner seems unnecessary.”
- “It is much more straightforward from a regulatory perspective to put differing requirements on those using automated software to send DMCA notices. Automated systems are easy to identify, and should be required to go through a
technical audit to ensure that they have an acceptably low error rate to reduce the overall number of false/incomplete/inadequate DMCA notices sent.”

**Bridy/Keller:** Both individual content creators and consumers would be harmed even if the proposed take-down-stay-down proposals would apply only to large ISPs. The stay-down proposals would remove lawful speech and cause harm to the global internet ecosystem. Forcing ISPs to build filtering tools for limited purposes risks the same tools being used to suppress legitimate access to information. Further, filters would risk the removal of lawful speech through filtering errors, and cause economic harm to victims, including content creators, of such wrongful removal. The requirements would also lead to competitive and consumer harms, including costs and resources required for negotiating licenses for reference files. Differentiating between different sized ISPs would be both difficult, relatively arbitrary, and not particularly useful.

**CA:**
- “we think that it is premature to suggest that changes to the DMCA should treat different ISPs and different content creators differently.”
- Diversity Among ISPs: “we would be concerned if factors like size or the volume of content an ISP hosts were used as the sole or dispositive gauge for comparing ISPs and determining how the DMCA might apply to them going forward.” + “to the extent that new distinctions among ISPs are determined to be appropriate, such distinctions should account for all of these factors, not just the two factors identified in the Notice.”
- Diversity Among Copyright Owners: “Efforts to improve the accuracy of notices and counternotices should take into account the differences between individual senders.”

**CCIA:**
- “CCIA disagrees with the implication that Section 512 does not already account for stakeholder diversity”
- “It is CCIA’s view that professional enforcement vendors sending incorrect notices for content that does not infringe or does not exist, however, are still susceptible to penalties under Section 512(f)”
- “mandates for filtering or so-called “stay-down” proposals continue to be infeasible”

**CDT/R Street:**
- “any new requirements beyond those currently imposed by section 512 would shift the balance of responsibilities and put providers in a policing role, the problems with which we discussed in our previous comments.”
- “scaling these measures according to the size of operator, the type of content, or the amount of content they host would create barriers to growth and favor larger providers.”
“Developers of automated content identification systems may need to take different steps than individual notice senders to improve their systems’ ability to accurately identify infringing material.”

Clinic:
- “The Copyright Office should take care to ensure that any remedies it proposes address as many sites as possible and are broadly accessible to creators, and user friendly.”
- “Solutions aimed at solving current problems with the DMCA on the world wide web should not overlook the rapid pace of evolution of services, and that many services already exist where DMCA enforcement is not realistically possible for individuals and small businesses.”

CTIA: The safe harbor system should not account for the diversity among the categories of content creators and ISPs. Any attempts to distinguish among ISPs or content providers would lead to arbitrary line drawing and threaten the balance of the DMCA system. Any attempts to distinguish between different sized ISPs or the volume of online material would likely prove illogical and impractical. The most pressing issue for conduit service providers subject to Section 512(a) is the burdens imposed by invalid notices sent by monetization entities, which impede the conduit services’ ability to respond to valid notices. Instead of size, the Copyright Office should focus on the type of service provided.

Digimarc:
- To serve both individual senders and automated systems:
  - “having ISPs make available a standardized takedown notice submission form would reduce rights holder costs and minimize the burden of erroneous notices on ISPs.”
  - “a takedown notice clearinghouse would streamline the issuance of notices to ISPs and ease their processing of those notices.”

DMLA:
- “The obligations of Section 512 should apply to all ISPs regardless of size. Section 512 is intended to ensure that creators are not harmed by widespread infringements and that ISPs will act expeditiously in taking down infringing content.”
- “The size of an ISP should not be used as an excuse to limit any takedown requirements... With regard to “size,” the amount of infringing content hosted by an ISP may be a more relevant consideration when determining what reasonable technical measures an ISP should employ to take advantage of the safe harbor.”

EFF: “Attempting to construct a new set of subcategories will undermine that clarity, to the detriment of everyone involved.”
**Engine:**
- “The DMCA has been beneficial for startups and large players alike, and any potential changes to § 512 should be evaluated particularly closely in terms of their potential impact on current and future startups”
- “Potential new measures, such as filtering or stay-down,” would be harmful to the Internet ecosystem as a whole but particularly devastating to small and startup service providers.”

**Etsy:**
- “[D]espite this wide range of diversity, Etsy does not endorse the proposal to impose additional statutory requirements such as filtering or staydown measures, based on the size of the ISP. These measures would impose significant technological burdens, costs, and resources on ISPs, and are best considered as voluntary efforts, regardless of an ISP’s size or volume of material. Implementing these additional measure would also lift the burden of rights owners from properly assessing whether material is infringing and block content that is potentially lawful. “
- Etsy strongly supports the “Copyright Office’s interest in improving the accuracy of notices and counter-notices. Notice accuracy is an issue across the board, whether the notices are sent by individual senders or through automated systems.”
- Etsy suggests “Strengthening and providing more structure around the good faith belief requirement of section 512(c)(3),” which could “help to improve accuracy of notices and prevent illegitimate, overly broad claims from disrupting free speech and the flow of commerce in the online economy.”

**FB:** “Section 512 has succeeded in striking the correct balance between copyright owners and online service providers [...] To now attempt to account for the diversity among ISPs within the DMCA safe harbors would create both significant uncertainty regarding liability and disincentives for service providers to innovate and grow”

**FMC:** “Currently, some larger ISPs seem to have prioritized intake of takedowns from automated systems over accessibility and transparency when dealing with individual creators. While these automated takedowns may represent the greatest amount of infringement by volume, and thus the greatest legal risk, it puts smaller creators at an unfair competitive disadvantage. Self-released artists and small independent labels simply do not have the resources to devote to navigating wildly different DMCA implementation measures across a range of sites. Taking into account the differences between individual senders and automated systems would mean that any standard technical measures or voluntary best practices must be calibrated to be accessible and effective for both categories of sender. It would also mean creating more consistent practices from platform to platform.”
FWF: “the DMCA should be evaluated to ensure that the social benefits of its implementation outweigh its costs” using economic analysis.

Getty: “The legal obligations of Section 512 should apply regardless of the size of the ISP and regardless of the nature of the content creator/notice sender”

Google:
- “Because the safe harbor system is working (as described in the Introduction), and because investors and others rely on the stability it has provided, imposing mandatory additional obligations on service providers, such as filtering, or stay-down, is unwarranted.
- “[N]either the size of a company nor the number of users it serves is a good proxy for whether copyright infringement is a problem on a particular platform or whether an OSP can afford to shoulder additional legal and technical obligations to protect the interests of copyright owners. Drawing arbitrary lines to distinguish how copyright laws apply to different OSPs is likely only to encourage gamesmanship and create market distortions that hinder economic growth and competition.”

GPC: Small and large ISPs should not be differentiated – small ISPs should not get a “free pass,” and should provide similar protections and procedures to dealing with copyright infringement as larger providers. However, smaller providers could be given a tax credit to incentivize investment in such filtering and stay-down systems. Pre-screening processes would be the most effective in filtering infringing material but “uniform rules and regulations should be applied to all ISPs in a uniform manner.”

i2Coalition: Any changes to the DMCA should keep in mind that the vast majority of IIPs are small businesses that do not have the resources to implement sophisticated monitoring processes.

IA: “The current Section 512 safe harbor system properly accounts for the differences in stakeholders and changes are unnecessary.”

ICC: “uncertainty of re-opening the DMCA either to fine-tune it or to make significant changes far outweighs any potential benefit”

IFTA: DMCA can be improved by adopting a fair and efficient notice, take-down, and stay-down framework, while at the same time taking into account the diversity of content creators and ISPs. The stay-down system, when properly calibrated, is the only solution that will adequately rebalance the law. A stay-down system could be narrowly focused on full-length film and television programming, especially if not publicly released by the rightsholder. This would also eliminate the system’s potential
interference with fair use, and could easily be applicable to all ISPs regardless of their size.

**IIPSJ:**
- Dislikes notice and stay-down because
  - it is “an attempt to incorporate in to the Safe Harbor system a perpetual OSP obligation to monitor the Internet for infringing content.”
  - Creates a “permanent end-run around fair use by eviscerating [copyright holders’] affirmative obligation to consider the applicability of fair use *in each individual case*”

**KCLMA:**
- Unsure of the costs associated with “acquiring and implementing a system which would automatically identify and remove infringing material” but if the costs aren’t high “then every ISP should be treated equally and, no matter the size, should be required to engage such systems.”
- “It is impossible for us to determine if ISPs should be subject to differentiated regulations regarding filtering based on size when that term is not defined”
- Concerned that larger ISPs might “create a series of smaller entities in order to avoid having to implement technologies which might detract from their profits”
- Advocates for a “standard notice (and counter-notice) form, drafted by the Copyright Office with significant input from creator and Internet Service Provider representatives, [to] allow for a streamlined process which would ultimately benefit both parties”

**MA:** “We seek a fair share in the profit our work generates, a fair market in which to sell what we make. Our ability to achieve these goals is dependent on access to our rights in the digital domain.”

**Mozilla:**
- “Any change to the notice and counter-notice system *must* take into account differences between the participation of individuals and automated systems.”
- “This asymmetry should be rectified by having penalties for improper notices strengthened (see below), and structuring such penalties in a way which takes these dynamics into account.”

**MPAA:**
- “creating distinct rights and obligations for different categories of copyright owners and service providers likely would be a confounding and ultimately counter-productive exercise.”
- “highest priority [should be] incentivizing copyright owners and service providers—regardless of their size—to take measures that effectively reduce online piracy.”
• “All service providers—large and small—must assume greater responsibility for combatting infringement facilitated by their sites.”

**Music Community/A2IM:**
• Entertainment providers derive benefit from the entertainment they transmit and so an unbalanced DMCA would unfairly subsidize “active, online entertainment companies and does not merely protect passive conduits.”
• “The massive scale of online infringement that has developed far outstrips the increased levels of infringement that Congress anticipated.”

**OSPs:** “Urge the Copyright Office to avoid the temptation to suggest broadly applicable fixes to concerns that apply narrowly to the largest OSPs. The current Section 512 system is flawed, but one of its strengths is that its structure is flexible enough to be implemented by OSPs of wildly varying sizes, sophistication, and technical ability.”

**OTW:** “The DMCA safe harbors allow a wide variety of types and sizes of ISPs to function, and the flexibility of the notice-and-takedown system allows a wide variety of content creators to address infringement.” No need for “stay-down.”

**Pilch** “Digital industries and their supporters create a false narrative around the idea that the internet has economically benefited content creators, who they paint into the picture of prosperity.”

**PK:** It is not clear what distinguishing among stakeholders would accomplish. Rights holders already have the same access to notice and takedown regardless of their size. Although online intermediaries vary in size and capability to handle takedown notices, the current scheme is functional and additional requirements would likely prove too expensive or burdensome. Further, setting arbitrary thresholds would be unwise, with the Copyright Office being unlikely to find consensus on the appropriate threshold, and the courts having to deal with defining the which standard would be appropriate for each defendant.

**Realtors:** “NAR further encourages the Copyright Office to find, or support legislation that states, that the DMCA applies to certain groups that heavily rely on the DMCA, for example, owners of brokerage websites displaying an MLS data feed.”

**RIPG:**
• “To qualify for a safe harbor, the ISPs should be required to have a pro-active technological enforcement capability built-in to their system prior to offering their services”
• “There can be some relief granted based on the size of the ISP, but the ceiling should be very low”
• There “must be an effective ‘stay down’ system developed and implemented
whereby ownership data is provided to the ISP for filtering purposes, either prior

to infringement or once upon the initial takedown notice being sent for each

work”

• “there should be no limitation on the use of automated notice and counter-

notice systems by ISP, copyright owners and/or individual”

Tulane:

• The good faith “requirement is subjective, its effectiveness depends entirely on

the knowledge of the submitter.”

• Concerns about abusive notices “can be alleviated through a policy

implementation on the part of the ISPs” whereby ISPs are required “to provide a

checklist to the submitter ... to ensure the submission is backed by good faith”

• Also, “a checklist that acknowledges basic fair use scenarios should be included

where a copyright holder must acknowledge that none of these fair use

scenarios are included”

UMG: “the DMCA should not make distinctions between such online service providers

based upon size, volume of material hosted, or other similar factors. [...] modifications
to the DMCA safe harbor system should be adopted and implemented in a manner that

 [...] does not unreasonably discriminate on any basis”

Urban: Any reform should take into account the “great diversity of the notice-and-
takedown ecosystem.” For individual notice senders, additional education on copyright

law and how and when to send notices might be useful. Meanwhile, for algorithm-based

notices, it is important to improve the search algorithms and potentially require human-

review before submission. Additionally, rights organizations should be incentivized to

focus on quality over quantity. Because the ecosystem is complex and changes

constantly, it is important not to “tailor policy too granularly.”

USTA: The safe harbor provisions work effectively and help to facilitate the growth of

the internet. The definitions in the DMCA should remain broad to cover new

technologies. Imposing different obligations based on ISP size would be inappropriate

and harmful. Adoption of voluntary measures should be left to stakeholders. Notices

and counter notices could be improved through voluntary educational initiatives.

Verizon: Section 512’s safe harbers, as they currently stand, are working effectively for

the most part, and there is no need for changes that would be unlikely to be

“improvements.” Questions soliciting input about proposals such as stay-down,

monitoring, and filtering are ill-advised. These proposals would strip away the

protections afforded by 512, and expose ISPs to crippling statutory damage awards.

Changes that would lead to increased copyright liability for ISPs would cripple

investment in broadband infrastructure, services, and equipment. Section 512 already

takes into account differences between different categories of content producers and

ISPs. It would be ill-advised to legislate or recommend solutions that would impose
different types of solutions based on the size of the ISPs or content owners. Decisions to adopt voluntary measures should be left to the stakeholders.

Wiki:

- “Accounting for the diversity of content creators and service providers in making changes to the DMCA safe harbor system requires following a process of developing and evaluating targeted changes that would benefit groups that are at a disadvantage under the current system but would not undermine important benefits of the current system.”
- Difficult to “know[] which of a service provider’s attributes would be relevant to which potential new requirements” and to “account[] for movement among categories.”
- The categories of creators could be determined by the creator/copyright owner’s method of distribution as well as how much access they have to professional copyright enforcement resources.

Wixen:

- “once a copyright owner has submitted a takedown notice in compliance with 512, the ISPs should take down the copyrighted material and keep it down regardless of the size of the ISP or volume of online material hosted by it.”
- “safe harbor protection should be conditioned upon an ISP's ability to implement stay down.”
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?

Some respondents representing the copyright community mentioned that copyright owners and individual internet users share many of the same interests, such as the ability to access and distribute creative content, and online safety. Others noted that while individual users are important, their interests are already accounted for, and they should not out weigh those of copyright owners. ISPs and other commenters discussed the importance of considering the individual user with regard to terminating internet access maintaining a thriving internet.

**ACA:** It is extremely important to take into account the interests of individual users when considering changes to the DMCA safe harbors. Losing internet connection would have dire consequences on individuals and would amount to a draconian measure. ISPs should not be forced to choose between potentially ruinous liability or accepting mere allegations of infringing activity as the basis of terminating a consumer’s internet connection. Conduit providers should be given wide discretion in deciding when such termination would be appropriate. In addition to the interests of individual users, the costs incurred by ISPs in dealing with notices should be taken into account, and the Copyright Office should recommend against including anti-consumer practices into the conduit safe harbor system, such as the attempt to use subpoenas. Further, attempts to monetize safe harbors, such as the proposal that ISPs be required to pay a $30 fee for each notice they receive, should be rejected.

**AG:** While internet users benefit from their ability to access and distribute information and expressive materials, there is no First Amendment right in stolen material. There are only relatively few cases where takedown notices mistakenly sweep fair use works, but technology companies use these cases as a red herring. Access and distribution interests are already adequately protected.

**Archive:** “The public interest should always be taken into account. The general Internet-using public has an interest in a balanced copyright system that allows a diversity of platforms to grow and thrive.”

**Bridy/Keller:** Interests of individual internet users should be central to any reform attempt as they have significant interests in the operation of safe harbors and their interests may differ considerably from each other and those of large companies.

**CA:** “It is important that ISPs work cooperatively with copyright owners to help combat infringement online, not only to ensure that the internet is a safe space for copyright holders to disseminate their work, but also to guard against bad actors that threaten the
safety of the internet, individual users, and the general public.”

**CDT/R Street:**
- “When considering how to construe the term “repeat infringer” in subsection 512(i), the interests and realities of families that share an internet subscription need to be examined.”
- “Additionally, the role of free expression and the fundamental interest that the public has in this right must not be impinged by narrow constructions of section 512.”

**Clinic:** “The challenge with […] phishing schemes and malicious sites is that the current 512 process is not designed for a creator to enforce their rights against sites which use the promise of copies of their works as bait for unwary consumers.”

**Cox:**
- “courts have not adequately considered what circumstances are “appropriate” for [conduit] ISPs to exercise their discretion to impose the very serious consequence of terminating a customer’s Internet access”
- “courts do not acknowledge the Act’s repeated distinction between “alleged” or “claimed” infringement and infringement that must be proven”
- mentions due process concerns with regard to terminating internet access

**DMLA:** “The perspectives of individual Internet users are already taken account under Section 512 under the counter notification process. In addition, the doctrine of fair use as codified in the 17 U.S.C. § 107 also takes into account the interests of the public, including individual Internet users. Internet users are often also copyright creators themselves, so their interest should not be too disparate from those of creators. Therefore, the perspectives of individual Internet users should not be used to maintain infringing content on websites merely because the use on the site may be free whereas uses on legitimate websites may be licensed.”

**EFF:**
- “The Internet today plays a critically important role in facilitating freedom of expression by providing a platform for users to exercise their free speech rights, including their rights to “receive information and ideas.””
- “Accordingly, the public has a strong interest in ensuring that the Internet remains a viable and accessible platform for free expression and innovation, and in ensuring that online platforms don’t unduly remove, filter, or block speech from the Internet.”
- “Congress also recognized that the public has a strong interest in ensuring that that individual speakers aren’t denied access to the Internet without adequate justification.”
- “Third, the public has a strong interest in privacy, which Congress addressed through section 512(m).”
**FB:** the “core focus [should be] on users [which] is consistent with relevant jurisprudence and congressional intent”

**FMC:**
- “We find that the interests of artists and audiences align more than they diverge; often these populations overlap significantly, as generating original creative work is increasingly a part of what everyone does online. Music listeners have an interest in the viability of cultural business models capable of sustaining cultural production at a variety of scales. They have an interest in cultural diversity, and thus in robust competition, both among service providers and among cultural producers (and competition cannot solely be equated with lower consumer-facing pricing structures).”
- “This underscores once again that section 512 must be implemented with a particular eye towards its effectiveness for small and medium sized entities, both among ISPs and among creative industries.”

