

**Before the  
U.S. COPYRIGHT OFFICE, LIBRARY OF CONGRESS  
In the matter of Section 512 Study: Notice and Request for Public Comment  
Docket No. 2015-07  
Follow-up Comments of Organization for Transformative Works**

The OTW is a nonprofit organization established in 2007 to protect and defend fanworks from commercial exploitation and legal challenge. The OTW’s nonprofit website hosting transformative noncommercial works, the Archive of Our Own, has over 770,000 registered users and receives over 115 million page views per week. We represent artists who make works commenting on and transforming existing works, adding new meaning and insights—from reworking a film from the perspective of the “villain” to retelling the story as if a woman, instead of a man, were the hero. We appreciate the opportunity to follow up on the Office’s roundtable on §512, which revealed a great deal of diversity and disagreement among the various users of §512.

In general, we will try to limit our comments to points that were not made in our original submission; many of the Office’s questions are addressed in that submission.

#### Characteristics of the Current Internet Ecosystem

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

The diversity among creators and ISPs is itself evidence that the DMCA’s safe harbors are effective. 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. This diversity should be reason enough to avoid filtering, whether denominated as such or as “stay-down.” There is no one-size-fits-all appropriate system, as participants in the DMCA notices best practices group working with the PTO/NTIA concluded.<sup>1</sup> No further information was presented at the Copyright Office’s roundtables to indicate that anything has changed in that regard.

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?

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<sup>1</sup>Nat’l Telecomms. & Info. Admin., DMCA Notice-and-Takedown Processes: List of Good, Bad, and Situational Practices (2013)

As we noted in our initial comments, Congress did not create the safe harbor for the purpose of benefiting ISPs in themselves. It created the safe harbor 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. As a result, the interests of individual internet users are fundamental to the entire operation of the DMCA.

### Operation of the Current DMCA Safe Harbor System

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

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, as the continuing explosion of content—free, ad-supported, and paid—online indicates. The profits of the motion picture, video game, and software industries continue to grow; more books are being published than ever; and new platforms for text, video, music, and images have created a more diverse expressive ecosystem than ever before. Any legal disruption thereof should be founded in a showing that changes would enhance that diversity, rather than benefit specific existing parties.

As the Writers Guild of America (West) told the FCC recently:

In September 2015, CBS Chairman and CEO Les Moonves told Vulture, “Look at the CBS revenues [and] what the network has done over the last 20 years. Our profits have gone up considerably. All these technology initiatives that supposedly were going to hurt us have actually helped us. . . .” This statement stands in sharp contrast with how technological developments are often portrayed by media companies in front of [government agencies].... Despite [the invalidation of the broadcast flag] the most watched and valuable programming remains on broadcast television years after the digital transition. With the music industry as a cautionary tale, concerns in 2002 that the entertainment industry could be next were plausible, but the specter of piracy damaging the broadcast business without such regulation remains unrealized. In fact, in 2015 CBS released information demonstrating that its primetime lineup was “delivering more viewers than 11 years ago as multi-platform viewing grows.”

While the Internet has made pirated material easier to access, it has also facilitated the dramatic growth of new, legal markets for content. According to industry analyst SNL Kagan, subscription OVD [online video distribution] services in the United States, such as Amazon Prime, Hulu Plus and Netflix, have approximately 89 million subscribers generating \$6.4 billion in revenue, and are expected to grow to 114 million subscribers in 2020. The Interactive Advertising Bureau reports that the United States digital video advertising market, “reached \$4.2 billion in 2015, a 30 percent rise over \$3.3 billion in

2014.” The Internet has also facilitated the rise of a new market for professional original video

programming that competes with what is offered on television. In 2013, Netflix premiered its first original series, *House of Cards*, which it reportedly licensed for \$100 million for the first two seasons. The show’s success proved the viability of the online video market for original high-budget programming. The growth of this segment has been robust as we project upwards of 100 original scripted series will be released on subscription OVD services in 2016.

The traditional media companies have also expanded their businesses to include online offerings. This includes making television and film programming available to consumers through company websites and applications as well as licensing to third-party sites and services....

The growth of the legal online video market highlights the continued consumer demand for legal services despite the availability of pirated material. As the Recording Industry Association of America has said “the best anti-piracy strategy is a vibrant legitimate marketplace rich with content and innovative business.” The results of the open Internet support this strategy. According to Sandvine, Netflix now accounts for 37% of downstream Internet traffic in North America, and in combination with Amazon Video, iTunes and Hulu, account for close to 50% of traffic, while BitTorrent represents only 4.4% of total traffic during peak periods and only 5% of total traffic during the entire day.<sup>2</sup>

This robust ecosystem does not need a major new government mandate for filtering, even labeled as “staydown.”

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.)?

As we noted above, there is a huge variety in notice recipients and senders. Automated systems may work for large-scale senders and recipients, but are infeasible for smaller ISPs and hard to navigate for smaller senders. The example of Usenet providers illustrates the impossibility of one-size-fits-all solutions—a standardized notice form would work poorly for the identification of Usenet posts that contained partial copies of audiovisual works.

