



**Before the United States Copyright Office, Library of Congress
Section 512 Study, Docket No. 2015-7**

**Additional Comments of the
Center for Democracy & Technology and the R Street Institute**

February 21, 2017

The Center for Democracy & Technology (“CDT”) and the R Street Institute (“R Street”) thank the Copyright Office for the opportunity to respond to its inquiry into the impact and effectiveness of the safe harbor provisions in the Digital Millennium Copyright Act (“DMCA”). CDT is a non-profit advocacy organization advancing democratic values in the digital age. R Street is a non-profit public policy research organization promoting free markets and limited, effective government.

In the mid-1990s, Congress faced a difficult problem: preserving the vitality of the emerging internet ecosystem while adapting copyright law to digital technologies that had the potential to make copyright infringement easier than ever before.¹ At the same time, policymakers also recognized that fair use was essential to organizing and categorizing these vast stores of information. In 1998, the DMCA was instituted as a compromise to address this challenge. It would lay the framework for the relationship between online service providers, rightsholders and creators, as well as internet users. Since then, fair use and the DMCA’s safe harbors have become the foundation supporting new creative economies built on memes, fan videos, and other digital content.

Title II of the DMCA created a new section 512 in Title 17, also known as the “safe harbors provision,” which aimed to provide certainty for online service providers and stability for the growth of the digital marketplace. It does this by providing rightsholders a channel through which to enforce their rights while taking advantage of the internet’s vast potential for distribution of works. In turn, internet users are given the latitude to create and share original works, and service providers maintain the confidence to offer innovative platforms for creators to reach a global audience.

¹ S. Rep. No. 105190, at 8 (1998).

The DMCA's notice-and-takedown process relies on the cooperation of rightsholders and service providers to combat infringement from user-generated content. As the parties best able to identify potential infringements, that responsibility should remain with rightsholders. Likewise, as the parties with administrative control over the content they host, the obligation to remove allegedly infringing material falls on service providers. Through counter notices, users and creators can challenge the removal of alleged infringements, since they are in the best position to claim their posts are protected by fair use, contain properly licensed content, or were otherwise wrongly identified.²

Policymakers should be wary of tampering with the delicate balance of the current regime, which could jeopardize the rights of both copyright holders and users while also undermining the foundations of the digital economy. The DMCA safe harbor framework that shields service providers from liability for content their users post has enabled companies like YouTube, Facebook, and Twitter to grow into multibillion-dollar global phenomena. Absent these protections, online services and access providers would feel compelled to strictly monitor or restrict their customers' activity for fear of litigation, likely leading to the suppression of significant amounts of protected speech.³

Characteristics of the Current Internet Ecosystem

1. How should any improvements in section 512 take into account the diversity among the categories of content creators and ISPs who compromise the internet ecosystem?

Part of section 512's balance lies in its equal application to all stakeholders. The statute's obligations and standards for service providers and copyright owners are the same whether those roles are played by large corporations or individuals.⁴ Disrupting this uniform approach to account for the diversity of participants would require division and classification, creating an uneven system that arbitrarily advantages some and disadvantages others. CDT and R Street oppose the adoption of new measures or obligations on service providers for different content categories; 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.⁵

Furthermore, 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 who

² BBC News, *Warner Brothers Reports Own Site as Illegal*, BBC Technology, (Sept. 5, 2016), <http://www.bbc.com/news/technology-37275603>.

³ Brian Fung, *The copyright case that should worry all Internet providers*, Washington Post, (Aug. 12, 2016) <https://www.washingtonpost.com/news/the-switch/wp/2016/08/12/the-copyright-case-that-should-worry-all-internet-providers/>.

⁴ 17 U.S.C. § 512(k)(1).

⁵ Initial Comments of the Center for Democracy & Technology and R Street Institute, United States Copyright Office, Library of Congress, Section 512 Study, Docket No.2015-7 at 9-11 (April 7, 2016) ("CDT & R St. Initial Comments").

already have the systems and resources to perform additional measures. Growing providers would have to invest resources to meet the next level of requirements as they crossed from one class to the next; for some, this could represent an insurmountable obstacle. Finally, section 512 already divides the world of service providers according to the fundamental attributes of their services; attempting to define particular classes or tiers of service providers beyond those categories likely would pose practical problems.⁶

A differentiated approach to accuracy standards for take-down notices or counter-notices, as suggested without description in the Additional Questions, seems counterproductive to the goal of improving accuracy.⁷ The legal effect of sending a notice or counter-notice is the same regardless of sender; ensuring the accuracy of the notice is no less important if the sender is an automated system or an individual. 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. So long as they all strive to meet the same high level of accuracy, however, the decision as to how to achieve this standard should remain with the sender.