**Getty:** “The user community’s interests will best be served when Congress’ twin goals of protecting both an innovative online environment and the rights of creators are met”

**Google:**
- The company asserts that the world is experiencing a boost of creativity thanks to platforms, like YouTube, where artists can directly connect with their audiences. However, Google warns that “Increasing burdens on OSPs and decreasing legal certainty about the channels through which these new creators make their living threatens this renaissance.”
- “If the Office intends to get a complete picture of the functioning of the DMCA safe harbor system, it should reach out to these new creators on platforms like YouTube, Instagram, the iTunes App Store, Google Play, Etsy, Twitch, and DeviantArt, to name just a few.”

**GPC:** While consumers interests and views are important, the rights and interests of creators are more important when it comes to copyright protection. Copyright law should state clearly that the interests of users are secondary to those of artists. The DMCA should not be amended to redefine the established protections for free speech already in the Copyright Act. “Doing the right thing” has not worked, and therefore safe harbors should be modified to provide incentives to build copyright protections.

**IA:** “The interests of users and the public are in a system that fosters creativity, which includes a vibrant internet ecosystem, robust protections for exclusive rights and the public’s right to access works, and in a fair and balanced administration of law that reflects that interconnectedness and interdependence of copyright stakeholders. The current statute recognizes and accomplishes this goal by creating shared responsibilities
and protecting legal access to creative works.”

**KCLMA:**
- “Creators who operate individually often have to make the choice of policing the Internet or being creative” which diminishes overall creative output
- “individual creators are often less knowledgeable about the notice and take-down procedure and have difficulty filing acceptable notices due to the complicated requirements, beyond those required by §512(c)(3)(A), imposed by various ISPs”
- *Lenz* ruling requires a fair use analysis for sending a takedown notice, which “will further complicate the already heavy burden on individuals, as a fair-use analysis is both complicated and time-consuming”
- “if individuals or small businesses are served with counter notices, the expenses involved with litigation often deter creators from pursuing the matter further”

**Mozilla:** “The “general public” thus has twin interests, in consuming and in creating.”

**MPAA:** “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.” + “Through provisions such as the counter-notification procedures, Congress also sought to protect the rights of individual users whose content may be taken down.”

**Music Community/A2IM:**
- “Several service providers and their associations also claim that automated content identification technologies would result in censorship of non-infringing works erroneously caught by the technology, such as fair use works. That concern is greatly exaggerated in an attempt to avoid any obligation to employ content identification technologies.”

**OTW:** Safe harbors were created “to avoid the crushing liability that would have prevented them from becoming platforms for individuals to express themselves, build communities, and take advantage of the new opportunities created by the reach of the internet” for the benefit of internet users.

**Pilch:** Any discussion about how copyright enforcement/DMCA leads to censorship mischaracterizes the situation.

**PK:** General users are the main intended beneficiaries of both Section 512 and copyright law more generally. Section 512 encourages the development of a vibrant online services and protects people from abusive takedown systems. Proliferation of online services also benefits individual, small creators who are regularly underserved by the creative industries.
**RIPG:** “in the face of unprecedented copyright piracy, any first amendment concern of the Internet user should be of minor consideration in comparison to the much more important property interest concern of the authors and copyright owners”

**Tulane:** “any future revisions or amendments to the DMCA should rightfully consider the effects on both [large and small creators, who have access to different types of resources] in order to provide for the fair, safe, and accessible internet that it was intended to create”

**UMG:** suggests education to “assist users in better understanding the scope of copyright (e.g., the existence of distinct copyrights in musical compositions and sound recordings), and in making more fully-informed assessments as to the limitations on their legal use of copyrighted content (e.g., what is, and is not, fair use)”

**Verizon:** The views of individual users should be taken into account in order to encourage wide participation in these issues. Further, the consideration of individual interests should not be limited to certain issues.

**Wiki:**
- Because the internet is so widespread and individual internet users and the general public make up a big portion of “content creators”, “[i]t seems safe to assume, then, that one of the interests of individual Internet users and the general public is the continued operation and improvement of these [the ISP] platforms.”
- “It is difficult for individual Internet users who are interacting with the system at the scale of individual notices, as well as for service providers that receive few notices and don’t have their own legal teams, to be able to evaluate or challenge notices.”

**Wixen:** “Free speech and legitimate fair use are two such issues. . . While we do not dispute the importance of these individual interests, they must be considered in the context of the extraordinary volume of infringing copyrighted material on the Internet.”
OPERATION OF THE CURRENT DMCA SAFE HARBOR SYSTEM (general comments)

**FWF:** “There is a vibrant new community of creators that is producing music, videos, and authoring creative works online that live in the shadow of Section 512. This group of creators has operates differently from the traditional content industry and relies on the existence of the safe harbors of Section 512.”

**i2Coalition:** While the current system is not perfect, it works relatively well, and the Copyright Office’s statutory mandate in this area is extremely limited.

**Pexeso:** Due to the velocity and spread of copies of original content online, there is a clear imbalance in the system to the disadvantage of rights holders. Mechanisms that allow rightsholders to automatize their search for infringing content and access of these services to the content platforms’ content management systems should be encouraged. Similarly, mandatory use of accessible fingerprinting technologies is key to reconciling the development of new technologies with the just management of intellectual property.

**Re:Create:** “There is a dichotomy that clearly exists within the broader creator community between those who argue movement away from the current Section 512 system is necessary and those that argue that without Section 512’s protections, they would not have platforms to consume and create content for”
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?

Some of the respondents, including ISPs, argue that the DMCA safe harbor has been effective, that both the internet and content industries are thriving, and that copyright litigation has decreased as a result. Those representing the copyright community argue that the DMCA has served the interests of the ISPs but has not done the same for content creators, as demonstrated by the number of notices being sent, the “whack-a-mole” problem, and the growth of online platforms as compared to traditional publishers.

**AAP:**
- “As we explained in our initial comments, recent experience shows that the process does not work effectively and is certainly no longer viewed as a workable solution “over the long run” for many service providers under Section 512(c) and (d).”
- The Copyright Office should not take the sheer number of notices “as a sign of success but as clear evidence that the current implementation of the safe harbor scheme neither deters nor prevents online infringement.”
- “A more realistic measure of the success of the DMCA is to look at whether the notice-and-takedown system contributes to the protection of copyright owners’ exclusive rights effectively. . . Evidence, however, shows that the overall volume of online infringements is increasing.”
- “In addition, we would like to reiterate reports of infringing site operators who rely on software that automates the re-uploading of content after it has been taken down in response to a DMCA notification. If this trend continues to grow under the current system, the number of notices will become exponentially higher as a result of an increased “whac-a-mole” problem.”
- “Another signal that the DMCA notice-and-takedown system is not working as Congress intended is that the burden on copyright owners and ISPs for sending and receiving notices, respectively, continues to increase.”

**AG:** It is clear that only one of Congress’ two goals have been met: the internet economy is doing great, as is online piracy. While there might be a compromise somewhere in between, law making is about doing what is right, not about compromising between stakeholders. 512 has been interpreted judicially so that piracy has flourished, while at the same time crippling the creative economy. Section 512 should be amended to require online platforms to bear a greater share for keeping infringing material out of circulation.
AIPLA:
• “There appears to be significant concern over the high volume of takedown notices necessary to address infringement, as well as the need to constantly police infringement and enforce rights without significantly reducing overall access to infringing content.” /DMCA not effective enough
• “no one perspective should be the standard for judging Section 512’s efficacy, and notes that certain concerns (such as abusive takedown notices) are common to all stakeholders, and encourages an objective analysis.”
• “detailed information relating to the success, quality, and efficacy of takedown notices, the number of abusive notices as a percentage of total infringement, and other key metrics is limited at best. Absent such information, it may be difficult for the Copyright Office to objectively evaluate the views of various stakeholders and reach a true middle ground.”

Archive: “Any reform of Section 512 of the DMCA should be undertaken only in light of the entire copyright system, including consideration of the exceedingly high statutory damages rightsholders can claim, as well as the Section 1201 anti-circumvention provisions which primarily benefit rightsholders at the expense of technology platforms and consumers.”

Beikmann: Speaking on Amazon’s roundabout ways of addressing piracy/counterfeit concerns/the way that counterfeit accounts keep popping back up: “All of this must be addressed in a revision of Safe Harbor laws so that these online marketplaces cannot exploit their Safe Harbor status for purpose of profit. The original spirit of the law has been completely violated without consequence to the perpetrators or recourse for the intellectual property holders.”

Bridy/Keller: Reasonable parties on all sides should aim to reach an agreement on common baseline beliefs about fact-based methodologies for empirical inquiry in order to address the polarization characterizing the DMCA debate. In order to do this, there should be disclosure of funding sources for research institutions and individual researchers, a prohibition on quid pro quo or prior approval rights for funders, and disclosure of data where appropriate to allow other researchers to verify any potential conclusions. The focus should not be on roundtable participants.

CA: “. . . as the public comments and roundtables has revealed—one side, the ISP community, is pleased with the DMCA but the other side, the copyright community, is not, it is clear that this balance has not been achieved.”

CCIA: “the effectiveness of the DMCA safe harbor system may be measured by research showing a relative reduction in copyright litigation due to the mechanism for expeditiously removing infringing content (when controlling for relatively recent litigation surges by copyright “trolls”)”
Clinic: “the DMCA could be measured a success if it 1) had a positive effect on the growth of electronic commerce; 2) protected intellectual property rights; and 3) protected the interests of information users.” The Clinic notes that the first goal has mostly been achieved while the latter two have not been achieved as there is still a lot of infringement/enforcement is difficult and since unscrupulous sites bait internet users with infringing content.

Cox: “the Copyright Office should focus on rigorous collection and analysis of real-world data by disinterested third parties such as academic researchers, economists, and social scientists”


DMLA: “Another neutral way to measure the effectiveness of the DMCA safe harbor regime in achieving Congress’ twins goals as referenced in the question is to examine the growth and revenues of online platforms that earn substantial revenue from aggregated content that it does not license, and compare that to the revenues of the industries that are in the business of licensing the same content directly to users.”

FB: “To the extent that copyright owners have contended [that internet] growth has occurred at their expense and that the additional goal of the DMCA to effectively address online piracy has not been realized, publicly available evidence suggests otherwise”

FMC: “Our hope is that the process of collaboratively working toward formulating best practices, standard technical measures, and educational resources might offer opportunities for various parties to better understand the everyday practical realities faced by other participants. Better and more genuinely collaborative DMCA practices would help ISPs to be better partners to content creators, not just growing the overall market for cultural goods, but helping sustain a broader diversity of business models.”

Getty: “look at the overall growth in terms of numbers and revenue for online platforms compared to traditional publishers, as well as the content industries funding the creation of content”

Google:
- “The best way to measure whether Congress’s twin goals have been met is to consider the state of the online industry and the state of the content industries. Streaming services are displacing piracy. Music consumption is exploding worldwide and traditional-music-industry revenues are growing. The Internet is thriving. Television is in a second Golden Age. These trends show that the DMCA has been effective in meeting both of Congress’s goals.”
- “Another sound metric for measuring the overall effectiveness of the DMCA safe harbors is to examine the diversity of voluntary measures being developed and
deployed by OSPs to go beyond the requirements of Section 512”

- “In addition to [Google’s] automated content recognition systems mentioned ... other OSPs are innovating with “follow the money” efforts, user education campaigns, and community norm-setting practices. While stakeholders can be expected to disagree about the details of these voluntary efforts, it cannot be said that the DMCA safe harbors are failing in the face of this overwhelming evidence that these voluntary measures continue to grow both in number and diversity.”

**GPC:** There is no need to support the growth of the internet anymore, except for providing access to those who do not have it yet. There is a need to focus on building an infrastructure that provides protection to all copyright holders. Subsidizing the communications and technology industries at the expense of copyright holders is not sustainable.

**IA:** “Despite divided viewpoints, DMCA is working: empirical data shows that both the internet and creative industries are flourishing. The goal is not for the statute to be perfect for any single interest group: rather, the goal is that the statute establish the best possible system for all parties to carry out the constitutional purpose of serving the public interest.”

**LCA:** “Given the tradeoffs that Congress made in assembling the DMCA, the Office should not assess the impact of any title in isolation. In particular, any adverse impact content providers claim they suffer on account of the safe harbors in Section 512 must be weighed against the benefit they receive from Section 1201 (which has had an adverse impact on other stakeholders, including libraries).”

**Mozilla:**

- “Measuring the success of Congress in achieving the first goal mentioned has a significantly different level of difficulty to measuring the second. No one can seriously dispute that the internet has grown, but finding good metrics for piracy and translating them to reasonable measures of economic harm is problematic.”
- “We also suggest that “supporting the growth of the internet” is not the only positive goal Congress has in this area, but that they also have an interest in promoting technology innovation.”

**MPAA:**

- Section 512 was intended to help copyright owners and service providers, but “current framework favors service providers. 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.

**Music Community/A2IM:** “the massive scale of online infringement that has developed far outstrips the increased levels of infringement that Congress anticipated.”

**OTW:** “The Office should ask: what is the state of the progress of Science, as the constitutionally founded goal of copyright? And that state is clearly strong”

**RIPG:**
• “The DMCA helped protect and facilitate the creation of the Internet in its early days – now it is time for a reset. The interests of the copyright owners, especially the Mobile Content Providers, should take precedence, and there is no further need for more government “helping hands” to the ISPs”

**UMG:**
• “The divergence in views reflected in the initial responses to the Notice of Inquiry is compelling evidence that the DMCA safe harbor system is fundamentally out of balance”
• “empirical data supports the conclusion that the current regime fails to strike the balance intended by Congress”

**Urban:** Copyright Office could develop a fuller research body on the notice and takedown system. Some of the subjects could include, for example, the experiences of small copyright holders. To increase data availability and transparency, the Copyright Office could encourage information sharing by online service providers and rightsholders. The Copyright Office could also encourage methodological best practices.

**Verizon:** The question of how to measure the divergent views seems to be wrong focus. The views of ISPs, technology companies, and other consumer groups should be given as much weight as those of copyright owners. Considering the large interest in this Notice, any possible change to 512 would be highly controversial. The Copyright Office should play the role of an honest broker, not advocating for the any particular stakeholder or offering specific solutions.

**Wiki:**
• “Neutral evaluation of the DMCA safe harbor regime has two parts: asking the right questions and looking to reliable sources for answers.”
  o Asking the Right Questions:
    ▪ “[D]etermine how effective the DMCA safe harbor regime has been in supporting the growth of the Internet, as well as how potential changes to the regime might strengthen or weaken that
Determine “whether the public is generally consuming media via channels and formats that are legally acquired and properly licensed.”

Determine “whether the platforms that are most used for copyright infringement are complying with the current section 512 system in the first place.”

- Looking at Reliable Evidence
  - Many of the comments “so far have been rightsholders and service providers. While it is important to consider these self-reported experiences, a handful of anecdotal data points is not sufficient basis for copyright policy.”
  - “Policy makers should seek out independently-conducted research. For all research, independent or not, they should examine its methods and conclusions. If more research is needed to answer a question, then they should commission it.”

Wixen:
- “A neutral way to measure the effectiveness of the safe harbor system is to "follow the dollar" in the many studies cited by other commenters. Which parties are the trillion dollar financial beneficiaries of the DMCA? The ISPs. Which parties are having their works infringed, stolen, and are struggling to make a living wage. The creators.”
- “Congress intended 512 to be a cost-effective way for copyright owners to enforce their rights and for innocent ISPs to be shielded from unreasonable liability for copyright infringement by its users. Unfortunately, however, in the nearly 20 years since the DMCA was passed, 512 has instead enabled tech companies and ISPs to profit from and avoid liability for mass copyright 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 a copyright registration or creation of certain web accounts). What are the most significant practical barriers to use of the notice-and-takedown and counter-notice processes, and how can those barriers best be addressed (e.g., incentives for ISPs to use a standardized notice/counter-notice form, etc.)?

Those representing the copyright community mentioned barriers such as difficulty locating takedown forms, a lack of uniformity among forms, malware and phishing schemes, the additional obligations imposed by certain ISPs, and how these issue are especially burdensome on small creators. Others argued that standardized/uniform takedown forms would be inefficient for ISPs, and that the sending of “non-meritorious” takedown notices presents a barrier to the DMCA’s efficient operation.

**ACA:** Conduit service providers would benefit from a uniform notification form that included only the IP address of the alleged infringer, date and time of the infringing activity, and the name of the copyrighted work. Content owners should also be required to send such notices by email to an address identified by the ISP specifically for that purpose.

**AG:** The biggest barriers for authors are finding the ISPs’ notice-and-takedown forms and contact information, and the lack of a standardized takedown form. Copyright Office should make a standardized takedown form easily available on its website. Congress should amend the law to require that ISPs must host the information required for filing a takedown notice in a conspicuous location on their websites.

**AIPLA:**
- “AIPLA supports the standardization of notices and counter-notices served in accordance with Section 512.”
- “AIPLA recommends that the Office undertake further inquiry to prepare and adopt a standardized notice and make it available on the Copyright Office website.”
- “AIPLA recommends that the Office undertake further inquiry to prepare and adopt a standardized notice and make it available on the Copyright Office website.”

**Archive:** “The Internet Archive does not believe that a standardized web form would be helpful in terms of mitigating the types of errors we see on a regular basis.”
Beikmann: Amazon (also talks about other companies as well) in particular outsources its IP department and so take-downs are inefficient/frustrating to see counterfeits and pirated products reuploaded through different accounts.

CA: Copyright owners have difficulty locating web forms, designated agents/face safety and privacy concerns.

CCIA: See the Department of Commerce DMCA Multistakeholder Forum

CDT/R Street: Voluntary cooperation between ISPs and rightsholders is good but “ISPs should remain free to customize their individual systems for sending and receiving notices if doing so helps produce more accurate and complete notices, and under no circumstance should gains in efficiency come at the cost of accuracy or validity.”