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<sup>2</sup> Reply Comments of Writers Guild of America, West, Inc., before the Fed. Commc’ns Comm’n, In the Matter of Expanding Consumers’ Video Navigation Choices, MB Docket No. 16-42, & Commercial Availability of Navigation Devices, CS Docket No. 97-80, at 2-3, 9-10 (footnotes omitted).

Unfortunately, some notice submitters fail to provide the requisite information, no matter how clearly they are asked to do so.<sup>3</sup> 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.<sup>4</sup> As we said in our initial submission, most of the notices the OTW receives are erroneous claims relating to claims of defamation, identical titles of different works, and the like, and numerous other OSPs reported similar experiences.<sup>5</sup> When most of the notices a specific OSP receives are invalid, 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. Stakeholders of many kinds discussed the process in detail in the USPTO/NTIA-organized best practices group and were unable to settle on specific forms or procedures. The Copyright Office received no submissions that provided additional guidance or other reason to think that the best practices statement could be improved upon by a government mandate.

Moreover, 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. Given the abuse of the DMCA to achieve non-copyright goals that the OTW, Wordpress, Wikipedia, and numerous other ISPs have found, it is not just *acceptable* to ask certain submitters for further information such as a copyright registration for the challenged material: it is the only way to protect free speech online. DMCA notices operate as privately initiated, automatic injunctions without prior notice to the party who posted the content, and also without any judicial review of the prerequisites for liability—a super-TRO. The OSP’s ability to use common sense, if it chooses to do so, is the only, thin protection an internet user has against this super-TRO. If it does not do so, it becomes like Tumblr, a blogging site on which “artists are having their material removed at the behest of the purported true copyright owner, a future-alien being channeled by a present homosapien named Darryl Anka.”<sup>6</sup>

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<sup>3</sup> Reply Comments of SiteGround, before the Copyright Office, Library of Cong., Section 512 Study, Docket No. 2015-7, at 1-2 (“In some cases, the complaints appear to be deliberately confusing in an attempt to create liability for our company. Sometimes the communication can be really long and slow, as usually the service providers are receiving complaints from individuals that are not familiar with the format of the documents and the procedure.”); *see also* Perfect 10, Inc. v. Giganews, Inc., 2017 WL 279504 at \*3 (9th Cir. Jan. 23, 2017) (describing takedowns sent as illegible faxes, apparently in an attempt to create noncompliance with §512).

<sup>4</sup> Reply Comments of Automattic Inc., before the Copyright Office, Library of Cong., Section 512 Study, Docket No. 2015-7, at 2 (“[I]t is our belief that the failure comes not from overly burdensome requirements, but because in many cases people simply don’t have a colorable claim that infringement is taking place. Like many service providers, Automattic provides an online form that guides a claimant in submitting a 512(c)(3)-complaint notification (<https://automattic.com/dmca-notice/>)—and even so, a quarter of the notices simply don’t include the necessary information.”); *see also* Jennifer Urban, Remarks at the U.S. Copyright Office, Section 512 Public Roundtable, at 37 (May 12, 2016), [https://www.copyright.gov/policy/section512/public-roundtable/transcript\\_05-12-2016.pdf](https://www.copyright.gov/policy/section512/public-roundtable/transcript_05-12-2016.pdf) (senders may be unsophisticated or seeking non-copyright-related goals).

<sup>5</sup> *Cf.*, e.g., Reply Comments of SoundCloud Operations, Inc., before the Copyright Office, Library of Cong., Section 512 Study, Docket No. 2015-7, at 12 (discussing record company takedowns based on use of artist’s name); Reply Comments of The Wikimedia Foundation, before the Copyright Office, Library of Cong., Section 512 Study, Docket No. 2015-7, at 1 (“We reject, unchallenged, over half of the notices we receive as improper and contrary to the mandates of the DMCA.”).

<sup>6</sup> Timothy Geigner, *Tumblr Complies with DMCA Takedown Requests from a Self-Proclaimed Future-Alien from Another Planet*, TechDirt (June 23, 2015, 9:23 AM), <https://www.techdirt.com/articles/20150618/14264131389/tumblr-complies-with-dmca-takedown-requests-self-proclaimed-future-alien-another-planet.shtml>.

The idea that DMCA notices must be accepted on their face, if they sufficiently identify the targeted material, is not borne out by the experiences of many—perhaps most—OSPs, who mostly don't resemble Google.

In addition to the numerous examples of notice abuses already submitted by various commenters, 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.<sup>7</sup> Uses of the DMCA to serve other non-copyright interests, such as an interest in avoiding embarrassment, continue apace.<sup>8</sup> In an age in which video plays a vital role in public discussion of the police, police agencies use DMCA notices to suppress video when it's used in ways they don't like.<sup>9</sup> The DMCA was also abused as part of the 2016 campaign cycle.<sup>10</sup> Bad reviews are perennial targets of DMCA notices.<sup>11</sup> And automation produces comedy-of-errors situations, such as when Fox downloaded a clip from YouTube, used it in a TV show, then sent a DMCA notice for the years-old clip because it matched a portion of the TV show.<sup>12</sup> Even the Digital Media Licensing Association's survey of creators, which assumed that takedown notices were always valid, produced a number of spontaneous complaints from creators about abusive takedowns.<sup>13</sup>

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<sup>7</sup> See, e.g., Janet Fries & Kelly Horein, *Protect Your Brand via Copyright*, DBRANDING BLOG (April 4, 2016), <http://www.dbrandingblog.com/protect-your-brand-via-copyright/>.