2. Are there specific issues for which it is particularly important to consult with or take into account the perspective of individual users and the general public? What are their interests, and how should these interests be factored into the operation of section 512?

When considering 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. Ideally, actions combating infringement should only impact those who are liable for infringement. Terminating internet access accounts is a far more extreme measure than revoking the ability to post or share content and the repeat infringer policies of “conduits” under section 512 should reflect this difference. Preserving a flexible construction of section 512’s repeat infringer provision allows access providers to preserve the social benefits of sharing internet subscriptions amongst families, households, and small communities.

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. The internet is now a critical component of free expression. We read our news, communicate with loved ones, and give feedback to our politicians online. Our reliance on the internet makes termination of internet access particularly injurious to the platforms that host the work of entrepreneurs and diverse

⁶ The European Commission is still struggling to capture some of the largest online entities with with a definition of “online platforms” that wouldn’t also include nearly every business or website on the internet. “...there is no consensus on a possible legal definition of online platforms...” *Full report on the results of the public consultation on the Regulatory environment for Platforms, Online Intermediaries and the Collaborative Economy*, European Commission (May 25, 2016) available at <https://ec.europa.eu/digital-single-market/en/news/full-report-results-public-consultation-regulatory-environment-platforms-online-intermediaries>.

⁷ Library of Congress, Copyright Office, Section 512 Study: Request for Additional Comments, *Notice of Inquiry*, 81 Fed. Reg. 78636, 78641 (Nov. 8, 2016) (“Additional Questions”).

voices. The safe harbor protection of the DMCA provides flexible parameters for intermediaries so that they do not threaten the individual expression of their users.

Operation of the Current DMCA Safe Harbor System

3. How should policy makers take into account the divergence of views on the operation of section 512?

Since the invention of the printing press, rightsholders have adapted to new technologies that facilitate and lower the barriers to the reproduction and distribution of creative works. While these technologies have generated tremendous wealth for society through non-infringing uses, they have also presented constant challenges for policymakers facing pressure to strengthen and adapt the law to better protect the interests of copyright owners.⁸ Yet, rightsholder anxiety about new technologies cutting into their bottom line has not always been warranted.

In 1982, the growing popularity of the VCR was derided as the “Boston strangler” of the movie industry.⁹ In the videotape format wars, it was VHS’s unsuccessful competitor, the Betamax, that catalyzed one of the most influential intermediary liability cases of the 20th century.¹⁰ In 1984, the Supreme Court held manufacturers were not liable for the potentially infringing uses of their devices since they could not have actual knowledge of the infringing activity by the user.¹¹ In this case, inhibiting a commercially important technology would have been a mistake, even though it meant making infringement easier for a small number of bad actors. Today, both U.S. and global box office revenues are bigger than ever.¹²

Since its implementation, rightsholders, consumers, and service providers have had strongly divergent views on the operation of section 512. Meanwhile, digital content distribution has steadily replaced analog channels.¹³ As sharing content online has become more and more popular, section 512 has had a dramatic increase in usage, indicating its effectiveness in policing infringing works.¹⁴ In the initial round of comments, commenters cited sending millions of infringement notices to website operators, hosting providers, and search engines, noting this ‘whack-a-mole’ approach placed them in the difficult situation of having an infringing work

⁸ Greg Sandoval, *RIAA lawyer says DMCA may need overhaul*, c|net, (Nov. 6, 2011) <https://www.cnet.com/news/riaa-lawyer-says-dmca-may-need-overhaul/>.

⁹ Testimony of Jack Valenti, President, Motion Picture Association of America, Committee on the Judiciary of the House of Representatives, *Hearing: Home Recording of Copyrights Works*, 97th. Cong. (April 12, 1982), available at <http://cryptome.org/hrcw-hear.htm> (last accessed Feb. 20, 2016).

¹⁰ PCMag, *Definition of: Betamax*, Encyclopedia, (last accessed Feb 20, 2017 3:50) <http://www.pcmag.com/encyclopedia/term/38569/betamax>.

¹¹ *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984).

¹² MPAA, *Theatrical Market Statistics*, 4 -10, (2015), available at http://www.mpa.org/wp-content/uploads/2016/04/MPAA-Theatrical-Market-Statistics-2015_Final.pdf.

¹³ IFPI, *Facts and Statistics*, (last accessed Feb 20, 2017 10: 00 AM), <http://www.ifpi.org/facts-and-stats.php>.

¹⁴ Google, *Requests to Remove Content*, Transparency Report, (last accessed Feb 15, 11:00 AM), <https://www.google.com/transparencyreport/removals/copyright/#glance>.

removed from a website to only later reappear and file another notice.¹⁵ In some rightsholders' view, this is evidence of section 512's failure to secure their interests in reducing online infringement.