Clinic:
- “Finding the appropriate forms, mediums, information/contact information, and contact points to issue a proper notice was difficult.”
- “Since this project began, the Copyright Office updated its DMCA agent registration requirements for websites. We hope that when fully implemented this change will help individual artists and small businesses trying to find the appropriate contact.”
- It is difficult on standard forms to follow up on responses to takedown request and figure out which response corresponds to which takedown request.
- “. . . a standard form is inherently limited in the information a creator can provide.” ISPs also “request additional information or documentation not required by the statute.”

Copia:
- “Under present practice, […] senders of takedown notices have not needed to properly plead and then prove that the targeted speech was indeed actionable prior to effecting the removal of targeted content via their takedown demands.”
- “no effective consequence for sending non-meritorious takedown demands”

Digimarc:
- “The Copyright Office is best positioned to provide guidelines to aid ISPs in implementing effective mechanisms for receiving takedown notices. . . Copyright Office could develop a standardized, embeddable takedown notice form and mandate its use on ISPs’ websites.”
- “Digimarc proposed that “the Copyright Office should also consider the establishment of a takedown notice clearinghouse to standardize and streamline the issuance of notices to [ISPs] and to ease [ISPs’] acceptance and processing of those notices.””
**DMLA:** “ISPs should not be entitled to take advantage of the safe harbor afforded under Section 512 if they impose additional barriers to an effective notice as set out in Section 512. One solution would be to have the Copyright Office adopt a uniform notice that would be effective under Section 512(c)(3) and would not result in any dispute as to whether effective notice was given.”

**Etsy:**
- Encountered “a multitude of practical barriers that other ISPs have implemented that hinder effective use of the notice process, including compulsory creation of an account before being permitted to submit a notice, an absence of clear policies, instructions, or contact information regarding submitting notices, and lack of response, action, or acknowledgement from the ISP following a notice.”
- “Due to the wide diversity of ISPs and the types of material involved, as well as the broad differences between digital, physical, and hybrid content, we do not endorse a standardized notice or counter-notice form as suggested by the Copyright Office. However, identifying and incentivizing the adoption of industry best practices can help to improve the efficiency of the handling and processing of DMCA notices.”

**FB:**
- there’s “little indication that service providers, at least responsible ones, fail to discharge their duties under the DMCA.”
- “[safe harbors] certainly present fewer barriers to effective copyright enforcement than litigation against users, with all the risks and burdens associated with federal lawsuits”

**FWF:** “The current system to challenge a take-down notice is daunting, and poses a significant burden on smaller providers.”

**Getty:** “A standardized online submission form would be helpful, particularly if more than one infringement could be notified (e.g., by inclusion of a spreadsheet) in a single submission”

**Google:**
- Google endorses the use of third party expertise in sending takedown notices. It even suggest the use of the Copyright Alliance as a clearinghouse.
- In order to address the obstacles small rightsholders experience while navigating the notice-and-takedown system Google “could convene a multistakeholder discussion about ways to allow smaller entities to take advantage of tools voluntarily developed by larger-scale entities to address any impediments in notice-and-takedown procedures, perhaps through collaboration with intermediaries or clearinghouses.”
In contrast, mandating standardized practices for OSPs would hinder efficient processing of notices. Different OSPs have different processes, as befits the enormous range in the volume of notices and the size of the OSPs’ businesses. Attempts to ignore this diversity, and to curtail flexibility, will only create problems.”

**GPC:** Compelling the use of standardized forms would be next to impossible but industry-wide best practices could work.

**i2Coalition:** The lack of consistency in DMCA notices makes timely response unnecessarily difficult, particularly for smaller companies. Furthermore, representative lists create even more uncertainty and burdens on internet infrastructure companies.

**IA:**
- “A single form for notices ignores crucial differences between platforms and has been explicitly studied previously.”
- “In stark contrast to those unspecific complaints, the forms of the member companies of the Internet Association are extremely easy to find. Without specific case studies and empirical data that display a substantial and convincing existing deficiency, government action is unnecessary”

**IIPSJ:**
- Litigation is “the only means for pursuing claims based upon the wrongful removal of content from the Internet” which is costly.
- USCO should create guidelines “for voluntary mediation and other dispute resolution alternatives where small/individual stakeholder rights are at issue” including a “registry of pro bono mediators experienced in copyright issues.”

**LaPolt:**
- Notice and takedown process puts “an overwhelming burden on creators and copyright holders due, in part, to the inability of these processes to effectively address the vast amount of infringing activity on the internet”
- To address this problem, “the Safe Harbor Provisions must encourage and incentivize ISPs to cooperatively work together with creators to identify instances of infringement” because they “are better situated to effectively discover and combat piracy” and they “continue to profit from the infringing content posted on their service”
- “the counter-notice process is alarmingly skewed in favor of an alleged infringer”
- “Many creators lack sufficient legal representation and are forced to forfeit valid infringement claims because pursuing litigation is practically, and financially, impossible”
- “Modernization of the Copyright Office and the creation of an independent agency are necessary for copyright law to function effectively and to efficiently
balance the interests of rights holders and ISPs.”

**MCNA:**
- “songwriters and composers have for nearly twenty years been placed in the burdensome position of having to monitor the entire digital world for infringements”
- “Infringing works that are taken down at the request of copyright owners are often immediately reposted, with no follow-up action by the ISP”

**MPAA:**
- It is burdensome to require content owners to list separate identification of each URL where infringing material can be located.
- “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.”
- “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.”

**OSPs:** “rightsholders often pair copyright-based takedown requests with accusations of trademark infringement”

**OTW:**
- “Automattic, for example, found that over 25% of the notices it receives fail to provide the necessary information, despite its extensive attempts to guide submitters”
- “it may be appropriate for the OSP to adopt specific submission requirements, even if that is annoying for the rare sender of a valid notice”
- “even were there to be a “standardized notice form,” there would still be good reason for there to be variations in OSP practices upon the submission of a notice”
- “we call the Office’s attention to an increasingly common strain of advice to trademark owners to claim copyright infringement where trademark claims would fail”
- Amazon’s representative said that more than half of the takedown notices it receives for Kindle books are attempts to get higher-ranking books pulled
- “Academic libraries face mostly non-copyright takedown requests, but recently have dealt with publishers’ sometimes-overreaching attempts to stop academics
from posting their own work”
• “Counternotices, which generally need to be sent by individuals with no access to legal counsel, are difficult to navigate”

RIPG: “Industry stakeholders, facilitated by those in Congress and at the Copyright Office, should develop a series of best practices relating to discretionary aspects of the DMCA, including the adoption of a standardized notice/counter-notice form”

SME: The Section 512 takedown process has been ineffective against massive online infringement not contemplated by Congress when it drafted the section. Further, many obligations of ISPs have been drafted narrowly by the courts, which has led many ISPs to take only minimal measures to address online infringement. Content owners do not have the visibility to detect infringement as efficiently as ISPs do, and ISPs often handle takedown notices using automated workflows that are efficient for them but inefficient and not useful for content owners. Therefore, all ISPs who engage in large-scale dissemination of content should provide content owners access to their entire databases for anti-piracy purposes. Further, ISPs should be required to use a standardized takedown form and process suited to high volume use, while preserving the right to send one-off notices by email or other means when necessary.

UMG:
• “the notice-and-takedown system is simply not designed to handle, or capable of handling, the sheer volume of infringement that occurs online”
• “the current system does not address the near-immediate recurrence of infringing material on a given site following a takedown”
• statute does not define “expeditiously”
• “courts have effectively read the “representative list” language out of the “notice-and- takedown” portion of the statute”
• requiring human review “would effectively preclude meaningful operation of the notice-and-takedown”
• lack of transparency from OSPs

Wixen: “All ISPs and websites should be required to use a universal, standardized electronic takedown process consistent with the information required by 512. If any ISP or website fails to use such process, then it should not receive safe harbor protection.”
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?

Respondents from the copyright community commented that the 10-day period to file a lawsuit should be extended, that “expeditiously” should be more precisely defined, and that a small claims tribunal may alleviate some of the problems. ISPs and other respondents argued that there are no statutory changes necessary, and that lengthening the 10-day window would be a detriment to free speech.

**AG:** The first part of the counter-notification timeline is well-tailored. 10-14 days may, in some instances, impinge on speech but the requirement that copyright holders need to notify the ISPs within 10 days of an action to seek a court order places an unrealistic burden on the holder. Instead, the Congress should require that copyright holders inform the ISPs within, for example, five days that they aim to file a lawsuit in the future. Misrepresentation provisions of 512(f) would apply to false statements of intent.

**Beikmann:** Define “Expeditious”. A specific time frame must be set for compliance to a take-down notice.

**CA:**
- “However, as discussed, copyright owners often lack the financial resources to afford to litigate in federal court, so extending the period of time in which they may file a lawsuit before the infringing material is restored, alone, fails to adequately address the issue.”
- “...a small claims tribunal. ...would provide a less expensive alternative forum in which copyright owners can enforce their rights.”
- “Additionally, that counter-notice senders express frustration with length delays in restoring access to content speaks to ISP non-compliance with the statute rather than a reason to amend the statute.”
Clinic:
• “creators say that the idea of filing a lawsuit within ten days is impossible. The logistics in filing a lawsuit would take much longer to pull together and would be cost prohibitive.”
• A small claims tribunal within the U.S. Copyright Office would provide senders and recipients of DMCA notice with streamlined/cost effective processes for adjudicating such claims.

Copia: Notice and stay-down “would only increase the severity of the Constitutional injury the DMCA inflicts, as would requiring any additional delay in restoring content after receiving a counter-notice”

DMLA: “In general, the most important time frame is the time it takes an ISP to remove infringing content. In particular, with time sensitive content where the value is in the immediacy of the content, such as a sports event or other exclusive entertainment content, any delay—even 48 hours—can cause irreparable harm. As counter notices are the exception, rather than the rule, a 10-day timeframe to commence litigation by a content owner is not realistic, nor does it make sense... A much better solution is to have a copyright small claims tribunal that can deal with small stakes online infringements, including those issues that come under the Section 512 takedown procedure.”

EFF:
• No changes are needed to the timeline.
• “Focusing in particular on the counter-notice process, lengthening the timeline would worsen the detrimental effect on speech when, as is common, the DMCA process is abused to take down lawful speech, particularly speech of a time-sensitive nature.”
• “Shortening the timeline, however, might make it difficult for senders to draft papers that can withstand legal scrutiny.”

Etsy: “The Copyright Office must take into account that inaccurate, abusive, fraudulent, or misinformed section 512 notices can seriously disrupt or even destroy a small business. Sellers have raised concerns that some notices are strategically sent in bad faith by competitors with no legitimate basis or solely with the intent to disrupt their business. When these bad faith notices are sent near the busiest shopping season of the year, it can be especially devastating to a seller that relies in large part on holiday sales for their livelihood. These notice recipients often do not have the resources to then file a lawsuit against an entity that may not even exist.”

FB: “no legislative amendments are needed to achieve the goals of the DMCA’s counter-notification procedures”

Getty: “ISPs should not take longer than 2 business days to remove infringing content”
**GPC:** Congress should immediately address the time and resources needed to enforce and protect copyrights from infringement. The timelines should provide much more leeway for copyright holders, and Congress should expand the time copyright holders have to bring a lawsuit so that the copyright holders have adequate time to assess counter-notices and seek the help of alternative dispute resolution mechanisms.

**IIPSJ:** USCO should recommend that Congress “expand the time for commencing litigation in connection with contested take-down disputes, which in some cases might obviate the need for litigation altogether.”

**LaPolt:**
- “the counter-notice process is alarmingly skewed in favor of an alleged infringer”
- To fix this, “the process of responding to counter-notices must be streamlined and the period of time a copyright owner has to answer to the counter-notice must be extended”

**Mozilla:**
- “One way to cut this Gordian knot might be to introduce a presumption of innocence for recipients who have already successfully challenged more than a certain number of notices on a particular platform.”
- “Sections 512(g)(2) requires that content be kept down for at least 10 business days, even if a counter-notification is filed immediately. In doing this, it assumes the *prima facie* validity of the takedown request in all circumstances. Altering this presumption in some cases may provide a way to improve the situation of everyone.”

**MPAA:** “Based on current information, the timeline specified in Section 512’s takedown and putback procedures appears to be working well.” MPAA says this because there has not been widespread abuse of counter-notices that would warrant a change in timeline and because material is only taken down for 10-14 days/not for very long.

**Music Community/A2IM:**
- “First, the undefined statutory term “expeditiously” leaves service providers far too much discretion to decide how quickly they will comply with a takedown notice.”
  - One possible solution, advanced by at least one commenter, “would be to require service providers to provide an online interface that permits a copyright owner to submit takedown notices, and that processes those notices in an automated fashion.”
  - Another possible solution that has been advanced is amending the statute to specify a maximum takedown notice response time.
- 10 day time limit given to copyright owners to determine whether or not to bring suit is insufficient. “. . .[a] possible way to alleviate problems with the counter-
notice provision would be to lengthen the time that copyright owners have to address clearly erroneous or invalid counter-notices.”
  o Doing away with the 10 day period “would incentivize fraudulent counter-notifications by allowing infringing content to be immediately reposted.”

**OTW:** “does not recommend any statutory changes at this time”

**PK:** The lack of a strict response deadline guarantees that services do not lose their safe harbor on a mere technicality but still have incentives to respond expeditiously. There is no need for a ten-day waiting period.

**SME:** Courts have regularly interpreted Section 512’s “expeditious” requirement loosely to encompass responses that are by almost any standard leisurely. Consequently, the current frameworks gives ISPs too much discretion to decide when to comply with a takedown notice. This is particularly the case with regards to pre-release material. It is a practical necessity to have automated takedown processes that process takedown notices almost instantaneously.

**UMG:**
  • DMCA “fails to impose clear or strict limits on how quickly a service provider must act in response to a takedown notice” … “There is no reason that the time to take down infringing content should materially exceed the time it requires to upload infringing content (i.e., nearly instantaneously)”
  • 10 days is “insufficient to permit copyright owners to evaluate the counternotice, attempt to resolve the dispute, and if needed, file a lawsuit before the material is reposted” (should be 60 days)
  • “the requirement of some courts that the Copyright Office issue a copyright registration (or affirmatively reject a registration application) before a copyright owner may file suit”

**Verizon:** The safe harbors have been working largely as expected, and there is no need for changes to Section 512. However, should there be such changes, they should focus on the counter-notification process. At the moment, the law does not compensate a user who is a victim of a false or mistaken takedown notice, and the ten-day waiting period is too long.

**Wixen:** “Getting more time won't make a difference since hardly anyone sues.”
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?

Respondents from the copyright community discussed issues like harassment, sharing of personal information, posting to Lumen/chilling effects, and legal fees. ISPs and other commenters discussed abuse of the notice-and-takedown system, and safety and privacy concerns for counter-notice senders, suggest that counter-notice senders be allowed to respond anonymously, and argue that this framework is better than the alternative (litigation).

**Archive:**
- “One way to create real penalties for abusive takedown notices would be to include automatic statutory damages under 512(f), to mirror the statutory damages for copyright infringement.”
- “There should also be more incentives for ISPs to take the risk of rejecting bad notices. For example, statutory damages could be remitted to $0 if the ISP has a reasonable belief that the manner in which the material is used is fair use.”

**CA:**
- A small claims court would address the concern over legal costs and safety/privacy concerns.
- The disincentives make it less likely that creators will utilize the DMCA.

**CDT/R Street:** “Neither CDT nor R Street is aware of any evidence that use of section 512's notice-and-takedown procedures creates unique risks for individuals, as opposed to any other mechanism by which people exercise their legal rights.”

**Clinic:**
- Artists are harassed users who gain the artist’s personal information through a public display of such information.
- Artists encounter a “stern warning that if they make a mistake they may be liable for fees and punished for perjury gives well-intentioned citizens pause in enforcing their copyrights.”
  - “If sites were required to use standardized language and approaches to DMCA notices that are consistent with and do not exceed the requirements of the statute it would be a positive first step in addressing some of these challenges. Additional resources and education to individuals and small businesses from a neutral and expert source such as the Copyright Office would also be helpful.”
- “They also expressed the impossibility in many cases of bringing a lawsuit for
infringement when the damages from the infringement cost far less than the
costs incurred in bringing a lawsuit.”

- “As noted above, the need to confirm infringement in order to send a takedown
  request opens the copyright owner up to all sorts of dangerous material,
  including phishing schemes, malware, and malicious sites.”

**DMLA:** “The main complaint of DMLA members... is that many websites that remove
content will post takedown notice on websites such as Lumen (formerly Chilling Effects),
which republishes the infringing content identified in the takedown letter. This
reposting is a disincentive and is viewed by some as a form of harassment for sending a
proper DMCA notices. [T]he cost of federal litigation after a counter notice has been
filed is prohibitive for most claims involving the unauthorized use of visual content on
the Internet.”

**EFF:**
- “Allowing users to send counter-notices anonymously, by designating a proxy or
  agent to accept service of legal process on their behalf, could ameliorate a major
  obstacle preventing effective use of the counter-notice system.”
- “Under the current system, many users may feel intimidated or fear harassment
  or reprisal if they reveal their personal information to the sender of the
takedown notice, particularly where the users’ content is critical, a parody, or
addresses controversial subject matter.”
- “We recognize that notice senders are also required to disclose identifying
  information and may have the same concerns. However, we do not see how the
remedial measures designed to address takedown abuse can be effective
without revealing the source of the takedown notice and so that information, at
least, must be disclosed.”

**Engine:**
- Unclear what disincentives exist for copyright owners “since the requirements
  for sending a takedown notice are significantly less burdensome than” filing a
lawsuit.
- “considering the heavy burden that § 512(g) imposes on users, the infrequency
  of counter-notices demonstrates that § 512(g) does not adequately protect
users’ rights”

**Etsy:** “While Etsy does not support using language that is intended to dissuade the
submission of even legitimate complaints, we provide information about the potential
consequences of abusive infringement notices or counter-notices. Our online form for
submitting notices and our counter-notice procedures were both designed to make the
process convenient and user-friendly, so the ease of use is balanced by informing both
sides that the information they submit may be shared with the other party and that
abuse of our Intellectual Property Policy or the DMCA may lead to termination of their privileges on Etsy or facing potentially serious legal consequences.”