<sup>8</sup> E.g., David Oxenford, *Axl Rose DMCA Takedown Notices Illustrate the Difficulty with Safe Harbor Reforms – User-Generated Content and Fair Use Issues*, BROADCAST LAW BLOG (June 9, 2016), <http://www.broadcastlawblog.com/2016/06/articles/axl-rose-dmca-takedown-notices-illustrate-the-difficulty-with-safe-harbor-reforms-user-generated-content-and-fair-use-issues/> (discussing Axl Rose's use of the DMCA to remove unflattering pictures); David Kravets, *Revenge Porn Boss Wants Google to Remove His "Identity Related" Info*, ARS TECHNICA (Feb. 24 2015, 3:40 PM), <http://arstechnica.com/tech-policy/2015/02/revenge-porn-boss-wants-google-to-remove-his-identity-related-info/>.

<sup>9</sup> E.g., Cory Doctorow, *Minneapolis Police Abuse Copyright Law to Censor Their Controversial "Shoot-First" Recruiting Video*, BoingBoing (July 13, 2016, 7:44 AM), <https://boingboing.net/2016/07/13/minneapolis-police-abuse-copyr.html> ("[T]he Minneapolis Police Department has perjured itself in issuing a copyright takedown notice to Youtube in order to suppress a controversial recruiting video that depicted the jobs of MPD officers as being a firearms-heavy shoot-em-up. The video had attracted alarm and criticism by officials and the public, who saw it as indicative of a deep culture of violent, shoot-first policing in the Minneapolis police.").

<sup>10</sup> Andy Cush, *John McCain Used to Feel Very Differently About Copyright and Campaign Ads on YouTube*, GAWKER (May 20, 2016, 3:23 PM), <http://gawker.com/john-mccain-used-to-feel-very-differently-about-copyrig-1777804400> ("The campaign of Ann Kirkpatrick ... uploaded a version of a 2010 McCain ad to YouTube with Spanish subtitles added, using the senator's own words as an implicit critique of his stance on immigration, and by extension, his relations with Arizona's large Hispanic community.... McCain's camp filed a copyright claim with YouTube about the ad, and it was removed from the site earlier this week."); Philip Bump, *YouTube's Copyright System Has Taken Rand Paul's Presidential Announcement Offline*, THE WASHINGTON POST (April 7, 2015), <http://www.washingtonpost.com/blogs/the-fix/wp/2015/04/07/youtubes-copyright-system-has-taken-rand-pauls-presidential-announcement-offline/>.

<sup>11</sup> See, e.g., Reply Comments of Michael Horton, before the Copyright Office, Library of Cong., Section 512 Study, Docket No. 2015-7, at 4-5 (Horton's video discussing the Stargate franchise was hit with takedown; Conde Nast falsely claimed ownership of video clips in a video about financial aspects of video game companies; in multiple instances, game critics received strikes for negative reviews; anime companies sent out mass DMCA takedowns for "long strings of critical Tweets with screencaps of poorly done official translations").

<sup>12</sup> Andy, *Fox "Stole" a Game Clip, Used It in Family Guy & DMCA'd the Original*, TORRENTFREAK (May 20, 2016), <https://torrentfreak.com/fox-stole-a-game-clip-used-it-in-family-guy-dmca-d-the-original-160520/>.

<sup>13</sup> See, e.g., Reply Comments of Digital Media Licensing Ass'n, before the Copyright Office, Library of Cong., Section 512 Study, Docket No. 2015-7, at 28-30, 43 ("The way it is written now encourages bogus claims of intellectual property ownership because it is too expensive a process to dispute the claim even when you have documentation to prove you were the originator."); *Id.* at 49 ("I just had an attorney tell me that although I had

Docstoc’s counsel explained:

I processed fraudulent, abusive or unfounded notices where people complained that writings critical of them infringed upon their copyright. They did not. I processed fraudulent, abusive or unfounded notices about sex-offender registries or arrest reports / records where people named wanted those documents removed. I processed countless fraudulent, abusive or unfounded notices where the documents being complained of were judicial opinions or orders in the public domain and the complainant was a party named in the lawsuit, judicial opinion or order. I even processed a notice from a fairly well known (in some circles) first amendment / technology / copyright lawyer who asserted that a document critical of that lawyer that contained a photograph of the lawyer, not taken by the lawyer and where the photographer did not assign the traditional rights in the photograph to the lawyer, asserted that the lawyer had a copyright interest in the photograph because of [sic] the lawyer posed for the photograph, and that such a pose constituted a copyrightable performance under the *Garcia v. Google* case before it was reheard and amended en banc. I do not believe that lawyer ever retracted the notice after *Garcia* was amended.