**FB:** discusses what it has done to “minimize obstacles” and says that section 512 is better than the alternative, litigation.

**Google:** “Google remains concerned that the existing counter-notice remedy has not prevented abuses of the notice- and-takedown process.”

**GPC:** There should be no new blanket licenses. While a small claims court would be useful in general, the government would have to lead the discussion regarding an easier DMCA dispute resolution system.

**MPAA:**

- “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.”
- Filing takedown notices “requires a significant amount of resources and often does not actually result in the copyrighted work being removed from the internet. . .” The MPAA states that “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.”

**Music Community/A2IM:**

- “Second, the “representative list” provision has been interpreted out of the DMCA safe harbors entirely. . . One possible solution would be to amend Section 512 to provide further guidance as to the meaning and proper application of the “representative list” language.”
- “Furthermore, requiring copyright owners to file suit in order to dispute each invalid counter-notice is an unrealistic solution given the proliferation of copyrighted works on the countless platforms hosted by service providers and the sheer volume of illegitimate counter-notices. . . As some commenters have suggested, one solution to problems with the counter-notice provision may be to allow disputing parties to participate in mediation or other alternative dispute resolution.”

**OTW:**

- “Improvements in the courts’ treatment of claims under §512(f) may be necessary to have any deterrent effect on abusive claims”
- “human review in many cases can prevent OSPs from merely acceding to the suppression of speech”
**Pexeso:** While useful, platform-specific mechanisms such as Content ID do not solve issues such as the so-called “whack-a-mole” problem, manual search on other platforms, and reliance on the good faith of internal mechanisms to spot and remove infringing content. Further, smaller entities do not necessarily have access to mechanisms like Content ID to accurately track their content. Therefore, take-down enforcement should be outsourced to third party services to lower monetary and resource costs to all parties.

**Pilch:** “Aggressively claiming to be victims of “abuse,” these super-wealthy corporations, benefiting from infringement, and their supporters, vilify takedown notices and devise shaming mechanisms to expose and compromise rightsholders attempting to assert their legal rights-- by reporting “abuses” publicly.”

**PK:** There is no disincentive problem, instead there are too many meritless takedown notices. However, utilizing counter-notices is considerably difficult. In addition to removing the mandatory waiting period, the law should be amended to require ISPs who receive takedown notices to inform the target of the notice and their right to file a counter-notice, and to establish a central repository of takedown notices.

**RIPG:** suggests notice and stay-down approach

**SME:** Section 512 is further undermined by the abuse of the Section 512(g) counter-notice process and similar processes, with submitting counter-notices sometimes being easier than submitting takedown notices. ISPs sometimes provide inaccurate or misleading information about counter-notices to customers, and rarely include warnings about submitting improper counter-notices. The resulting high volume of false counter-notices is a fundamental problem for the takedown system. Further, the ten-day time period in which copyright owners can file a lawsuit after being provided with a counter notice is entirely unrealistic. Copyright owners also cannot afford to launch thousands of lawsuits, and the courts could not handle such a case load.

**UMG:**
- “concerns respecting potential legal costs are valid” and “if adequate time is allowed during which the content owner is not being harmed, UMG believes that many of the disputes over notices and counternotices can be amicably resolved in that period without court intervention”
- proposed that “that online interfaces and standardized forms be used”
- “one change that cannot be made is to allow accused infringers who wish to utilize the counternotice process to do so anonymously”

**Wiki:**
- “To the extent that disincentives to filing notices and counter-notices exist, and more research is needed to determine the extent and comparability of
such disincentives, they generally seem to hit individual Internet users and small rightsholders the hardest.”

• “Efforts to counter disincentives to filing notices and counter-notices should focus on providing additional support and resources to individual Internet users and small rightsholders.”

**Wixen:**

• “The biggest disincentive to filing takedown notices is that they simply do not stop or prevent copyright infringement. This is because the current system does not guarantee that infringing material will be taken down permanently.” Instead, Wixen notes that copyright owners would have to file a lawsuit over reposted content.

• “Another disincentive is that some ISPs and websites publicly post the name of any individual who sends a takedown notice. This is done to publicly shame such individuals for simply trying to protect their copyrights.”
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?

While they may disagree about the prevalence of abusive notices, many respondents suggest that the section 512, properly construed, is sufficient to guard against abuse. Others argue that penalties should be strengthened and suggest statutory damages.

**AAP:**
- “many large AAP members do not actively oppose strengthening the penalties for abusive notices and counter-notices but deem this effort unnecessary given that Section 512 already imposes penalties for those who send non-complaint notifications of either kind.”
- “If the Copyright Office decides to recommend legislative action in this area, it should limit stronger penalties to repeat offenders to allow room for good-faith mistakes.”

**AG:** False notices should be penalized but there is no need to strengthen the penalties. However, if the Congress considers strengthening the penalties, it should try to avoid overreach and require a showing of bad faith prior to imposition of any penalties. Takedown automatization should not be discouraged.

**CA:**
- “the DMCA adequately guards against this sort of abuse under section 512(f), which provides that “Any person who knowingly materially misrepresents ... that material or activity is infringing” can be held liable for such misrepresentation. As such, any effort to expand the scope of 512(f) liability or otherwise legislate new penalties is unwarranted, and would effectively create more barriers to enforcement for copyright holders.”
- “A small claims court would also “help those aggrieved by abusive notices and counter- notices to enforce claims under 512(f) without the need for legislating new penalties.”
- “Additionally, with regard to a proper reading of section 512(f), the Copyright Office should confirm that the basis for liability under section 512(f) is separate from the requirements for a valid notice under section 512(c).”

**CCIA:** “Properly construed, Section 512(f) should be sufficient to deter most abuse”

**Clinic:**
- “false notices and counter notices do not appear to be a problem based on
reports by major recipients of notices.”

- “oppose[s] any stricter penalties for sending notices because there is no evidence that large numbers of false notices is a problem that needs to be addressed, and additional penalties would only serve to further discourage individuals and small businesses from using the DMCA tools available to them.”

**Copia:** “there are already plenty of deterrents to sending counter-notices, even for non-infringing content, and the Copyright Office should not be advocating for more”

**CTIA:** There should be stronger penalties for filing false or abusive notices or counter-notices, especially if the notices are facially improper notices sent to conduit services not subject to Section 512(c). Education efforts and policy positions would also be helpful. Current requirements are not effective. Since there is no proper accountability framework, there is a cottage industry aimed to abuse the system by flooding carriers and ISPs with invalid notices. Conduit services keep getting millions of invalid notices demanding the services to limit customers’ access to internet based on unverified allegations of infringement.

**DMLA:** “The Copyright Act provides sufficient recourse under Section 512(f) for the filing of false or abusive notices or counter notices and we see no need to strengthen any penalties.”

**EFF:** “The problem of false and abusive takedown notices is common and well documented. . . Further, without an effective remedy against improper takedowns, the notice and takedown system becomes an easy vehicle for censorship of unpopular or critical speech by both government and private entities.”

**Engine:** “The penalties for false or erroneous takedown notices under § 512 should be strengthened”

**FB:** “section 512(f) currently provides adequate protection against fraudulent, abusive, or unfounded notices”

**Getty:** “Existing penalties are adequate”

**GPC:** Educating users of their counter-notice rights would be a better and more sustainable solution than dissuading notices altogether. Creating penalties would make enforcing copyrights even harder and weaken copyright protections. We should focus on managing the cause, i.e. the lack of barriers and screening processes for infringing content, instead of focusing on the symptoms.

**ICC:** “The abusive notice problem, which occurs on a scale of millions for each major service provider, can be addressed by courts constructing ‘knowing material
misrepresentation’ in the sort of ‘should have known’ standard that rights owners urge in contributory infringement cases”

Mozilla:
• “Given relevant international treaties, it seems more feasible to impose statutory damages as a penalty for abusive notices than to modify infringement to trigger only actual damages.”
• Mozilla proposed a system where there are two paths for a rightsholder:
  o “To seek and receive a judicial decision that the act of posting is in fact infringing in context; or
  o To submit a compliant DMCA notice, as now, but a) assert under penalty of perjury that the information in the notice is accurate (as opposed to penalty of perjury applying solely to the authority of the complaining party to act), and b) face statutory damages if the notice is later determined to be unfounded and an abuse of the process.”

MPAA: “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.”

Music Community/A2IM:
• “[a] solution would be to impose a duty of care on service providers to deal with clearly erroneous or invalid counter-notices.”
• Statutory damages for willful misuse of the DMCA process “is unwarranted. Section 512(f) already provides an adequate deterrent against abuse of the notice and takedown system, and there has been no data provided to show it is an insufficient remedy.”

OTW: “Raising penalties can’t have a deterrent effect without realistic risk of §512(f) liability at all. Thus, the law ought to clearly recognize a requirement of good faith, including consideration of possible statutory exemptions such as fair use”

RIPG: “shift the burden of policing the Internet for unauthorized use from the content owner to the ISP”

SME: Service providers should discourage improper counter-notices the same way they discourage original takedown notices, use plain English in putback options, instead of terms of art, and include balanced educational messaging for users. Another option would be to impose a duty of care on ISPs to deal with clearly erroneous counter-notices or to include an alternative dispute resolution mechanism or a longer interval for copyright owners to address false counter-notices. Eliminating or shortening the current 10-day waiting period would be a mistake.
**UMG:** “increased or otherwise “strengthened” penalties are not the answer” ... “the better approach to addressing concerns respecting baseless notices or counternotices is to address the issue holistically, from multiple angles”

**USTA:** Many copyright owners consistently abuse the DMCA by flooding conduits ISPs with invalid automatic notices. This abuse should be addressed by adoption of more robust fines for unsubstantiated and abusive filings. Courts should be the ultimate arbiters of repeat infringement, not ISPs. Therefore, no legislative changes to section 512 should be adopted, but stronger penalties should be contemplated.

**Verizon:** The safe harbors have been working as the Congress intended, and there should not be any changes to Section 512. False and abusive notices prevent ISPs from dealing with actual, good-faith legitimate notices. Section 512(a) conduit notices that pretend to be Section 512(c) notices are improper. Many conduit services are unable to control or track the data transmitted through their services effectively. Further, “copyright trolls” are a growing concern. Currently, neither 512(c)(3)(A)(v) nor 512(f) prevent the abuse of the notice process by copyright owners, whereas there has is no similar problem when it comes to counter-notifications. The Copyright Office could do more to deter abusive notices sent by agents and talk more about copyright trolls. Educational efforts could play a major role in this process. If any changes to 512 are to be made, they should include stronger, clearer, and more effective penalties to address abuse of the process. Penalties for notice abuse should be similar to the statutory damages for willful copyright infringement, and include attorney’s fees and costs.

**Wiki:**
- “One way to strengthen penalties would be to impose statutory damages for filing false or abusive notices.”
- “The disincentives also would be no greater than the ones that result for counter-notices from the statutory damages imposed on copyright infringement, so Congress has already concluded that such a tradeoff is acceptable.”
- “Another option would be to preserve the safe harbor protections for intermediaries if they refuse to comply with a notice due to a good faith belief that it is false or abusive.”

**Wixen:** “Yes the benefits of strengthened penalties would outweigh the risk. A high standard for both notices and counter-notices is paramount to a well-functioning notice process.”
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?

Several respondents from the ISP community argue that “repeat infringer” means a person adjudicated as such. Many oppose the requirement for terminating repeat infringer access. Respondents from the copyright community argue that adjudication is not necessary for a user to be considered a repeat infringer. Some of the respondent on both sides request clarification and/or a statutory amendment.

**ACA:** There is a need for a more fundamental change in the safe harbor system, particularly when it relates to repeat infringement. The repeat infringer policies should only be triggered by evidence of an adjudicated act of repeat infringement. The district court’s opinion in BMG v. Cox was flawed because it failed to recognize the difference between the conduit safe harbor and other safe harbors. As long as ISPs warn consumers that there is a realistic risk that repeat infringement could cause them to lose their internet connections, conduit ISPs should not be forced to choose between policing online activities or accepting at face value notices of alleged infringing activity.

**Bridy/Keller:** There is no reason to amend Section 512(i) at this time. The requirements in 512(i) are much less specific than the detailed notice-and-takedown provisions in 512(c) but this is for a reason. The Congress chose to leave the repeat infringer provisions relatively loosely defined. The case law over the past two decades has set clearly the parameters for ISPs to follow. The NOI is correct in suggesting that 512(a) ISPs are differently situated from other types of providers. The UN Human Rights Council has called terminating a person’s internet access a human rights violation due to its effect on the person’s everyday life in today’s world.

**CA:** “A reading of the statute which requires an ISP to implement a policy only after the rightsholder expends resources litigating does nothing to support the goals of the legislation [to encourage cooperation between ISPs and the copyright owners in combatting online infringement].”

**CDT/R Street:** “Attempting to define a fixed “trigger” for account termination or 20 any other response delineated by a repeat infringer policy would severely limit the flexibility that is crucial not only to providers’ ability to adapt their policies to ever-changing circumstances, but also to section 512’s continued relevance and effectiveness.”

**Cox:**
- “Clarification that a person must be judicially proved to be an infringer to be
affected by a repeat infringer termination policy would be an important step to achieve an appropriate balance of interests”

• The consequences of terminating internet access “are far more severe in 2017 than they were in 1998 when the DMCA was enacted.”

• Citing to Nimmer: “Although § 512 does not expressly define “repeat infringers,” the statute shows that “Congress carefully delineated the difference between allegation and proof” of infringement.”

**CTIA:** The statutory structure makes clear that conduit services should never be required to terminate internet services, at least in the absence of a judicial finding on infringement. This is particularly the case considering the role and importance of internet access in today’s society. Services should only be required to terminate repeat infringers’ services in the most exacting circumstances. Unverified allegations are not sufficient to find someone a repeat infringer.

**Digimarc:** “A three-strikes policy would be simple to implement for ISPs, regardless of whether they are a conduit, host, index, or provider of some other service. There is no reason why one sort of provider should be treated differently when all are facilitating illegal activity.”

**DMLA:** “While a repeat infringer policy may be fact-specific, many ISPs adopt a three-strike policy similar to those adopted in other jurisdictions. This policy considers anyone who has been the recipient of three notices a repeat infringer. There should be no requirements to bring an action in federal court before a repeat infringer policy is triggered, as that would defeat the purpose of the DMCA in providing an efficient and non-litigious way to have infringing content removed.”

**EFF:**

• “More broadly, appropriate circumstances and reasonable implementation will vary across different ISPs that perform different functions, and will change as these services and uses of the Internet evolve. The law is deliberately flexible enough to account for these differences.”

• “ISPs should have the flexibility to attempt to persuade customers to cease infringement, and to take other steps prior to termination.”

• “In light of the severe consequences of terminating Internet access, the Office should endorse a reading of 512(a)(1)(A) that allows ISPs to limit terminations to egregious instances of repeat infringement, without forfeiting the protection of the safe harbor. The Copyright Office’s report should reflect that appropriate circumstances and reasonable implementation of this provision should be determined on a case-by-case basis, taking into account both the consequences of loss of Internet access as well as the volume and egregiousness of the alleged infringements.”
**Etsy:**
- “Etsy uses our repeat infringer policy to remove persistently bad actors from our member base and to protect the integrity of our marketplace. However, implementing the policy fairly is a complicated practice.”
- “Some factors that could be considered when determining when a repeat infringer policy should be triggered include overall number of notices the member received, the size of the member’s business, the frequency of notices, whether multiple notices have come from the same rights owner, whether the complaining party has withdrawn their claim, and whether counter-notices have been submitted with no court order sought.”

**Getty:** “Anyone who has been the recipient or subject of a takedown notice on 3 or more occasions should be considered a repeat infringer”

**GPC:** Penalties would be best determined based on previous history of infringement rulings involving penalties and damages. While a national database of infringers is not necessary, tracking and providing blocking mechanisms would be useful. Further, there should be both financial penalties and loss of internet privileges. ISPs should be held accountable for repeat infringers when the number of infringements on their website exceeds a pre-determined total percentage. After reaching the site should be taken down and reconfigured so that infringement is no longer possible or, alternatively, the safe harbor protection taken away.

**ICC:**
- Conduit repeat infringer policies should be treated “very differently than caching, hosting and indexing repeat infringer policies”
  - “The three other safe harbors deal with service providers who have more control over allegedly infringing material”
  - “consequences of a complete shut off of an Internet access subscription for an individual or a business are far, far more severe than when specific content is removed from the Internet”
  - Conduits “do not have the right or ability to examine the enormous volume of 512(a) material transmitted to or from subscriber machines”

**KCLMA:** suggests amending the statute because there is “no clear standard articulating circumstances that trigger an ISP’s obligation to terminate a subscriber” and it is unclear “when a subscriber, once excluded from a network, may rejoin that network, as this is not mentioned in §512(i)(l)(A)”

**LaPolt:**
- “a clear and uniform repeat infringer policy must be mandated for all ISPs regardless of which of the four safe harbors the ISP qualifies for”
- 512(i)(1) “should clearly set forth a number of factors that must be considered when determining whether someone is a "repeat infringer"
Potential factors to consider: “number of credible takedown notices received regarding a particular user's infringing activity and whether or not a user changes his or her username but continues to post infringing content”

- Section “should also clarify what constitutes an adequate and reasonably implemented repeat infringer policy” ...
  “by specifying conditions and time periods under which an ISP must terminate or suspend the account of a user who qualifies as a ‘repeat infringer’”
- ISPs should be required to record “repeat instances of infringing action by its users” which can later be used to prove that they are terminating repeat offenders

**LCA:** “interpreting [512(i)(1)(A)] as creating a uniform repeat infringer policy would undermine the federal objective of promoting broadband in libraries”

**MPAA:**
- Thinks that ISPs need to have a working notification system in place and actually terminate repeat infringers. MPAA also agrees with the Cox holding “that notices from copyright owners are at least “powerful evidence” of a service provider’s knowledge of infringement.”
- There is no merit to the 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.”
- “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.”

**Music Community/A2IM:**
- “amend the statute to define the term “repeat infringer” to mean a user who has uploaded or posted links to, or otherwise uploaded, distributed, or downloaded content concerning, some threshold number of infringements of work(s) that have been subject to valid takedown notices, or at a minimum to make clear that “repeat infringer” does not mean only an adjudicated infringer but also includes users who are the subject of repeated, valid takedown notices.”
- “The statute could also require service providers to disclose to the public annually the specific terms of their repeat infringer policies as well as details of their implementation and application of their repeat infringer policies.”

**OTW:** “cautions against setting a low standard for “repeat infringers” when they may truly be repeat speakers, as illustrated by the experience of McMansion Hell”
**PK:** Repeat infringer policy should only be triggered after multiple instances of actual infringement, preferably following a finding of infringement in a court of competent jurisdiction. The importance of internet access weighs against requiring conduits to terminate access except in extraordinary instances.

**RIPG:**
- “There should be no different treatment or rules for ISPs acting as a conduit or providing other functions.”
- “Congress should clarify the parameters and scope of a minimum repeat infringer policy that must be created and adopted by each service”
- “penalties for repeat infringers must not be solely for monetary damages, but should also include the discretionary remedy of removal from a system”

**UMG:**
- “There is no basis for distinctions between online service providers that act as conduits and those that engage in caching, hosting, or indexing functions with respect to the “repeat infringers” requirements of Section 512(i)(1)(A)”
- No reason “to limit repeat infringer policies such that they apply only to “adjudicated” repeat infringers”

**USTA:** ISPs do not have the obligation to terminate a customer’s internet access unless there has been a repeat infringement finding by a court of competent jurisdiction. The proliferation of invalid notices arguing otherwise impedes federal telecommunications policy that is aimed at expanding internet access to all Americans. The district court erred in the Cox case when it found that Cox was not entitled to the DMCA safe harbor under section 512(a) because of its failure to implement a repeat infringer policy. The court failed to explain what constituted “sufficient,” and found wrongly that Cox had actual knowledge based on Rightscorp’s invalid notices. The omission of the terms “claimed” and “alleged from 512(i)(A)(1) indicates that repeat infringers cannot be persons who have only engaged in copyright infringement. The definition requires courts to find that the person has committed copyright infringement more than once. “Reasonably implemented” and “in appropriate circumstances” limit the circumstances in which ISPs must terminate internet access. Terminating internet access should be limited to the rarest of instances.

**Verizon:** All decisions regarding when and how to implement a repeat infringer policy should be left to the ISP’s discretion, especially in the case of conduit services. The district court in Cox erred in finding that Cox was not entitled to Section 512(a) safe harbor. Section 512(i) does not specify what kind of infringer policy an ISP should adopt nor under which circumstances a termination would be appropriate. The termination penalty applies only to repeat infringers, not repeat alleged infringers, and mere allegations do not constitute actual knowledge or a red flag. Further, the United Nations considers internet access an essential part of an individual’s freedom of opinion and expression, which means that the repeat infringer policy must be considered from a
broader social policy perspective. Determining copyright infringement and defenses to infringement must remain in courts.

Wiki: “There should be no requirement on ISPs acting as conduits to implement repeat infringer policies at all—if anything, there should be a prohibition against it.”

Wixen: “reform is needed to clarify exactly what constitutes an acceptable repeat infringer policy and how ISPs must implement it.”
POTENTIAL FUTURE EVOLUTION OF THE DMCA SAFE HARBOR SYSTEM (general comments)

FWF: “The emerging Internet of Things may provide new opportunities for creating content and Section 512 should facilitate—not impede—new developments and opportunities for creation.”

i2Coalition: Any changes to the DMCA should take into account the long-term viability and sustainability of the global internet system. However, the need to have “balance” in the DMCA notice and takedown process often means protecting the rights of copyright holders while harming the IIPs.

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

Most, if not all, of the respondents support the idea of more education. Suggestions include K-12 education, USCO circulars for users, copyright owners, and ISPs, an outline “best practices,” and roles that ISPs can play in educating the public.

AG: The Department of Education should create a copyright curriculum that would be a required part of K-12 public education. This curriculum should include DMCA forms and information on how to act when a student receives a takedown notice.

AIPLA: “AIPLA supports the publication of a Copyright Office Circular that provides guidance on Section 512 and its various provisions based on case law and data collected through Copyright Office studies.”

Archive: “The Copyright Office could develop materials to help individual and small rightsholders to better understand when the DMCA safe harbors may be used and what information is necessary to provide in a valid takedown notice.”

Bridy/Keller: There is no need for legislation, although the Copyright Office could play a role as Section 701 allows the Copyright Office to conduct programs regarding copyright. Providing objective and balanced educational materials falls squarely within this authority. Senders of flawed and erroneous notices clearly do not understand what types of material are protected, what is fair use, and when it is appropriate to send takedown notices, among other things. The Office could provide information about the importance of registering a DMCA agent, and about notice formalities, model web forms, among other issues.
CA:
• “To help educate the public and clear up some of the confusion regarding the rights and responsibilities of ISPs and copyright owners under Section 512, the Copyright Office could consider creating circulars for ISPs, notice-senders, and counter-notice senders.”
• “The Office may also wish to consider increasing awareness of copyright issues by partnering with schools at the K–12 level to provide education on copyright and creative content in the digital landscape, and foster a greater respect for copyright.”

CDT/R Street:
• “The Copyright Office should encourage rightsholders and intermediaries to take steps to improve the accuracy and transparency of their takedown practices, but not penalize intermediaries for nonparticipation.”
• “The Office should continue to produce information circulars, host roundtables with stakeholders and policy makers, and present developments in public forums.
• “In addition the Office could put forward examples of complete notices and counter notices, including explanations of relevant legal concepts such as fair use.”

Clinic:
• “Greater effort should be made to provide artists with resources, education, and advice about the DMCA system and tools and tips on how to send notices properly and efficiently. They need education about finding the right parties to send notices to, how to avoid the phishing schemes and malicious sites that lurk online, and what their rights are under the DMCA.”
• “The everchanging ecosystem of sites and platforms would require the Copyright Office to have a technology team that can keep on top of developments and changing business practices of infringing sites, which adapt and reorganize in response to enforcement patterns. But investing in such a technology resource would also ensure that the Copyright Office is aware of developments as they occur.”

Cox:
• “‘educational’ efforts mounted by rights owners and organizations have largely been cast as ‘anti-piracy’ campaigns. Accordingly, they have tended to emphasize the litigation risks of infringement [...] falsely analogize copyright infringement to property crimes such as theft; exaggerate the scope of the exclusive rights granted to copyright owners; demonize filesharers; and, denigrate or ignore fair use”
• Suggests “‘best practices’ documents to provide guidance to their members for uses of protected works in various contexts”
• USCO “should also consider whether educational efforts aimed at the judiciary
could be effective in helping to reduce the cost and uncertainty involved with copyright litigation.”

**CTIA:** There is need for more education on copyright issues and digital citizenry, and ISPs and content providers should do more to provide such education. The current efforts have been successful, and the Copyright Office should continue monitoring digital literacy efforts to ensure that they remain effective.

**DMLA:** “The Copyright Office should be the primary source of information concerning copyright law, including the DMCA and copyright education. The Copyright Office is in the best position to provide the public with compliant DMCA notice and counter notices forms, and can offer information as to what content is appropriate for DMCA notices”

**Etsy:**
- “One way to improve the functioning of section 512 is to provide widely accessible educational resources. This could potentially decrease the number of notices or counter-notices sent without a fundamental understanding of intellectual property basics, such as discerning what can or cannot be protected under copyright law or what the potential penalties are for fraudulent notices.”
- “Etsy... has made efforts to provide accessible educational content, such as through periodically published online articles about intellectual property concerns on our Seller Handbook blog and our easy-to-understand Terms of Use ... that are written in plain English, including our Intellectual Property Policy.”

**FB:** “education for both users and rights owners is important and valuable and contributes to the existence of a safer and more open Internet” but “here is no need for legislative involvement”

**FMC:**
- “the most effective educational resources are created by members of the target audiences themselves. Musicians are perhaps best able to effectively educate other musicians, through the production of informational materials and campaigns; the same is likely to be true of photographers, video creators, software developers, writers, etc. Federal agencies often tend to use in-house communications staff that may be better equipped to reach other policy professionals; they don’t always succeed at connecting culturally with the intended audience, and can be jargony & technical.”
- FMC would “love to see the Copyright Office work directly with creators of all mediums in the development of informational resources on a broad range of copyright topics.”

**Getty:** “The Copyright Office could create sample submission forms for ISPs as well as spell out guidelines for response times” and create “a compendium of best practices –
written for the layperson”

**GPC:** Copyright.gov should be more user friendly and provide resources to understand the copyright law more easily.

**IA:**
- “Legislation is unnecessary; the pace of technological development and marketplace evolution requires rapid adaption for resources.”
- “However, the Copyright Office may be better suited to organizing educational resources relevant to issues including the proper use of takedown forms and content subject to Section 512 removal in order to reduce abusive takedowns, as well as the various ‘DMCA-plus’ models available to rights holders.”

**IFTA:** While education on all aspects of copyright is important, real change can only happen through legislation and changes to the notice-and-take-down system. Copyright Office plays a key role in education efforts, and there is no need for legislation regarding such educational activities.

**IIPSJ:** Public should be “better informed as to the purpose and nature of fair use and the importance of appropriately building upon preexisting expression”

**KCLMA:** Suggests that the USCO “could produce a guide for non-lawyers discussing how to conduct” the fair use analysis articulated in *Lenz*

**MPAA:**
- 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.
- 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

**Music Community/A2IM:**
- “One possible form that such education could take is through targeted educational alerts that a service provider can send to users when they are about to upload content, click on a link to a pirate site, engage in potentially infringing activity, or submit a counter-notice.”
- “The government has a role to play in facilitating the development of targeted educational campaigns to combat infringement.”

**OTW:** “Mandatory copyright education as a condition of internet access, however, as suggested by some roundtable participants, would be a terrible idea”
Pilch:

- “Educational resources need to reflect common sense and ethics and to be truthful, and they need to provide a full picture of the landscape. Copyright might be introduced into college and university mandatory ethics programs. Also, it is possible the Higher Education Opportunity Act (HEOA) could be amended to include a more standard code of practice and a more visible communications plan across campuses.”
- “In addition, copyright education might become a condition for exercise of certain limitations and exceptions, even for a fair use defense . . .”
- “To improve the functioning of Section 512, the people who are most affected by the dysfunction of Section 512 are in the best position to play a role.”
- “It may be feasible to have a government-produced curriculum and educational plan. But legislation is also necessary.”
- The U.S. Copyright Office “might engage another stakeholder group to work on copyright education.”

PK: While additional education would be beneficial, it should not be mandated legislatively.

Realtors: NAR supports the Copyright Office creating educational materials to improve the functioning of §512.

RIPG:

- “materials should be offered through the Copyright office website, but also should be offered by the ISPs”
- “Copyright Office should also provide links and even referrals to reasonably priced legal firms and sites that can offer the proper legal advice”

Tulane: Suggests that USCO use “an explanatory YouTube channel, or other means” to educate internet users about the DMCA

UMG:

- “online service providers should be encouraged to prominently address copyright and other intellectual property issues on their websites”
- “copyright owners (both directly and through trade associations) should continue their efforts to educate the public respecting the critical importance and scope of intellectual property rights”
- “education should be integrated into the notice-and-takedown process itself”
- “relevant government agencies and departments [...] should play an active role in educating the public about the importance and protection of intellectual property, including through online resources, advertising, community outreach, and other suitable means”
**USTA:** There should be more consumer education about the copyright law and the DMCA, and the final recommendations issued by PTO’s multi-stakeholder process on improvements to the notice-and-takedown system are good. The federal government should play a role in such outreach measures.

**Verizon:** The Copyright Office should play a role in educating the public, for example by providing information about the final recommendations of the PTO’s multi-stakeholder process on improvements to the DMCA’s notice-and-take-down system. The Office could also educate people on how to understand notices sent to them, and secure their wireless connections and avoid uploading software that may compromise their accounts. The Office should also talk about safe harbor abuse and copyright trolls.

**Wiki:** “the best way to learn what educational resources would most benefit those who need them the most is to ask them on a regular basis using relatively informal channels. Because the general public would be the target for these resources, it is particularly important that the resources be easy to find and use, and, if possible, that they are published in multiple languages.”
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?

There were a variety of responses to this question. While some support the idea of voluntary initiatives, others suggest that they be made mandatory. Likewise, some respondents encourage the government’s involvement while others say these initiatives should remain private.

**IIPSJ**: Voluntary initiatives should be encouraged

**FWF**: “it will take a combination of updating laws and adopting new business models for the industry to thrive.”

**KCLMA**:
- “Ideally, an automated system could detect how much of a creative work was incorporated into a post and automatically allow the ISP to post those with, say, a match under 90% while saving for human review those with a higher rate of similarity”
- “It would be beneficial to develop a program which would preserve an author’s identifying information”
- The challenge is making technology like Content ID and Audible Magic available to all stakeholders
- “Under §512(i), Standard Technical Measures means ‘technical measures that are used by copyright owners to identify or protect copyrighted works.’ This should not discourage ISPs from leading the way in developing and implementing such systems”
- “It is hard to mandate standard protection measures if either none are commonly available or the price is too steep for every copyright holder and service provider to have reasonable access to them”
- “there is direct incentive for ISPs to slow the process” of consensus on STMs through 512(i)(2); suggests amending.

**RIPG**:
- “Copyright Office should play a serious role as facilitator and mediator in developing ‘best practices’ that can be voluntarily used by the public”
- “Copyright Office, the USPTO and other agencies, as well as private actors like The Copyright Alliance and the U.S. Copyright Society, can help through educational activities directed at the entire Internet community.”
- “voluntary measures are not sufficient without significant changes to the DMCA”
CCIA: “‘voluntary’ measures risk discouraging competition and disadvantage smaller services and startups because a service’s compliance capacity varies with size and scale”

Getty: “Service providers should not receive immunity unless they take steps to prevent or deter copyright infringement”

OTW: “doesn’t see a role for the government in this process”

UMG: “The best way to incentivize the adoption of important measures that are currently “voluntary” is to make them mandatory”

FB: “many online platforms already have developed a wide variety of voluntary measures to combat online infringement”

MPAA:
- MPAA points out that “the most effective voluntary measures” have been created from collaboration between service providers and copyright owners when they discover shared interests/common goals.
- 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. 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.

Wixen: “Voluntary is ineffective as a deterrent. The true deterrence is active enforcement with significant penalty.”

AAP: “One of the challenges for initiating such a “voluntary” process has been that ISPs have no incentive to participate; as long as such multi-stakeholder process reaches no agreement on STMs, there is one less requirement for them to meet to be eligible for the 512 safe harbors. In its recommendations to Congress, we urge the Copyright Office to pair a solution for this impasse with the aforementioned amendments to the definition of STMs as key elements of any plan to ameliorate the “whac-a-mole” problem.”

Music Community/A2IM: “The government should encourage/incentivize the development/adoption of voluntary measures/standard technical measures to combat infringement/increase DMCA effectiveness/promote legitimate authentic sources for music.”

AIPLA: “AIPLA recommends that the Office study these issues and consider working with stakeholders to develop “best practices” for automated systems, to help parties ensure
that any takedown notices generated by such systems are rooted in “good faith” beliefs as required under Section 512.”

**CA:**
- “We enthusiastically support the use of voluntary, collaborative efforts to address the problem of online infringement.”
- “. . . we would be interested in exploring this dynamic further with the ISP community in the context of voluntary initiatives to determine the viability of eliminating the potential for liability through “red-flag” knowledge for those ISPs that effectively monitor for and take action against infringement.”

**Wiki:** “One possible role for government, and in particular the Copyright Office, would be to conduct that research itself or assist independent researchers who are doing so. The Copyright Office would then be in a position to offer stakeholders guidance on voluntary measures based on how they have worked when implemented previously.”

**Pilch:**
- “Any process to come up with voluntary agreements should involve independent rightsholders as well as industry representatives.”
- “Finally, the U.S. Copyright Office might consider engaging a stakeholder group to work on the solution of notice and takedown for a small number of creators.”
- “If technology and content industries are not able to come to a voluntary agreement on staydown and standard technical measures that apply to all interested rightsholders, they should be forced into one by Congress.”

**IA:**
- “Empowering platforms as they scale and diversify to invest in ‘DMCA-plus’[voluntary measures that are “above the floor of action for the DMCA”) actions is best done through the current system of clear limitation on legal liability and a floor of action for all internet companies.”
- “Marketplace incentives, rather than government mandates, will best encourage continued development of voluntary measures. Without excessive government regulations to confine their initiatives, internet businesses and market participants are likely to move faster to find acceptable solutions, and those solutions will be market-based and avoid the unintended consequences of government regulations.”

**Mozilla:** “Government endorsement, encouragement, or incentive must not be allowed to turn a “voluntary” measure into an involuntary one in practice. And in particular, mandating or “encouraging” technology which blocks content would lead to significant harms, as we noted in our previous engagements in this proceeding and as we outline in our next answer.”
EFF:
• “Private copyright enforcement agreements can also be a means of avoiding government accountability for unpopular or unfair policies.”
• “No private copyright enforcement agreement can fairly be called “voluntary” if it is “incentivized” by the government. Any participation by government raises the express or implied threat of binding regulations or new laws, or the withholding of benefits, if the “voluntary” agreement does not pass muster.”
• “Therefore, if the Copyright Office and other government entities continue to encourage private enforcement agreements, they must ensure that such agreements, and the processes by which they are created, meet the same procedural and substantive standards as laws or regulations. Specifically, they must be developed in a transparent process that gathers and integrates the input of all affected stakeholders. And, the resulting enforcement mechanisms must protect freedom of speech and provide due process for those accused of infringement.”

CDT/R Street
• “These solutions [content ID, search demotion, notice forwarding etc.], while beneficial, must not replace the current notice-and-takedown regime in the DMCA, and should not be enshrined or mandated in law. Until technology develops further and automated systems can meet an appropriate standard of consideration for non-infringing uses, these solutions are best left to develop between private parties.”
• “Our previous comments further argued that, while government bodies can incentivize the creation of new voluntary measures, such as the Department of Commerce’s DMCA Multistakeholder Forum list of “Good, Bad, and Situational Practices,” it is essential that government facilitation does not attach burdens or coerce non-practicing private entities.”
• “Any voluntary measure must work in tandem to the DMCA’s formal process and should be adopted and refined through an inclusive process open to all affected parties and stakeholders.”

DMLA: “ISPs should be required to cooperate with creators and take voluntary measures that reduce infringement, without overly burdening creators with a system that requires creators to send the same ISP repeat notices for the same content.”