... I believe countless fraudulent, abusive or unfounded notices were received by Docstoc. And so countless UGC files were removed from Docstoc based on such notices that perhaps should not have been removed because the notices were fraudulent, abusive or unfounded. Furthermore, it was often easier and safer to simply remove the files that we did happen to review and where we might have otherwise questioned whether there might in fact be copyright infringement than to risk threats of lawsuits by rightsholders.<sup>14</sup>

Different OSPs face specific types of abuses: at the §512 roundtable in San Francisco, for example, 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—clearly anticompetitive notices.<sup>15</sup> Ebay sellers may face similar attacks.<sup>16</sup> Individuals may also be exploited by

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documentation to prove that I was the intellectual property owner ... and that the person who filed the takedown notice was ... infringing [it] would be too expensive to litigate.”); *Id.* at 56 (“I have also had non-infringing work have DCMA notices filed against it and have had to submit counter notices myself. There needs to be a process to stop and punish nuisance DCMA filers.”) (note that the DMLA classified this and similar answers as “trolling”); *Id.* at 57; *Id.* at 65; *Id.* at 71 (“Encountered issues with other parties using false DMCA claims to take down content I have created. This is especially a problem on Youtube where the automated system makes false matches, but is also frequently done manually there and elsewhere. These tend to come from larger companies or agencies and are almost always very difficult to get resolved (and there have been times where I’ve had to repost content, as they dispute my counter notification). I’ve also had times where a DMCA has been filed on my content repeatedly by the same party. And with strike systems being implemented by Youtube and other websites, it ends up being a threat to my ability to do business. As I cannot afford financially or with time spent to sue for these incidents, there is no deterrent against these companies and agencies continuing their actions. It’s gotten to the point that it may be a greater concern for my continued ability to produce content than infringement is.”); *Id.* at 74.

<sup>14</sup> Reply Comments of Matthew Neco, before the Copyright Office, Library of Cong., Section 512 Study, Docket No. 2015-7, at 7-8 (footnotes omitted).

<sup>15</sup> Stephen Worth, Amazon, Remarks at the U.S. Copyright Office, Section 512 Public Roundtable (May 12, 2016) [https://www.copyright.gov/policy/section512/public-roundtable/transcript\\_05-12-2016.pdf](https://www.copyright.gov/policy/section512/public-roundtable/transcript_05-12-2016.pdf).

<sup>16</sup> See *Curtis v. Shinsachi Pharm. Inc.*, 45 F. Supp. 3d 1190 (C.D. Cal. 2014) (entering a default judgment under section 512(f) where a seller alleged that between 2011 and 2013 defendants, who were her competitors, submitted

companies seeking to exercise anticompetitive control over public domain works. Andrew Norton, for example, recounted how a company sent him a DMCA notice for his video of a concert by the Jasper County (Georgia) Middle School playing Dvořák’s 1893 “Symphony No.9 in E Minor,” among other fraudulent claims to which he’d been subjected.<sup>17</sup>

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.<sup>18</sup> In 2015, Kickstarter rejected approximately 39 percent of the DMCA notices it received—a percentage that speaks to the huge variety in OSPs, even for-profit OSPs, in the kinds and validity of notices they receive, and the inadvisability of making policy based on the experiences of a few large OSPs.<sup>19</sup>

Another example comes from the operator of the widely recognized McMansion Hell blog,<sup>20</sup> which engages in architectural criticism—a classic form of fair use. During the blog’s operation, she has received thirteen claims of infringement. Of these, twelve were clear-cut and archetypal cases of fair use, given the extensive alteration of and commentary on the images she provides. However, if the rules had been more stringent, her account would likely have been terminated for “repeat infringement.” Instead, after the first notice, she sought pro bono legal assistance—not something that is available to most users—and is now able to explain fair use to the realtors who target her. Even so, she explains that she would not be financially able to take a case to court were the burden on her to sue to restore her heavily altered images (and, because of the “repeat infringer” provisions, her entire blog). As she concludes, “I had a hard time trying to understand the [notice and counternotice] process before asking a lawyer for help. I think it’s dense for a reason, which is why it’s so heavily abused.”

Counternotices, which generally need to be sent by individuals with no access to legal counsel, are difficult to navigate. Because the Office received so many initial comments, the OTW would like to highlight Gordon Byrnes’, which recounts his experience with the aggregation of Content ID and the DMCA, including repeated DMCA takedown notices against his fair uses or takedown notices filed claiming infringement of a song that isn’t present in his videos. As he points out, this process invites fraudulent claims in order to monetize works to which the

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30 false Notices of Claimed Infringement to eBay, resulting in the removal of at least 140 listings and causing eBay to issue strikes against her selling account).

<sup>17</sup> Reply Comments of Andrew Norton, before the Copyright Office, Library of Cong., Section 512 Study, Docket No. 2015-7, at 4-5.

<sup>18</sup> See Brianna L. Schofield & Jennifer M. Urban, *Berkeley Digital Library Copyright Project Report: Takedown and Today’s Academic Digital Library*, U.C. Berkeley Pub. L. Research Paper No. 2694731 (Nov. 2015), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2694731](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2694731).

<sup>19</sup> Reply Comments of Engine, Github, Kickstarter, Medium, and Redbubble, before the Copyright Office, Library of Cong., Section 512 Study, Docket No. 2015-7, at 9-10.