FMC:
• “[T]he role of government is especially important to SME creators and rightsholders, because market-based approaches tend to result in voluntary measures that work better for cultural producers that themselves have the most market power.”
• “An example is YouTube’s Content ID, which many small creators complain they are not even able to access—or if they are granted access, it may be predicated on acceptance of licensing terms that some rightsholders find objectionable or
that provide compensation at levels far below market rates on competing services. This is not an acceptable outcome.”
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 were a variety of responses to this question. While some support the idea of voluntary initiatives, others suggest that they be made mandatory. Likewise, some respondents encourage the government’s involvement while others say these initiatives should remain private.

AAP:
- “AAP shares the view expressed during the roundtables that one-size-fits-all solutions will be impractical, not only because of the different sizes of ISPs but also because of the wide variety of activities and services that ISPs conduct and provide.”
- “First, the Copyright Office should recommend legislative amendments to the definition of standard technical measures (“STMs”) in terms that are flexible and results-oriented to stop and prevent further infringements. ISPs can be allowed sufficient flexibility to develop customized mechanisms that are effective, proportionate, and “do not impose substantial costs on service providers or substantial burdens on their systems or networks” – as the statute already requires.”
- “Second, AAP asks the Copyright Office to promptly follow-up those amendments by initiating the collaborative, multi-stakeholder process that the statute prescribes for the development of STMs in 512(i) (2) (A).”
- “The Copyright Office should also look to the 2007 Principles for User Generated Content Services (“UGC Principles”) in developing recommendations for implementing a notice-and-stay-down system.”
- Speaking on the virtues of the European Proposal for a Directive (see AAP’s entry in question 15): “For instance, the Copyright Office could recommend that ISPs that store and give access to large amounts of copyright-protected works uploaded by their users must cooperate with copyright owners to agree on effective, commercially and technically reasonable measures to stop and prevent the further infringement of works identified by copyright owners through a good faith notice.”
- “Even if the identified solutions need to be calibrated and refined when they are implemented, we believe full-length work filters are an adequate starting point for practical discussions on implementing STMs for a notice-and-stay-down system.”
AG: While there exists effective and reasonably priced filtering and anti-piracy technologies, these are not often available to individual creators. Voluntary measures would be beneficial if individual creators were included in the process. The Copyright Office and the USPTO should become the convening body to facilitate the development and adoption of standard technical measures contemplated in 512(i). There is no need for legislation as the statute advocates voluntary standards.

Archive:
- “the statute mandates a one-size-fits-all technical approach to the problem of detecting and combating copyright infringement. Given the wide diversity of ISPs and types of content they host, this requirement is nonsensical.”
- “policy makers should avoid mandating the creation of technologies that do not already exist at the time the regulation is drafted.”

CA: “To date, platforms like YouTube, Facebook, Scribd, and Dropbox have implemented technology capable of identifying and removing unauthorized copyrighted material posted by their users. Technologies like these should be shared with other ISPs in the context of 512(i), which specifies that STMs must be made “available to any person on reasonable and nondiscriminatory terms.””

Digimarc:
- “Existing or inserted digital watermarks provide a cost-effective and efficient means for live streaming services to detect and block infringements.”
- “Further, the arrangement of embedded codes throughout works could enable automated processes to measure the extent of copying by detecting a continuous sequence of codes within a work.”

DMLA: “The solution is to amend Section 512(i)(2) to promote the use of available technologies – and not to legislate the manner in which those technologies are created. Otherwise, the Copyright Office should review the industry-applicable technical measures and approve them for adoption. If copyright owners and ISPs do not participate in this review, they should be deemed to have forfeited the right to object if those measures are adopted.”

EFF:
- “While some service providers and content owners have proposed and/or implemented some technical measures, none of those measures comes close to meeting the requirements of section 512(i).”
- “The statute’s drafters purposefully declined to establish a government-ordered technological mandate for service providers, and ensured that any standards that might be adopted would be confined to those resulting from “open, fair, [and] voluntary” processes.”
  - “Government “encouragement” is often perceived as government pressure. Any such pressure would fatally undermine the “voluntary”
requirement.”
• “Moreover, the diversity of Internet services today makes adoption of an industry-wide or even sub-industry-wide technical measure difficult to imagine.”

FB: “Legislating industry-wide or sub-industry-specific “standard technical measures” would not be beneficial to any stakeholders; it would be unduly limiting and probably ineffectual”

FMC: “Because licensing, authorship, and ownership function differently across different media and formats of creative work, we encourage standards to be tailored to account for this.”

Getty:
• STMs should be adopted but “service providers have no incentive to participate in a dialogue around standard technical measures, and by refusing to participate can avoid the need to implement them”
• “Section 512(i)(2) should be amended to promote the use of available technologies – not to proscribe the manner in which those technologies are created”

GPC: Such measures should have been adopted much earlier. At this point, the government should facilitate the adoption of such measures by using tax credits.

KCLMA: [combined answers to 10 and 11. See above]

Mozilla:
• Mozilla generally supports collaboration in finding technical standards that are implementable without fee or discrimination.
• “However, we would suggest that in this case no such measure has been created because a technical measure that fits the criteria in 512(i) would not be useful in practice. 512(i) talks about measures used “to identify or protect copyrighted works”. Proprietary technologies do exist that find matches between works in a library and works in another corpus, which are often used to identify copies of copyrighted works from the library which are present in a body of uploaded content.”
  o Such systems are not easy to engineer
  o Posting copyrighted work is not per se an infringing act and a positive result from such a system is not conclusive proof of an illegal action.

MPAA:
• “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.”
“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 to adopt any particular technology, but rather whether service providers are using effective measures to reduce online infringement.”

**Music Community/A2IM:** “The government should encourage/incentivize the development/adoption of voluntary measures/standard technical measures to combat infringement/increase DMCA effectiveness/promote legitimate authentic sources for music.”

**OTW:** “No”

**Pilch:**
- “Standard technical measures should be universally available. Takedown and staydown measures should be universally implemented to prevent the unlawful distribution of works.”
- “If technology and content industries are not able to come to a voluntary agreement on staydown and standard technical measures that apply to all interested rightsholders, they should be forced into one by Congress.”

**PK:** If there are to be any standard technical measures, they should be voluntary, transparent and developed together with public interest stakeholders. Congress should refrain from imposing standard technical standards for online activities.

**RIPG:** “government should strongly encourage the adoption of standard technical measures”

**Schneider:**
- Youtube ought to be an “standard technical measure” under the DMCA and should allow all content creators to access the technology.
- Copyright Office should deem that digital fingerprinting has achieved the status of a “standard technical measure,” and that such a finding should be reflected in any legislation.

**SME:** Automatic content identification and filtering technologies are an important first line of defense for some larger services, and they should be adopted across the industry as a standard technical measure. Filtering solutions should be approached as a standards issue in order to establish a yardstick against which to measure the effectiveness of such technologies.

**Tulane:** no legislative or executive action is necessary
**UMG**: See “Additional Comments of the Music Community”

**USTA**: The requirements for a technology to qualify as a standard technical measure are rigorous for a reason. Weaker criteria would lead to excessive litigation and force courts to second guess business and technical decisions. The only obligation on ISPs is to “accommodate and not interfere with” measures used by copyright owners. The definition of standard technical measures should not include technologies that inspect packets or investigate data as they are not viable and raise serious legal concerns.

**Verizon**: Section 512 sets out the framework governing standard technical measures, and that framework is still as applicable today as it was in 1998. Just because no standard technical measures have been adopted does not mean that the ISPs would have been unwilling to participate. The content owners have not initiated a single Section 512(i) meeting since its adoption. Further, targeting sub-industries for technical measures is inconsistent with 512’s language and principles. The Copyright Office should not try to suggest any changes that would change the voluntary nature of the technical standards.

**Wiki**: “It is also difficult to think of a technical measure that would be applicable to the wide variety of service providers and that would “not impose substantial costs on service providers or substantial burdens on their systems or networks.””

**Wixen**: “The market is far better at dictating development standards than government. Private enterprise often develops superior standards and technical measures before existing government mandates are even effectuated”
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?

While most respondents from the copyright community support the idea of notice-and-stay down, at least in principle, most of the ISP respondents oppose imposing those requirements on ISPs, and argue that such a system would abridge free speech.

**AAP:**
- “The Copyright Office should recommend legislative and policy action conducive to a notice-and-stay-down system to address the shortcomings of the existing notice-and-takedown system.”
  - “First, the Copyright Office should recommend legislative amendments to the definition of standard technical measures (“STMs”) in terms that are flexible and results-oriented to stop and prevent further infringements.”
    - “One route would be to amend Section 512(i) to require stakeholder participation in dialogues and agreements on STMs for safe harbor eligibility.”
    - “Another route, in a broader reform of safe harbor eligibility based on a factor test rather than strict requirements, would be to “downgrade” the adoption of STMs from a requirement for safe harbor protection to a consideration related to a broader “good faith” criterion.”
  - “Second, AAP asks the Copyright Office to promptly follow-up those amendments by initiating the collaborative, multi-stakeholder process that the statute prescribes for the development of STMs in 512(i) (2) (A).”
    - “Even if the identified solutions need to be calibrated and refined when they are implemented, we believe full-length work filters are an adequate starting point for practical discussions on implementing STMs for a notice-and-stay-down system.”
    - AAP noticed from roundtable discussions that there were sufficient/different technologies to address the “whac-a-mole” problem.

**AG:** There should be a notice-and-stay-down system. Such a system could work so that if a service provider removes infringing content from the service following a legitimate notice from the author, and the content is then uploaded again on the service a day later, the service should be required to automatically remove any instance of the
infringing content. Due to resource constraints, smaller, low-risk ISPs could be exempted from this requirement.

**Archive:**
- “Although we have very little detail about what a “notice and staydown” system might look like in reality, one thing is clear: it would create mandatory technical filtering of the Internet. This would be dangerous, unconstitutional, and technically infeasible.”

**Bridy/Keller:** The costs of a notice-and-stay-down system would far outweigh the potential benefits of such a system to copyright owners, and there is therefore no need to amend the DMCA to adopt a notice-and-stay-down framework. The cost of filtering systems would be extremely steep, and the costs for mistaken removals would also be high. Furthermore, the cost to democratic ideals would be considerable. Introduction of a notice-and-stay-down system would constitute a radical restructuring of the enforcement burdens embodied in the DMCA.

**CA:**
- “One recommendation that is strongly supported by many of our members, but not all, is implementation of a “notice and staydown” system.” But...
- “We think the concept of a notice and takedown system is ripe for discussion between the copyright and ISP communities to better determine next steps.”

**CCIA:** “Stay-down’ obligations would also impose false positive costs on users”

**CDT/R Street:** “As discussed in our previous comments, a “notice-and-staydown” regime imposes upon providers a duty to monitor all user generated content to prevent the reappearance of allegedly infringing material.” 512 should be left as it is.

**Copia:**
- Notice and stay-down “would only increase the severity of the Constitutional injury the DMCA inflicts, as would requiring any additional delay in restoring content after receiving a counter-notice”

**DMLA:** “supports a notice-and-stay-down system. A proper notice of an infringing use of a copyrighted work on a platform should be treated—at the copyright holder’s election—as a takedown notice for all appearances of the content on a going-forward basis on that platform. This notice-and-stay-down system could permit counter notices in the same manner that the current Content ID system (which is not available to image providers) allows persons blocked from uploading claimed content to challenge the block. This would greatly benefit DMLA members who are engaged in content licensing on behalf of numerous creators and millions of works, as it would allow them to review the appropriateness of the individual usage on a particular site—including considering whether the use is a fair use—and choose either provide a notice and stay down request
or simply a notice. This system would be a substantial improvement as it would greatly reduce the heavy burden, on both creators and ISPs, of repeat notices for the same content.”

**EFF:**
- “EFF opposes any such requirement.
  - First, a notice-and-stay-down regime would run afoul of section 512(m).
  - Second, “these proposals would stifle competition for Internet services, exacerbate current problems with the notice and takedown system, and increase the risk that valuable, lawful speech will be silenced.”
  - Third, filters are not sophisticated/adaptable enough to account for complexities in the law like fair use and for technological changes.
  - Fourth, a filtering mandate would distort the market for Internet services by privileging those service providers with sufficient resources to develop and/or implement costly filtering systems, reduce investment in new services, and impair incentives to innovate.”

**Engine:**
- “Any new proactive content monitoring mandate would dramatically affect the responsibilities of rights holders and service providers and fundamentally change the DMCA’s “balance.””
- “A content filtering mandate would impose an expensive, uncertain, and largely impractical content monitoring obligation on service providers”
- “A notice-and-staydown mandate would impose an expensive, uncertain, and largely impractical content monitoring obligation on service providers”
- “Notice and stay-down “would be harmful to the Internet ecosystem as a whole but particularly devastating to small and startup service providers”

**Etsy:**
- A “notice-and-stay-down” system would “present troublesome implications for future online innovation and content creation. An ISP may not have enough information to know whether removed material has reappeared or whether reposted material is unauthorized or infringing. The system would lead to overly broad stay-downs, suppressing non-infringing, creative, or fair use material not subject to the original notice.”
- “‘Notice-and-stay-down’ would also be burdensome both financially and technologically to an ISP that would be tasked to build and operate this functionality.”

**FB:**  “a “stay-down” system would be unworkable, as it would be inconsistent with established law and nearly impossible to achieve in practice”
FMC:
- “FMC has never been fond of the “notice-and-stay-down” terminology, because it appropriates syntax describing a statutorily defined process (notice-and-takedown) to instead describe a preferred outcome (creators wouldn’t have to submit repetitive notices to the same services for the same works) without directly addressing how that outcome would be achieved.”
- “Better calibration of such detection technologies [for infringement] to account for fair use can certainly help alleviate fears about expressive rights and critical dialogue.”
- “Good-faith efforts at problem solving from the technology sector would go a long way,” in improving the notice-and-takedown system “and government must help encourage, incentivize, and facilitate that.”

Getty: “notice of an infringing use of a copyrighted work on a platform should be treated – at the copyright holder’s election – as a takedown notice for all appearances (current and future) of that work on that platform”

Google: Believes “that while “staydown” technologies can play a valuable role in both preventing infringement and fostering new business models (as Content ID does), they are best developed in the context of voluntary efforts between rightsholders, OSPs, and user communities” because “the tools to implement a “staydown” obligation are often nonexistent or too expensive for most OSPs.”

GPC: A notice-and-stay-down system is highly advisable as it would have a major effect in helping solve the copyright infringement epidemic. Possible screening system could be designed as follows: 1) Copyright holders upload their works onto a secure database, where it is then compared to other works, and if conflicts are identified, the works would be flagged and directed to the claimants for resolution; 2) All content uploaded by users on ISP platforms would be checked against this database; 3) If the uploaded content was licensed properly, the copyright owner would get paid royalties, whereas if there was no record of the work or it conflicted with a work in the database, it would get flagged, and additional questions would be asked from the uploader; and 4) If the same uploader tried to upload flagged content too often, he would be barred from the service. Recording Academy’s Do Not Upload list would also be useful. The use of the database should be the condition for enjoying safe harbor protections and compulsory licenses.

i2Coalition: There is no need for a notice-and-stay-down system, as it would impose an impossible burden on IIPs. Only copyright holders themselves can identify infringing content. Notice-and-stay-down provisions would also have significant free speech implications. The current regime divides the responsibility for the enforcement fairly and effectively.
IA:

- “A notice and staydown system would be technically and practically unworkable, stifle innovation, threaten fair use and other legal uses of works.” Such system is not flexible enough to consider things like fair-use, which requires a case-by-case determination.
- “Additionally, the diversity of platforms, and how they intersect with content, makes a staydown monitoring obligation even more complex.”
- On proposals for a notice and staydown system for full length works: “Limiting the scope of a notice and staydown system still offers no details on the technical details necessary for carrying out such a proposal. Additionally, there is no system to distinguish content that is licensed in one instance and unlicensed in another.” This would run counter to “the anti-monitoring language of Section 512(m). . .”
- “Notice and staydown is bad for content creation as well since small/independent creators can reach global audiences through the internet and “inspire[] further follow-on creative works.” The system would end up deterring online innovation and discouraging a competitive online ecosystem that benefits our economy, the public interest, and creators alike.”

ICC: “diversity of Internet platforms makes mandating notice and stay-down impractical”

IFTA: A notice-and-stay-down system is absolutely necessary at this point as the current law provides too great an umbrella for ISPs. Such a system would not stifle innovation as Section 512(i)(2)(C) already provides that standard technical measures must not impose substantial costs or burdens. Further, under such system, the copyright holders would have to develop and adopt suitable technologies to mark and identify their digital work products.

IIPSJ:
- Dislikes notice and stay-down because
  - it is “an attempt to incorporate in to the Safe Harbor system a perpetual OSP obligation to monitor the Internet for infringing content.”
  - Creates a “permanent end-run around fair use by eviscerating [copyright holders’] affirmative obligation to consider the applicability of fair use in each individual case”

KCLMA:
- Supports notice and stay-down and says “having a system whereby an author could effectively stop the posting and reposting of unauthorized material would help both authors and ISPs alike.”
- “systems such as YouTube’s Content ID program can identify proprietary material and provide the rightsholder with choices about how to treat the material” … “But it is difficult to implement such a program unless websites can
have access to these technologies”
• In response to opponents who argue that notice and stay-down will limit the rights of users to create fair uses:
  o There will be some false positives, but “a carefully-calibrated stay-down filter could minimize the notices and counter-notices that take up time for all stakeholders and would be a start [...] to righting the balance between creator and Internet provider.”
  o “Whether a stay-down filter would trap non-infringing copying largely depends on the extent of identity between the source work and the uploaded copy, and the tolerance of the filter for partial replications. The greater the identity between the source work and the uploaded work, the less likely the copy will manifest the kind of authorial contribution that transforms a copy into a fair use.” Points out that human review would be necessary.

LaPolt:
• “Safe Harbor Provisions must be amended to effectuate a notice-and-staydown system in order to appropriately address the continuing reappearance of infringing content”
• Proposes that “ISPs be required to implement a type of digital fingerprinting technology to prevent users from repeatedly uploading infringing content” in order to “readily identify and circumvent the reposting of infringing content.”
• Adds that “An ISP's decision to start a business that relies on and profits from user-generated content should therefore take into account the cost involved in implementing certain technological measures which would prevent the reappearance of known infringing content.”

MCNA: Urges USCO to “enact[] changes in the notice and takedown provisions that make less onerous the burden on content creators of policing the Internet in an endless game of ‘whack-a-mole.’”

Mozilla:
• “We believe that a so-called ‘notice-and-staydown’ system is not advisable except perhaps in extremely limited circumstances.”
• “This would undermine fair use and other permissible activity under copyright law. Any form of ‘notice-and-staydown’ functions essentially as a permanent injunction, and will prevent some activity that copyright law permits, with significant risk of broad scale socioeconomic harm.”

MPAA:
• “The only way to significantly reduce online copyright infringement is for the system to ensure that material that is taken down, stays down.”
• “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.”

• “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.”
  o First, interpret “red flag knowledge” to require service providers under 512(c) and (d) “to act if they knew that their services were being used for widespread copyright infringement.”
  o Second, the representative list requirement should not require “notice on a URL-by-URL basis. . .”

Music Community/A2IM:
• In response to the whack-a-mole problem:
  o “One possible solution to this problem would be to require that, once a service provider receives a takedown notice with respect to a given work, the service provider use automated content identification technology to prevent the same work from being uploaded in the future.”
  o “Another option would be to require the use of such technology to identify and take action with respect to known third party copyrighted works at the time of upload or sharing.”
  o In the context of search engines:
    ▪ “One possible solution would be to require search engines to de-index structurally infringing sites that are the subject of a large number of takedown notices.”
    ▪ “Another possible solution would be to require search engines to demote the ranking of such sites in search results, even where such sites engage in domain hopping.”
    ▪ “A third possible solution would be for search engines to either promote authorized sites over infringing sites and/or to proactively take into account authenticity over popularity in search rankings.”

OTW: “Procedures such as digital fingerprinting, suggested as “staydown” techniques, are neither practical nor advisable”

Pilch: “a “notice and staydown” system . . . would solve the problem for those who invest labor and talent into their art only to have it stolen by the internet. . .”
PK: The current record does not support the adoption of a notice-and-stay-down regime, as it would amount to a filtering requirement that would generate endless complexities. If the Copyright Office considers such a regime, it should provide more details and a further opportunity for public comment. Any mandate would have to be drafted broadly, which would be highly unpredictable in practice and likely to impose unnecessary and excessive obligations on OSPs.

RIPG:
- Says notice and stay-down “is essential and strongly recommend”
- Proposes that a copyright owner “provides metadata to the ISP or a centralized and accessible database identifying their work prior to infringement (the database to cross-check) or if a takedown notice is sent, then the work identified in the initial takedown notice must be ingested into the ISP database and will be flagged and filtered every time it is found, with no required second notice based on a new use”
- “One additional component could be an ongoing ingestion of copyright metadata identifying legal uses of the work, even if there is a prior identification of the work in the system”

SME: Section 512 has proven ineffective mainly because of the frequency and speed that users have posted infringing content, requiring content owners to send out thousands of takedown notices to a single service with respect to the same piece of content. Once an ISP receives a takedown notice, it should be required to automatically identify and prevent copies of the same work from being uploaded in the future.

UMG:
- says notice and stay-down is critical. “A critical aspect of an effective “notice-and-stay-down” system is the mandatory use of content identification technologies, or “filters,” that can identify and block copyrighted content before it is even uploaded or posted online”
- Proposes language for statutory amendment (pg. 23-24)

USTA: Section 512(a) does not include a notice-and-take-down provisions and therefore any notice-and-stay-down mechanism would not be appropriate, especially when it comes to conduit providers. Further, the DMCA does not have a provision for counter-notification with regards to conduit ISPs. DMCA also does not require ISPs to conduct monitoring activities, which is something a notice-and-stay-down system would require. Further, Section 512(i) is incompatible with notice-and-stay-down proposals as there are no technologies that would allow implementing such a measure. The proposals by copyright holders are unrealistic.

Verizon: There is no significant problem of infringing content reappearing on the service once it has been removed, and the concept of notice-and-stay-down system is deeply troubling. Filtering and website blocking have the potential to chill lawful speech. With
regards to conduits, terminating internet access is hardly ever reasonable nor one that could be limited to appropriate circumstances. A stay-down regime would greatly disturb the balance of the DMCA.

Wiki: “A mandatory filtering, or “notice-and-stay-down”, regime is not advisable. . . A tool designed to detect undesirable material and automatically remove it can be used to target anything [like censorship].”

Wixen:  
• “The system should allow copyright creators/owners to provide standard identifiers (e.g. ISRC numbers for sound recordings, ISWC numbers for musical compositions, audio/video files for fingerprinting, etc.) to ISPs with their notices. The ISPs would then be required to make sure future user uploads of the identified content "stay down." To balance legitimate free speech and fair use concerns, the uploader of flagged "stay down" content should continue to be allowed to file counter-notices, provided that the concerns about the practical effectiveness of the counter-notice process (see #6 and #7) are adequately addressed.”
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.

Some respondents say that no amendments are necessary. Others suggest amendments/clarification to sections including 512(c)(3)(ii), 512(c)(3)(A)(vi), 512(f), 512(i)(1), 512(j), and 512(k).

AAP:
• “AAP continues to believe that the Copyright Office should focus its structural statutory recommendations to Congress on addressing the underlying causes of the “whac-a-mole” problem . . . [by recommending] (1) the fine tuning of the statutory definition of “online service provider” with respect to eligibility for safe harbor protection; and (2) clarifying the circumstances in which injunctive relief is available under Section 512(j) in cases where an ISP qualifies for the safe harbor for monetary damages.”
• “We urge the Copyright Office to consider the German concept of Storerhaftung, whereby, an intellectual property owner may request injunctive relief for both current and future infringements – rather than an award of monetary damages.”

AG: Many courts have conflated the red flag and actual knowledge standards of the DMCA with the notice provisions. Congress should therefore clarify what constitutes as “red flag” knowledge, and this definition should include awareness of massive infringement on the service in question. Definition of “awareness of facts or circumstances from which infringing activity is apparent” should be added to Section 101 or 512(k). Definition of “actual knowledge” should also be included and defined so that actual knowledge does not require knowing exactly where and when the infringement is occurring. Congress should also clarify the meaning of “financial benefit” and “right and ability to control,” as courts seem to be inconsistent in applying these terms. “Right and ability to control” should be found to exist when IPS retains the right and has the ability to block or remove infringing content that exists on their systems. Section 512(c)(3) should be amended to clarify that a “representative list” means exactly that, a representative list, so that a copyright owner would not have to produce a list of each item by title and URL. Further, Section 512(i)(1)(B) should be amended to clarify that “standard technical measures” so that there would be no requirement for a formal multi-industry standards process, and that the then-current industry filtering standards fall under the definition by default.

Beikmann:
• “Routine denial or non response to valid correctly written DMCA take-down
notices should nullify any companies “Safe Harbor” status in its entirety for a period of time. This could be managed by a “Safe Harbor Compliance office” created by the U.S. Copyright Office along with an online tool for reporting and submitting evidence of DMCA takedown policy violations.”

• “All companies that sell online via a U.S. website or have U.S. offices must abide by the same DMCA takedown procedure. I would also recommend that all companies with U.S. offices be required to manage the IP complaints with a U.S. based department made up of U.S. citizens.”

• “Revisions to and compliance with U.S. trade / import laws should also be considered in regards to Safe Harbor status.”

• “Currently there is no uniform way for rights holders to report to the ad networks that the advertisement they are serving to millions features infringing material or is linking to infringing material. This could be addressed by requiring the “Ad choices” or “AdSense” links to offer a clear link to report copyright infringement / DMCA takedown of the content to the ad network.”

Copia: “the most needed fix is to simply stop reading in the word ‘subjective’ as part of the good faith standard and instead read it to require an objective one”

DMLA: “The courts have interpreted Section 512 so broadly in some respects, and so narrowly in others, that the balance between ISPs and content owners in reducing piracy has never been achieved. The definition of “ISP” has been expanded by courts so that nearly anyone online who aggregates content can be an ISP, though legislative history shows it was intended only for the passive conduits of content. Conversely, courts have interpreted the definition of “knowledge” of infringing content on a platform so broadly that content owners are forced to send repeated notices to ISPs even in situations where it should be obvious that the site is benefiting from a substantial amount of infringing content, tipping the balance in favor of the ISPs. Statutory definitions of “ISP” and what constitutes “knowledge” of infringing activity would be helpful.”

FB: “no additional provisions or amendments are needed at this time”

FMC: “Whether or not a service provider is DMCA compliant, small & medium size creators (like musicians, independent labels, or independent publishers) may have limited recourse in even clear-cut cases of copyright infringement, because only the wealthiest companies can afford the cost of litigation. Passage of small-claims court legislation would make it more possible for more diverse entities to pursue infringement claims, and would thus be an important step towards a more functional DMCA. Importantly, current draft legislation also includes meaningful provisions ensuring due process and discouraging false claims; this too would improve the operation of the DMCA safe harbors.”
**Getty:** 512(k)(1) – “The focus on “network access,” “facilities,” and “the transmission, routing, or providing of connections” demonstrates that Congress intended that covered activities be focused narrowly, applying only to providers of these technical services.”

**GPC:** The red flag provisions should be strengthened, more attention paid to repeat offenders, and a requirement adopted stating that copyright holders do not have to identify each and every instance of infringement for a work to be taken down.

**IFTA:** In addition to the notice-and-stay-down system, the following amendments would be warranted:

- Obligation on ISPs to address security breaches resulting from cyberattacks and to assist copyright owners in the aftermath of such attacks; and
- Adoption of strong deterrents, including classifying large-scale unauthorized streaming as a felony. This would mean amending the federal criminal code to provide for imprisonment for up to five years and a fine if the offense consists of at least 10 public performances during any 180-day period of copyrighted works, subject to fair market value and retail value restrictions.

**MPAA:** “The members of the MPAA do not believe that legislative changes are necessary at this time. . . . The weaknesses in the current system are therefore largely due to courts’ and stakeholders’ failure to follow Congress’s intent.”

**Music Community/A2IM:**

- “Given the controversy over how “red flag” knowledge should be interpreted, one possible solution would be to clarify legislatively, as suggested by some commentators, that “red flag” knowledge applies to whole categories of infringement and more generalized infringing activity, and not only to specific instances of infringement. “
- “One possible solution [to the lack of protection that vicarious infringement elements of section 512(c) and (d) provide] would be for Congress to clarify that the DMCA safe harbors should incorporate, and be interpreted consistently with, the common law standard for vicarious liability along the lines of the Fonovisa standard.”
- “Alternatively, the Copyright Office could provide guidance that the vicarious liability prong of Sections 512(c) and (d) should be interpreted consistently with the Fonovisa standard.”

**OTW:** “does not believe that statutory amendments to §512 are necessary at this time”

**PK:** Section 512(c)(3)(A)(vi) should be amended so that notice senders have to certify, under penalty of perjury, that all of the information in the notices is true and correct. Section 512(f) should be amended to provide for a lower burden of proof for those bringing claims under that section.
**Realtors:** “The Copyright Office should permit the electronic registration of a DMCA agent for multiple unaffiliated companies under one form.”

**RIPG:** “Congress should also strengthen other provisions of the DMCA that have been gutted by courts over the years since passage of the DMCA, specifically provisions relating to “red flag” identification of infringements, the use of representative lists, repeat offender policies, and implementing a “stay down” system that is not dependent on redundant identification of every purported infringing use.”

**Tulane:** No statutory amendments are necessary at this time

**UMG:**
- “to the extent the Lenz holding is intended to require individualized, human evaluation of every potential takedown, it would be simply impossible to discharge”
- “need to clarify the meaning of “representative list,” as that phrase is used in Section 512(c)(3)(ii)”
- “numerous court interpretations have effectively read “red flag” knowledge out of the DMCA, and have likewise all but eliminated the “willful blindness” doctrine as applied to the statute”

**Visual Artists:**
- A second concern presented by Section 512 involves the circumstances under which an ISP may be determined to be a “contributory infringer.” Generally, a contributory infringer is one who with knowledge of the infringing action induces, causes or materially participates in the infringement. However, there is considerable ambiguity concerning the circumstances under which this test is met. In part, this uncertainty centers on the knowledge requirement and whether knowledge of the activity that is infringing is sufficient.
- Strongly endorse “a revision of Title 17 to make it clear that both willfulness under Chapter 5, for the purposes of statutory damages, and contributory infringement under Section 512, may be found and immunity will be lost, where the ISP knows or reasonably should know that, or is willfully blind to whether, the activity is occurring, and materially contributes to, induces, or participates in the activity that constitutes and infringement, whether or not the ISP knows that the activity rises to the level of an infringement.”
- In order to provide clarity regarding a definition for acts that “constitute contribution, inducement, or participation,” Visual Artists “endorse codification of these principles and an amendment to Title 17, Section 512, that expressly states that ISP immunity shall be lost where the ISP is 1) notified of the infringing content, 2) the ISP knowingly acts as a conduit or storage facility for the infringing content, 3) the ISP does not terminate the user account for the User or terminate the infringing content if they store it, and 4) the ISP has received three or more infringement notices concerning the infringer or the same content.”
OTHER DEVELOPMENTS (general comments)

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.

In addition to BMG v. Cox and Capitol Records v. Vimeo, respondents discussed the implications of cases like Lenz, Fonovisa, MP3Tunes, Viacom International v. Youtube, and BWP Media v. Clarity on the meanings of “red flag knowledge” and “repeat infringer.”

AAP:
- AAP believes these decisions in BMG v. Cox and EMI v. MP3Tunes, respectively, show how clear and meaningful definitions of “repeat infringer” and the “appropriate circumstances” for termination would assist the courts when deciding these issues.
- “. . . clear definitions would also establish clear guidelines for businesses that enable public access to works protected by copyright – which likely would reduce, in turn, the amount and complexity of related Section 512 litigation.”
- “We urge the Copyright Office to consider recommending legislative amendments to the ‘repeat infringer’ requirement for safe harbor eligibility that trace the reasoning in these decisions.”

ACA: The court in BMG v. Cox erred in finding that multiple notices of alleged infringement amounted to actual knowledge of repeated infringing activity, and therefore trigger the obligation to terminate internet subscription. This threatens the utility of the safe harbor system to all ISPs, and particularly to small and medium-sized firms. ISPs should only be required to terminate connection upon showing of a decision by a court of competent jurisdiction of repeat infringement. In general, reliance on case-by-case litigation is inefficient. Voluntary measures would be an optimal solution, but considering the aggressive stance of copyright owners, the Copyright Office should resolve any ambiguities surrounding the conduit safe harbor regime.

Archive:
- “In Capitol Records v. Vimeo, the Second Circuit held that the DMCA safe harbors apply to pre-1972 sound recordings. This holding agrees with the statement of the Copyright Office that there is no policy justification for excluding older sound
recordings from Section 512. We agree that this is the correct outcome, and it is
good for libraries who seek to preserve older works.”

- “We do not believe that any change is necessary to the statutory language,
however, if any change is made it should be to clarify that the DMCA safe
harbors apply to all copyrighted materials, not just those protected by federal
copyright.”

**Bridy/Keller:** With regards to the BMG v. Cox, the court correctly decided the case
considering the court’s factual finding that Cox failed to implement the repeat infringer
policy it belatedly adopted. As for Capitol Records v. Vimeo, the decision was a well-
reasoned application of Viacom International v. Youtube. Neither of these cases
evidence a need for changes to Section 512. Although the court in Cox failed to consider
the conduits role as gatekeepers of internet access in the society, at the end of the day,
Cox failed to implement its own graduated response policy. If the appellate court fails to
address the conduits’ special role, an amendment to section 512(i) may be warranted.

**CA:**

- “In Lenz v. Universal, the Ninth Circuit improperly conflated 512(f) with the
requirements of a valid notice under 512(c)(3) to essentially broaden 512(f) so
that it triggers liability whenever a copyright owner sends a notice that does not
meet the requirements under 512(c)(3).”
- Believes that the question referring to BMCG. Cox ad Capitol Records v. Vimeo
are premature.

**CDT/R Street:**

- On BMG v. Cox: “The Fourth Circuit should consider the importance of
internet access in people’s everyday lives when considering the reasonableness
of an ISP’s repeat infringer policies.”
- On Lenz: “If the Court chooses to take the case, its decision will have significant
impacts on both abusive takedown practices and the use of automated notice
systems.”

**Copia:** “Section 512(i) only says that an intermediary must have a policy for terminating
repeat infringers; it is otherwise silent as to what that policy should be, and post-hoc
decisions by a court threaten to make safe harbor protection illusory, given that a
platform can never be sure if it has complied with the statute or not”

**Cox:** BMG v. Cox – “The erroneous judicial interpretations of ‘repeat infringer’ and
‘appropriate circumstances’ [in 512(i)(1)(A)] upset the balance provided by § 512 and
the public’s Internet access”

**CTIA:** EDVa’s decision in BMG Rights Management v. Cox Communications was wrongly
decided and could set a dangerous precedent. The court erred in finding that Cox
acquired knowledge of purported infringement from invalid notices and that Cox should
have terminated the internet access based on these allegations. If allowed to stand, this
decision could undermine Section 512 safe harbors. Section 512(a) does not require ISPs
to respond expeditiously to remove or disable access to allegedly infringing content in
order to enjoy immunity. Furthermore, disabling someone’s internet access is a
draconian remedy, absent formal adjudication. The Cox decision has led to an increase
in improper notices sent to conduit services. Therefore, the Copyright Office should
clarify that conduits are not obligated to terminate subscribers solely based on
allegations of infringement.

**DMLA:** “While legislation is an ideal solution, it is a slow process. Therefore the
Copyright Office should be granted the administrative authority to provide regulations
and guidance in effectuating the 512 notice and takedown procedures so it can become
more efficient and less burdensome and therefore supports creativity.”

**Etsy:** “The *Lenz v. Universal “Dancing Baby”* decision set forth that a complaining party
must evaluate for fair use in good faith before a notice of infringement is submitted.
While this decision has the potential to improve the often muddled landscape of DMCA
complaints and could prevent the chilling of fair use on the internet, it remains to be
seen how effective it will be going forward.”