<sup>20</sup> MCMANSION HELL, <http://www.mcmansionhell.com/> (last visited Jan. 26, 2017). As the creator explains, “McMansionHell aims to educate the masses about architectural concepts, urban planning, environmentalism and history by making examples out of the places we love to hate the most: the suburbs. By alternating comedy-oriented takedowns of individual houses with weekly informative essays about urbanism, architecture, sociology, and interior design, McMansionHell hopes to open readers’ eyes to the world around them, and inspire them to make it a better one.”

claimants have no rights, and given the difficulty of counternotifying, “[a]ll but the most persistent victims of this abuse of the legal process will simply give up.”<sup>21</sup>

Similarly, Automatic’s statistics show that 10% of notices are simply not credible, but there is a counternotification rate of only .5%.<sup>22</sup> Redbubble reports the same disproportion between credible fair use claims and counternotifications.<sup>23</sup>

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?

The OTW does not recommend any statutory changes at this time, but we commend the practice of a number of OSPs of restoring access immediately when it becomes clear that a notice has been fraudulently sent, for example to suppress political speech.

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?

Again, the variety of participants in the system on all sides—OSP, individual users, and copyright claimants—is so great that recommendations to help one group will inevitably harm some other group also containing sympathetic, poorly resourced parties. As the OTW noted in our initial submission, it may be that, like democracy, the DMCA is the worst compromise that we could have come to—except for the others on offer. Given the difficulty of filing a counternotice for many fair users, improvements in the courts’ treatment of claims under §512(f) may be necessary to have any deterrent effect on abusive claims. Likewise, human review in many cases can prevent OSPs from merely acceding to the suppression of speech.

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?

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<sup>21</sup> Reply Comments of Gordon Byrnes, before the Copyright Office, Library of Cong., Section 512 Study, Docket No. 2015-7, at 1.

<sup>22</sup> Automatic Comments, *supra* note 4, at 3.

<sup>23</sup> Engine et al. Comments, *supra* note 19, at 13.

It's not so much the penalties for filing false notices that are the problem as the chance of a DMCA abuser getting caught, given the rarity of counternotifications even in cases of clear noninfringement or fair use. 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.

Copyright claimants expressed complete confidence in their ability to act as judges in their own causes.<sup>24</sup> This is not, however, how the rule of law ought to work. For that reason, we do not advocate raising penalties for violation of 512(f), but as noted above, do advocate for an interpretation of 512(f) that presents a realistic deterrent effect on abusive or overreaching claims. Such an interpretation would include a requirement that the sender of a takedown notice must have formed an objectively reasonable belief that the material it seeks to have removed is not fair use, as opposed to the "subjective good faith belief" standard currently applied by courts.

Similarly, there is no need for enhanced penalties for abusive counter-notices; unlike the few but important §512(f) cases challenging abusive notices, the OTW is not aware of any litigated cases finding that a counternotice was abusively sent. Indeed, the commenters who claimed that abusive counter-notices are a problem are the entities who, in general, are most likely to have timely registered works and thus to be entitled to an award of statutory damages in cases of actual infringement. They could sue now, according to their own claims; they regularly choose not to do so. Adding another hypothetical penalty to an award of up to \$150,000 cannot, as a matter of logic and economics, have any additional deterrent value.

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?

The OTW is not a conduit, but cautions against setting a low standard for "repeat infringers" when they may truly be repeat speakers, as illustrated by the experience of McMansion Hell. The comments of Educause are also worthy of note, because they highlight the mistakes made by automated systems targeting educational institutions serving as conduits for their students:

[E]nforcement agent notices frequently contain inaccurate information, such as citing instances of alleged infringement at IP addresses that were not in use at the time a notice specifies. Likewise, even though rights holders and their agents should consider fair use before asserting infringement, institutions regularly see a high degree of notices requesting takedown of content that any good-faith determination would identify as fair use.<sup>25</sup>

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<sup>24</sup> See, e.g., UMG comments at 33 (UMG considered that it was right 98% of the time there was a Content ID dispute). By UMG's own admission, it determined that nearly one in five counternotices it received had merit; even though UMG naturally thinks it was still right, this is exactly the kind of dispute that should be resolved by a neutral factfinder if it is pursued further. See *id.* at 36. And UMG has far more litigation resources available to it than most individual citizens.

<sup>25</sup> Reply Comments of Educause, Association of American Universities & Association of Public and Land-Grant Universities, before the Copyright Office, Library of Cong., Section 512 Study, Docket No. 2015-7, at 2-3.

## 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?

Educational resources are wonderful to have when people seek them out. In that regard, numerous public interest groups have created resources available to people who are targeted by copyright complaints so that they can better understand what they should and shouldn't do, and to help them to consider counternotification in the case of an error. Mandatory copyright education as a condition of internet access, however, as suggested by some roundtable participants, would be a terrible idea.

The proponents of such an "education" requirement would not accept it for their own activities, if they were required to check a box affirming that they hadn't infringed copyright every time they sought to upload a photo, send an email, post a video, or take other action online. Even if such a massive waste of time and energy were imposed on consumers, it's precisely the wrong way to inform them: We already know that very few people read terms and conditions; they simply check the box and proceed.<sup>26</sup> There are only a few effective ways of making consumers pay attention to information they're not already interested in, and they must be used sparingly or people tune those out too. There are opportunities in particular circumstances once the issue has become salient to people, such as Wikipedia editors, but in the end education about copyright has to be part of a broader media education strategy integrated with students' overall experiences.