**FB:** “the courts have largely construed the DMCA as Congress intended and that there is
no reason for Congress to step in and amend the statute”

**Getty:** “Legislative action to amend the DMCA would be preferable [...] But given the
difficulty of amending the statute, the next best approach would be for the Copyright
Office to create guidance for the courts”

**Google:** “The Second Circuit’s decision in Capitol Records, LLC v. Vimeo LLC, 826 F.3d 78
(2d Cir. 2016), correctly interprets section 512(c) and the protections it provides to both
service providers and rightsholders. First, the Second Circuit was correct to read section
512(c) to encompass pre-1972 sound recordings... Second, the Capitol Records Court
correctly interpreted the safe harbor’s “red flag” provision to preclude liability where a
service provider’s employee merely viewed some or all of a video that included a
copyrighted work.”

**GPC:** Lenz should be overturned as it imposes a fair use requirement on the copyright
holder. Copyright owners should not have to consider any other interests than their
own.

**IA:**
- “It is unnecessary for the Copyright Office or Congress to consider action based
  on recent court decisions.”
- “The historical trend of judicial interpretations of Section 512 has been largely
  successful in implementing the safe harbors. . .”
• “In particular, notable 2016 decisions in *Capitol Records LLC v. Vimeo, LLC* and *BMG v. Cox* have ongoing requests for higher court action and should be permitted to reach final outcomes.”

**IIPSJ:** *Capitol Records, LLC. v. Vimeo, LLC* – “court’s continued refusal to accept general awareness theories in satisfaction of the DMCA’s knowledge requirements is consistent with the statutory objectives of promoting the proliferation of the Internet”

**KCLMA:**

• *Viacom Int’l, Inc. v. YouTube, Inc.* –
  o “Second Circuit eviscerated the red flag language of §512 because it treated the §512(c)(1)(A)(ii) standard as an objective standard of actual knowledge, as opposed to a subjective standard under §512(c)(1)(A)(i)” but the statute merely requires “that the ISP be ‘aware of facts or circumstances from which infringing activity is apparent.’”
  o “‘red flag’ is not synonymous with actual knowledge, contrary to the opinion of the Second Circuit”

• *BMG Rights Management LLC v. Cox* -
  o “the "red flag" test does not contradict §512(m)’s provision that ISPs have no duty to monitor their sites.”
  o No duty to monitor under 512(m) “implies an investigation undertaken without the prompting that repeated notices would give. This interpretation is supported by the recent decision in *BMG Rights Management LLC v. Cox*” (see also *EMI Christian Music Group v. MP3Tunes*)

**LaPolt:**

• *BMG v. Cox* –
  o Court did not specify whether the “high penalty requirement [14 notices] or [Cox’]s employees’ disregard for the DMCA obligations was dispositive on its own, which leaves ISPs uncertain of whether or not their current repeat infringer procedures meet the Safe Harbor Provision requirements.”

• *Capitol Records, LLC. v. Vimeo, LLC* –
  o “The Safe Harbor Provisions need to set forth specific types of evidence which sufficiently demonstrate when an ISP has "red flag knowledge" or has been willfully blind to infringement”

**MPAA:**

• On *BMG v. Cox*: “Cox continues courts’ growing (and correct) consensus that service providers must have effective repeat infringer policies.” + “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.”
• On Vimeo: “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.””

• On MP3Tunes: “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.”

• “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.”

Music Community/A2IM:

• On MP3Tunes: “Only recently, the United States Court of Appeals for the Second Circuit breathed some life back into “red flag” knowledge and willful blindness in holding that a service provider can have “red flag” knowledge or willful blindness regarding categories of works.”

• “Given the controversy over how “red flag” knowledge should be interpreted, one possible solution would be to clarify legislatively, as suggested by some commentators, that “red flag” knowledge applies to whole categories of infringement and more generalized infringing activity, and not only to specific instances of infringement. “

• “One possible solution [to the lack of protection that vicarious infringement elements of section 512(c) and (d) provide] would be for Congress to clarify that the DMCA safe harbors should incorporate, and be interpreted consistently with, the common law standard for vicarious liability along the lines of the Fonovisa standard.” + “Alternatively, the Copyright Office could provide guidance that the vicarious liability prong of Sections 512(c) and (d) should be interpreted consistently with the Fonovisa standard.”

• On Lenz: After disagreeing with the outcome of the case ““One possible solution would be for Congress to clarify that content owners are not required to evaluate fair use before sending a takedown notice, that automated notice-and-takedown processes without human review are appropriate, and that, consistent with the Supreme Court’s description, fair use should be treated as an affirmative defense and considered by the copyright owner in connection with a valid counter-notice raising such a defense.”

• “. . . all jurisdictions nationwide should apply a uniform rule that filing an application for a copyright registration is sufficient to file suit on the work in
question. Currently, federal courts of appeals are split as to whether an infringement suit can be filed once the copyright holder’s application is filed with the Copyright Office, or whether filing suit must wait until the Copyright Office acts on the application.”

**OTW:** doesn’t see a necessity for statutory amendments to §512

**PK:** Second Circuit’s decision in Vimeo is important as it ensures that online intermediaries can rely on 512 to limit their liability. Meanwhile, BMG v. Cox is troubling. Appellate courts have been generally correct in their interpretations of 512, and should remain the venue for continued interpretation of the statute.

**Realtors:** On *BWP Media v. Clarity*: This organization strongly agrees with the 10th Circuit Court of Appeals that the term “user” in the DMCA “exclude the service provider’s owners, employees, agents or independent contractors, stating that “a ‘user’ is anyone who uses a website – no class of individuals is inherently excluded.””

**RIPG:** Lenz case should be overturned by legislation

**Tulane:** “the appropriate method of clarifying and addressing existing provisions of §512 does not require legislative or executive action”

**UMG:** see initial comments; “There is simply no justification for the dichotomy imposed by the Second Circuit [in Vimeo], in which the rights and remedies of owners of pre-1972 recordings are restricted under the DMCA, but without the corresponding benefits that federal law provides to owners of federal copyrights”

**USTA:** The Cox court erred in suggesting that invalid notices were “powerful evidence” of actual knowledge of alleged infringement. Even proper notices are merely allegations, and therefore not enough to prove actual knowledge. Further, the court falsely suggested that forwarding invalid notices to customers showed actual knowledge. It would be unreasonable and inappropriate to terminate internet access without judicial sanction when there are only allegations of infringement. Instead, any termination should be based on judicial review, a view supported by 512(i)’s provision that termination should only take place under “appropriate circumstances.” Termination should be reconciled with the federal policy of promoting universal broadband adoption. DMCA also did not contemplate mass complaints or sending those notices to subscribers without the safeguards contemplated by counter-notices.

**Wixen:** On *Lenz*: Lenz “strikes another blow to copyright owners and the heavy burden imposed upon them in using the notice and take down procedures to protect their copyrights online. Now copyright holders must subjectively consider fair use before issuing a takedown notice pursuant to 512.”
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?

Respondents discussed the E.U., Manila Principles, Canada, Chile, India, South Korea, and France.

**AAP:**
- “...the European Commission released a Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market... Under this proposal, ISPs that store and provide public access to large amounts of copyright-protected works uploaded by their users must collaborate with copyright owners in the implementation of “appropriate and proportionate” measures, including “effective technologies”, “to ensure the functioning of any licensing agreements.” The Proposal does not impose specific measures but obligates ISPs that create significant risk of infringement to take effective, appropriate and proportionate steps to prevent infringement of content identified by rights holders.”
- “The approach taken in the European Copyright Proposal could help to delineate a U.S. notice-and-stay-down system...”
- “AAP and its members believe that several decisions from the Court of Justice of the European Union (“CJEU”) and the German Federal Court of Justice on the liability of ISPs for copyright infringement perpetrated by their users offer helpful guidance to delineate a statutory path to a more sustainable online environment built on a notice- and-stay-down system.”+ “These cases show a balanced approach between exclusive rights of copyright holders, the right of ISPs to conduct legitimate businesses and the right of users to access lawful information online...”
- “The experiences from 25 countries “that have since adopted judicially-construed site-blocking legislation to address online copyright infringement provides the right backdrop for... discussion on whether appropriately scoped and constitutionally-sound site-blocking legislation is a viable option for the U.S.”
- Define “Profiting directly”. This must be further defined and not left up to interpretation.

**DMLA:** “The EU is currently looking at competition and the dominance certain ISPs have achieved along-side issues of copyright infringement on the Internet. In addition the EU is looking at limiting immunity under take down to passive platforms. It is too soon to determine if these approaches, if implemented, will improve the economic models for platforms that offer image licensing.”
EFF:

- **Systems that EFF supports:**
  - “Notice-and-notice systems, which do not require the intermediary to block or remove access to content on receipt of a notice of infringement, provide the strongest protections for users’ free expression and are more consistent with the Manila Principles. Because the intermediary is not obliged to remove or block content, erroneous or abusive removals are less likely.”
  - “Any content removal requests are evaluated by the user, and if necessary, by a court. **Canada** currently employs just such a system. Under Canada's framework, once intermediaries receive a notice of alleged infringement from a rights holder, they must either forward that notice on to the subscriber or user, or provide the notice-sender with an explanation as to why they are unable to do so. The intermediary is not obliged to take any action to remove or block access to the content, nor to terminate or suspend the subscriber’s account. Following receipt of the notice, the subscriber herself determines whether to remove the content, or risk the content owner seeking a court order for removal.”
  - “**Chile and India** approach’s to notice-and-takedown requires a court order before an intermediary can be required to remove or block access to content. This provides more protection against unjustified content removals than notice-and-takedown systems that don’t entail independent judicial review.”

- **Systems that EFF criticizes:**
  - Currently, the Council of Europe and the European Commission are considering a proposal from the European Commission that “would require online platforms that host “large amounts” of user-generated content to reach agreements with rights holders to “prevent the availability on their services of content identified by rights holders.””
    - The EFF believes this runs against “the fundamental rights to free expression, access to information, and privacy of personal information” and believes that it runs against the EU’s ecommerce directive that prohibits EU Member States from imposing “general monitoring obligations” on ISPs and with case law from the Court of Justice of the European Union.”
  - **South Korea** implemented a graduated response liability framework which provides for “imposition of progressive penalties against users’ accused of infringement by their ISPs, often culminating in suspension or termination of users’ Internet access accounts.”
    - the scheme was unsuccessful because it “led to wide-spread termination of subscriber accounts for minor infringements, and seemingly had no impact on online infringement. Korea’s National Human Rights Commission recommended that the law be re-
examined, and Korean lawmakers have proposed to repeal it.”
  o France’s 2009 HADOPI law, which created a government agency with the
    power to terminate Internet subscribers’ connections was
    unsuccessful/unconstitutional because it was determined that the law
    violated the French constitution’s guarantee of “free communications
    of ideas and opinions.”

**FB:** “the European Commission recently released legislative proposals regarding
  copyright in the Digital Single Market that have since faced significant criticism from
  both the copyright owner and Internet communities”

**Getty:** “The EU is currently in the process of addressing platform liability through a
  proposal that will limit immunity for platforms that act as more than passive
  intermediaries”

**Google:** “The DMCA’s Section 512 safe harbor regime has proven to be the blueprint for
  a growing international consensus with respect to how to address the role of OSPs in
  countering copyright infringement on the Internet. The notice-and-takedown and “no
  monitoring” concepts, in particular, were adopted by the European Union in the E-
  Commerce Directive shortly after the DMCA became law in the United States. The core
  structure of Section 512 (notice-and-takedown and no obligation on OSPs to monitor)
  has also been mirrored in numerous multilateral and bilateral trade instruments,
  championed in particular by the U.S. Trade Representative. The U.S. has included these
  provisions in trade agreements with Australia, Bahrain, Chile, Colombia, Korea,
  Morocco, Oman, Panama, Peru, and Singapore. Similar provisions have been adopted by
  numerous other countries as well, including Japan, Brazil, and New Zealand.”

**IA:** “. . . threats to intermediary liability laws abroad threaten the continued success and
  growth of U.S. companies through creation of artificial market access barriers or
  discriminatory policies, such as online monitoring requirements.”

**KCLMA:**
- EU: “exempts service providers from liability in ways similar but not identical to
  §512”
  o French Supreme Court “held a search engine too closely implicated in
    facilitating end-user copyright infringement to claim the benefit of ISP
    liability limitations”
- “The European Union Commission is currently endeavoring to redress the service
  provider/right owner balance in order to close the ‘value gap’ that the service
  providers' immunity has engendered”
**MPAA:**

- “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.”
- “A number of countries in Asia have similarly authorized injunctions requiring internet service providers to block access to pirate websites.”
- “…some European countries have implemented initiatives to reduce the flow of advertising revenue to infringing websites.”
  - “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.”

**Music Community/A2IM:** “One possible way to restore balance and proportion to the safe harbors would be to adopt an approach similar to the one recently advanced by the European Commission in its proposal for a directive “on copyright in the Digital Single Market.”

**OTW:**

- “Keller notes that there are continuing problems with the DMCA, but that over-removal under other regimes appears even worse”
- (Cites to Daphne Keller, Empirical Evidence Of “Over-Removal” by Internet Companies Under Intermediary Liability Laws, THE CENTER FOR INTERNET AND SOCIETY (Oct. 12, 2015, 8:23 AM))

**Pilch:** “In light of this apparent deadlock, it may be time for Congress to step in, such as has been contemplated in the UK as a way to address infringement. A proposed amendment to the UK Digital Economy Bill would require search engines to come to a voluntary code of practice with rightsholders or be forced into one by the government.”

**RIPG:** “Courts in E.U. countries appear to be more willing to place the responsibility to police the Internet on the ISPs and other copyright users, then courts in the United States”

**UMG:** see “additional comments provided by the Music Community”

**Verizon:** Canadian and French examples are highly relevant to the Copyright Office. Canada’s 2015 Copyright Modernization Act adopted the concept of “notice and notice,” which requires ISPs to forward notices of alleged infringement to subscribers and the subscriber information is not released to the copyright owner without a court order. The burden rests on the copyright owner to initiate any legal action. The program is intended to educate customers and does not result in termination of internet access.
There is no take-down provision. Regardless, there are still abusive notices with monetary demands, showing that notice abuse is a growing global problem. In France, meanwhile, the 2009 HADOPI law, the applicable government agency was vested with the authority to implement a three-strikes policy, where the infringer was imposed with a maximum fine of 1,500 EUR and his or her internet was suspended for up to a month following two notices. It was repealed in 2013, at which point only one user was ever fined. The Constitutional Council found the law a violation of basic human rights.
16. Please identify any other pertinent issues that the Copyright Office may wish to consider in conducting this study.

**AIPLA:**
- “To the extent that sending a takedown notice constitutes asserting a claim of infringement, attorney review or supervision also may be appropriate to comply with the statutory requirement that each notice include 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.””
- “Similarly, ISPs’ use of automation to disable content must also comply with the obligation of good faith in order to qualify for limitations on liability under Section 512.”

**CA:** “Automated processes” contain a “human component of artificial intelligence—the programs behind those automated processes are ultimately subject to human design, engineering, and review.”

**DMLA:**
- “The DMLA supports a creation of a copyright small claims court as there is currently no effective way to reduce the piracy of visual content without a cost effective specialized copyright tribunal. The notice and takedown regime offers removal, but DMLA members—whose websites offer images by individual creators for legitimate licensing—need to protect their archives of images from users who choose not to obtain a license.”
- “Further, with the massive amount of images that are displayed online, of which a substantial amount of the uses are unauthorized, it is impossible for DMLA’s members to participate in a notice and takedown regime without using technology. Content owners and their representatives should not be penalized (as in Lenz v. Universal Music Corp., 801 F.3d 1126 (9th Cir. 2015)) for good faith efforts in combating piracy, and the system should not require human intervention. As machine intelligence improves, creators and their representatives should be able to be rely on software to identify infringing content and send proper requests for removal without fear of penalties under Section 512(i).”

**FB:** “we urge the Copyright Office to reject any reallocation of the policing burdens currently codified in section 512, including by mandating “stay-down” or other proactive obligations on service providers”

**Getty:** Supports small claims system; “content creators do not have simple, cost-effective means of enforcing their copyrights”
**GPC:** The government should terminate the DMCA safe harbor provisions on December 31, 2018, unless the stakeholder manage to create a comprehensive set of policies that address the issues effectively.

**MCNA:**
- “The current expansive reading of the DMCA definition of an “ISP” is allowing many companies that are actively engaged in digital content distribution to claim safe harbor, and notice and takedown protections”
- Asks “the Copyright Office to consider recommending amendments to Section 106 of the US Copyright Act that would expand the scope of the “making available right.”

**Pexeso:** Given the volume of copyright infringement, manual evaluation of each instance for fair use, as impliedly advocated by the Lenz court, would make copyright enforcement next to impossible. Therefore, notices should be automated and fair use considered an affirmative defense to be evaluated in the event of a counter-notice.

**Re:Create:** “During the “New York and San Francisco hearings, the March 29, 2016 study on Notice and Takedown by Jennifer Urban, Joe Karaganis and Brianna Schofield was subjected to numerous attacks, many of which had nothing to do with the actual study and which were personal in nature” which discourages researchers from participating.”

**Realtors:** “The Copyright Office Should Support Standardized Copyright Management Information.”

**RIPG:** Copyright Office should address:
- “Improvements in copyright registration and recordation practice.”
- “How to enforce the copyright law in cases where phone apps embedded with ringtones containing unauthorized material are offered for distribution, and then taken down – but the prior recipient of the app continues to control and use the app with the infringing material”

**Tulane:** USCO “could set up a link that would provide information about the Section 512(c)(3)(A)(v) and Section 512(f) requirements, along with basic definitions, that also link to the Fair Use Index”

**Visual Artists:** Expressed concerns about 512(h) enforcement and anonymous infringers and believed “that significant changes to section 512(h) are required. Specifically, we endorse a revision to Section 512(h) that would require issuance of a subpoena by the clerk where 1) the rights owner states the elements of a prima facie infringement claim, 2) that the information sought includes the name and address of the party associated with the IP address and other information in the hands of the ISP, 3) that alternative means are not available to obtain the information, 4) that the information is needed to pursue the infringement claim, 5) that the interested party regarding whom information
is sought does not have an expectation of privacy or that any expectation of privacy does not outweigh the rights owner’s interests in redressing infringement.”

**Wixen:** “Ultimately please remember that American intellectual property is a huge driver of our economy and worldwide export sales, and the weakening of IP protections so as to benefit a few huge conglomerates does immense damage to our economy and to the incentive to create programs, films and music.”