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?

The OTW doesn't see a role for the government in this process.

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?

No.

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

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<sup>26</sup> Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. Legal Stud. 1, 3 (2014) ("Our main finding is that regardless of how strictly we define a shopper, only one or two in 1,000 shoppers access a product's [End User License Agreement] for at least 1 second, which yields an informed minority of .2 percent ...").

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?

Even accepting without question that piracy is a problem, “do something” is not a policy. Nor is the neologism “staydown,” which is as a practical matter no more than a catchy way of saying “do something.” Procedures such as digital fingerprinting, suggested as “staydown” techniques, are neither practical nor advisable. Even a trivial change in a bit changes the fingerprint used by a simple filter. Further measures for detecting variations cost tens of millions of dollars to implement, raising the prospect of entrenched online monopolies in contradiction to the public interest in competition.<sup>27</sup> Existing measures that have been voluntarily implemented—Content ID, Book ID, and Audible Magic—overblock and underblock, as their own users readily admit.

For example, Scribd’s own website clearly explains the two big problems with BookID.<sup>28</sup>

BookID relies upon computer-readable text in digital documents. Content scanned from paper sources may not contain computer-readable text data, making those sources unsuitable for use as references. Similarly, digital documents encoded with optical character recognition (OCR) technology may contain garbled or partial computer-readable text data. This may be true regardless of whether the document is readable to humans. These conditions make it very difficult, if not impossible, to detect matches...

#### False Positives

The BookID database may contain reference samples from educational textbooks and other works that contain long excerpts of classic literature, religious texts, legal documents, and government publications that are typically in the public domain. This can occasionally result in the removal of uncopyrighted, authorized, or public domain material from Scribd.

... Unfortunately, the volume of reference samples and uploads to Scribd prevent any sort of manual oversight or notification prior to effecting removals.

Thus, BookID, like all filtering mechanisms, produces overblocking: quotes from public domain materials or even fair use quotes of another book mean that the first uploader will block subsequent users for quoting or using public domain materials—classic noninfringing and fair uses. And when, as with Content ID, the first claimant can monetize later works for its own benefit, the stage is set for abuses conflicting with copyright’s goal of allowing authors to claim

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<sup>27</sup> For example, Soundcloud touts its expensive ID system, which it does not propose to share with potential competitors. It has an anticompetitive interest in forcing new entrants to start out with technological burdens it did not carry upon its own entry into the market. *See also* Neco Comments, *supra* note 14, at 10 (discussing trade organization’s demand for licensing fees for fingerprinting technology and insistence that any attempt to develop a similar fingerprinting technology would infringe copyrights in underlying works).

<sup>28</sup> SCRIBD, <https://www.scribd.com/copyright/bookid> (last visited Jan. 26, 2017).

rights in their own work—a creator who loses out to an automated claim loses the benefits copyright is supposed to provide.<sup>29</sup>

As the required “match” gets smaller, the harms of overblocking get greater, given that quotation is a classic form of fair use, and that quotation in new forms of media is increasingly common.<sup>30</sup> As Docstoc’s former counsel, Matthew Neco, explained:

I have personal knowledge that automated processes result in many false-positives, and do not adequately take into account section 107 fair use right. I processed many automated notices that were issues because the title or contents of a document included the title or phrase of some other copyrighted work. For example, I processed requests to take down videos of TV shows or feature films where the name of the show or title of the film is part of a document. We did not host UGC videos. The document did not include portions of a teleplay, screenplay, script, book, or a transcription of any portion of the TV show or film. The document clearly did not infringe upon the rights claimed by a rightsholder in some completely different work.<sup>31</sup>

Likewise, the Internet Archive reports numerous similar instances:

- Notices that mistakenly identify works that are in the public domain. For example, we have received notices that mistake volunteer audio recordings of classic works such as *Jane Eyre*, *Sense and Sensibility*, *Bram Stoker’s Dracula*, *Moby Dick*, and *Little Women* for commercial audiobook editions.
- Notices that use loose keyword matching that overclaims works that are clearly not owned by the major content holders they represent. For example, we received a takedown notice regarding an old Salem cigarette commercial based on the term “Salem” which is also the title of a major television series. Similar keyword misidentifications frequently show up as “matches” for music, concerts, home movies, and public domain books.
- Notices sent regarding reviews or lesson plans about a given work, rather than for the work itself. For example, we received a takedown notice regarding a lesson plan from the Department of Education about “*To Kill a Mockingbird*.” Similarly, Warner Brothers has sent takedown notices for reviews of films and television programs mistaken for the works themselves....<sup>32</sup>

Consider the implications of these routinely mistaken notices for the actual operation of “notice and staydown”—if the recipient took down the challenged work and filtered to prevent it from returning, it would have absolutely no precautions in place to prevent the uploading of the *actual* work in question. Would it then have violated “notice and staydown”? If so, “staydown” is far more than a “fingerprinting” requirement—it would impose keyword filtering.

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<sup>29</sup> See Leron Solomon, *Fair Users or Content Abusers? The Automatic Flagging of Non-Infringing Videos by Content ID on YouTube*, 44 Hofstra Law Review 237, 258-59 (2016).

<sup>30</sup> See, e.g., *Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, 868 F. Supp. 2d 962, 972, 982-93 (C.D. Cal. 2012) (re-edited video critiquing original video was fair use).

<sup>31</sup> Neco Comments, *supra* note 14, at 5; see also *id.* at 6 (discussing wrong requests from music publishers and record labels over song titles and lyric snippets).

<sup>32</sup> Reply Comments of The Internet Archive, before the Copyright Office, Library of Cong., Section 512 Study, Docket No. 2015-7, at 3-4.

Second, there is underblocking. A new scan using OCR will produce different results. Given the ability to upload using HTML and CSS—basic building blocks of online content—a filter-defeating change can be something invisible to the naked eye, such as putting a nonbreakable space (&nbsp;) in place of a regular space, or adding random sentences and hiding them with CSS. More generally, a simple filter is trivially easy to evade: it is easy to recode media in a new file format and get a different hash. Algorithms to spot minor edits, by contrast, are extremely onerous in terms of programmer time and expertise, as well as in computational resources.<sup>33</sup> And even the most sophisticated, expensive algorithms are in a losing battle with encryption.<sup>34</sup>

Because underblocking can be produced by deliberate evasion, even the most aggressive overblocking won't fix it.<sup>35</sup> And, because of underblocking, the biggest beneficiaries of Content ID can't say enough bad things about it; they suggest keyword blocking and other, undefined measures to supplement it.<sup>36</sup> In essence, these large copyright owners have taken the position that Content ID doesn't work well, so everyone should have to use it (and whatever else they decide is useful).

Even worse, proposed filtering requirements have no connection to suppressing the worst offenders—those overseas and rogue sites that do nothing to comply with the DMCA right now. Proposals to increase the burdens on intermediaries thus are proposals to cripple US-compliant sites and sites trying to do the right thing without even getting the benefit sought.

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<sup>33</sup> See WIKIPEDIA, [https://en.wikipedia.org/wiki/Plagiarism\\_detection](https://en.wikipedia.org/wiki/Plagiarism_detection) (last visited Jan. 26, 2017). The OTW's Systems team notes that, because it is made up of part-time volunteers, we couldn't expect even minimal progress on such an algorithm for years.

<sup>34</sup> See Vance Ikezoye, President and CEO, Audible Magic Corp., Statement before the House Science and Tech. Comm. 8 (June 5, 2007) (available at [https://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/060507\\_ikezoye.pdf](https://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/060507_ikezoye.pdf)) (“The reality is that encryption technology can prevent the detection of content transfers at the file level such as that performed by our product.”). Audible claims resistance to “some” but not all encryption methods. See Audible Magic Corp., *Response to the RFI from the Joint Comm. of the Higher Educ. and Entm't Comtys. Tech. Task Force*, (2008), <https://net.educause.edu/elements/attachments/rfi/vendors/audible.pdf> (vendor statement to educational institutions touting its product); see also *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1104 (C.D. Cal. 2009) (noting that “the Audible Magic filter had failed to identify as infringing hundreds of ... allegedly infringing videos”). Mandating such filtering isn't consistent with EU law, even though that law more readily imposes liability on OSPs than US law. *Case C-70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] ECR 2011:771 (Para. 52); *Case C-360/10 SABAM v. Netlog* [2012] ECHR 2012:85.

<sup>35</sup> See, e.g., Reply Comments of Facebook, before the Copyright Office, Library of Cong., Section 512 Study, Docket No. 2015-7, at 6 (“[E]ven for sophisticated services like Facebook, it is technologically difficult, if not impossible, to ensure that the same or similar content, once reported, will stay down indefinitely. Slight variations in the content could result in its reappearance, and users intent on gaming the system likely would find workarounds.”).

<sup>36</sup> UMG Comments, *supra* note 24, at 23 n. 4 (seeking keyword filtering by artist and album name); id. 25 n.5 (“UMPG estimates that Content ID fails to identify upwards of 40% of the use of UMPG's compositions on YouTube” and is “susceptible to user manipulation of the content that is often designed to circumvent the technology”); Reply Comments of Warner Music Group, before the Copyright Office, Library of Cong., Section 512 Study, Docket No. 2015-7, at 5 (complaining that Content ID doesn't sufficiently identify videos “incorporating” recordings or live performances); Reply Comments of Sony Music Entm't, before the Copyright Office, Library of Cong., Section 512 Study, Docket No. 2015-7, at 3, 12-13 (claiming that nearly 1.5 million infringing works since December 2012 weren't identified by Content ID, and that even one copy renders Content ID and “fingerprinting” meaningless).

Quite separately, “staydown” wrongly presumes that every use is the same. This is completely untrue, as highlighted in the Digital Media Licensing Association’s comments: “If images are distributed by multiple representatives, or licensed on a non-exclusive basis, it can be nearly impossible to distinguish an infringing use from a licensed use without sufficient resources to contact potential sources of licenses.”<sup>37</sup> If that’s true for the copyright owner, it’s ten times more true for the OSP, meaning that properly licensed uses will be taken down both to the detriment of the copyright owner (who will lose at least a good relationship with her licensee, if not further licensing fees) and the licensed user.

Furthermore, fair use analysis may differ as between uses, as Yahoo’s experience with discussions of tobacco ads—a classic subject of fair use—indicates:

Over a year ago, Yahoo processed DMCA notices from a large tobacco company that identified images of cigarette marketing materials (old posters) posted by Flickr users. In several cases, different users had posted the same image. For some of the reported images, the users did not provide commentary. Yet, in several cases, the users did post commentary along with the images. The Stanford Research into the Impact of Tobacco Advertising controlled one of those user accounts. A notice-and-staydown policy would have prevented any subsequent posting of those marketing materials....

Given the inability of automated technology to address such nuances, the safest bet and most likely approach for most platforms in the face of a notice-and-staydown regime would be to over-filter and over-takedown in response to notices - in other words, “‘Notice-and-Stay-Down’ is Really ‘Filter-Everything.’”<sup>38</sup>

Like adding expensive medications to counteract the side effects of other expensive medications, proposals to fine-tune filtering only make matters worse from a competitive perspective:

Building a system like YouTube’s Content ID program—an automated digital “fingerprinting” system that compares the content of files uploaded to the site against a list of copyrighted material to identify infringements—costs more than the entire value of most startups. And even with such a sophisticated system, YouTube recently announced that it was creating a dedicated team to review takedown claims to address the growing number of complaints from users that their legitimate content was being misidentified as copyright infringing. Needing to hire a dedicated team to monitor takedown notices for accuracy would significantly increase the cost of starting and operating a platform OSP, which would in turn limit competition in the sector and ultimately harm the economic and creative potential of the Internet. In fact, requiring a system as robust as Content ID, as some rights holder organizations have suggested, would do nothing more than entrench

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<sup>37</sup> Digital Media Licensing Ass’n Comments, *supra* note 13, at 5.

<sup>38</sup> Reply Comments of Yahoo! Inc., before the Copyright Office, Library of Cong., Section 512 Study, Docket No. 2015-7, at 11.

the dominant players' position in the market and drive out any competitors, as no new entrants to the market could afford such an obligation.<sup>39</sup>

We fully endorse the Wikimedia Project's explanation of the trouble with any automation mandate:

Even if a perfect (or very good) automated process could be created for sending notices, it would still not be feasible for organizations like us—small, non-profit—to implement and comply with automated processes. We do not have the engineering resources to create or purchase an automated system for identifying problematic material (or even for evaluating and processing notices) in a manner that still protects free expression. It would be prohibitively expensive to hire professional staff to review the many more notices that we could receive in an environment that allowed for widespread, unchecked use of automated notice-sending systems. In addition, it would be unnecessary to make it easier for rightsholders to send more automated notices to sites where there is no evidence of widespread copyright infringement....

Complying with a new requirement to check every upload against every piece of material we have ever taken down would necessitate an enormous investment of resources—time and money—on our part—resources that we frankly do not have. We would need to develop new technological mechanisms and provide the staffing necessary to implement and maintain those mechanisms. Large and for-profit OSPs may be able to shoulder those additional burdens, but we would struggle under the weight. Additional burdens also serve to privilege existing and well-funded OSPs over newcomers and organizations like us with limited resources.<sup>40</sup>

In sum, the Takedown Project's summary of its findings stands as a simple statement about why filtering proposals aimed at conduct affecting large providers like Google are a terrible idea for the internet ecosystem as a whole:

First, the relatively high number of problematic notices we observed our studies counsels against expanding automated practices without much better controls against mistake and abuse. Second, DMCA Classic OSPs appear to make up a substantial portion of the online ecosystem, and they are very sensitive to the costs automated measures would impose on them. Further, many DMCA Classic OSPs rarely or never encounter large-scale infringement issues, weighting the cost-benefit analysis against automated measures. Third, the numbers of problematic notices we observed in our quantitative studies show that targets' expression interests remain a crucial issue for notice and takedown policy.<sup>41</sup>

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<sup>39</sup> Engine, et al. Comments, *supra* note 19, at 7 (footnote omitted). See also Reply Comments of Electronic Frontier Foundation, before the Copyright Office, Library of Cong., Section 512 Study, Docket No. 2015-7., at 13 (detailing numerous problems with Content ID).

<sup>40</sup> Wikimedia Comments, *supra* note 6, at 9-10.

<sup>41</sup> Reply Comments of Takedown Project, before the Copyright Office, Library of Cong., Section 512 Study, Docket No. 2015-7., at 8.

For the majority of OSPs, such as the OTW, filtering mandates are not just matters of rewriting existing algorithms; they would require completely new technologies. The game is not worth the candle.

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

The OTW does not believe that statutory amendments to §512 are necessary at this time.

#### 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.

See above.

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?

One useful 2015 roundup comes from Daphne Keller, who collected studies about the DMCA as well as other regimes.<sup>42</sup> Keller notes that there are continuing problems with the DMCA, but that over-removal under other regimes appears even worse.

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<sup>42</sup> 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), <https://cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws> (including studies of Indian, Dutch, and UK ISP practices).