At the same time, many have expressed concern about the negative effects of erroneous or abusive takedowns.¹⁶ Both viewpoints have merit. The compromise achieved in section 512 is just that, a compromise. While the re-negotiation of this compromise may offer the promise of improvement for both parties, to do so at the expense of the neutrality of intermediaries would be disastrous. The broad divergence of views on section 512's effectiveness and functionality is evidence of the statute's balance, not of dysfunction. Accordingly, policy makers should note the lack of consensus on how, or even whether, section 512 might be improved.

4. What are the most significant barriers to use of section 512 and how can those barriers be best addressed?

As noted in our earlier comments, voluntary cooperation between ISPs and rightsholders to streamline notification through standardization of processes could benefit both parties by reducing the transaction costs of sending and receiving notices.¹⁷ However, 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.¹⁸

[Question 5 omitted]

6. How do disincentives to the use of section 512 (such as concerns about security or privacy) affect the use of section 512 and how should they be addressed?

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. While concerns about security and privacy are valid, they lie outside the scope of copyright law and are best addressed by the laws and law enforcement agencies designed to protect individuals in circumstances like those cited in the Additional Questions.¹⁹

¹⁵ Comments of the RIAA, et al., United States Copyright Office, Library of Congress, Section 512 Study, Docket No. 2015-7 at 4 - 5 (March 31, 2016).

¹⁶ Comments of the Electronic Frontier Foundation, United States Copyright Office, Library of Congress, Section 512 Study, Docket No. 2015-7 at 9-13 (April 1, 2016); Center for Democracy & Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (Sept. 2010) available at https://www.cdt.org/files/pdfs/copyright_takedowns.pdf.

¹⁷ CDT & R St. Initial Comments at 7.

¹⁸ Comments for the Second Public Meeting of the Multistakeholder Forum on Improving the Operation of the DMCA Notice and Takedown System Internet Policy Task Force, Department of Commerce (May 8, 2014), available at <https://cdt.org/files/2014/05/PI-Statement-re-NT-efficiency.4.30.pdf>.

¹⁹ Additional Questions at 78639 and n. 29.

7. [Question omitted]

8. What notice or finding should trigger the need for a repeat infringer policy for ISPs operating as “conduits” under subsection 512(a)?

The strength of section 512’s repeat infringer provision lies in its flexibility. This flexibility allows equal application of this single clause to all service providers, regardless of statutory classification, by giving providers sufficient leeway to create policies capable of adapting to a broad array of circumstances.²⁰ Attempting to define a fixed “trigger” for account termination or 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.

Potential Future Evolution of the DMCA Safe Harbor System

9. What types of educational resources would improve the functioning of section 512?

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. Transparency reports, accompanied by clear and accessible explanations of notice processing mechanisms are examples of education on behalf of the intermediaries.²¹

The Office should continue to produce information circulars, host roundtables with stakeholders and policy makers, and present developments in public forums.^{22 23} In addition, the Office could put forward examples of complete notices and counter notices, including explanations of relevant legal concepts such as fair use.

²⁰ CDT & R St. Initial Comments at 17-19.

²¹ See, e.g. Google, *Requests to remove content due to copyright*, Google Transparency Report, (last accessed Feb 20, 2017 9:00 PM), <https://www.google.com/transparencyreport/removals/copyright/>.

²² *Circular and Brochures*, Copyright Office, (last accessed Feb 20, 2017 1:00pm), <https://www.copyright.gov/circs/>.

²³ Eric Goldman, *Copyright Office Q&A Session About The New Online DMCA Designated Agents Directory*, Technology & Marketing Law Blog, (Feb 14, 2017), <http://blog.ericgoldman.org/archives/2017/02/copyright-office-qa-session-about-the-new-online-dmca-designated-agents-directory.htm>.

10. How can the adoption of additional voluntary measures be encouraged or incentivized?

In our previous comments, we addressed several voluntary measures used to supplement section 512's notice-and-takedown process.²⁴ These measures include:

- Content identification and hashing,
- Search demotion,
- Notice-forwarding,
- "Trusted submitter" programs, and
- Financial best practices.

Automated voluntary measures such as Content ID, search demotion, and notice forwarding are attractive solutions to the so-called 'whack-a-mole' problem of rightsholders.²⁵ While they offer many benefits, these solutions can be expensive, lack transparency, and fail to consider fair use—an inherently subjective assessment—making it difficult to quantify with an algorithm.²⁶ These solutions, 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.²⁷

Incentivization must take into consideration the DMCA's notice-and-takedown process as a carefully constructed balance between the interests of rightsholders, users, and service providers. 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.

11. [Question omitted]

²⁴ CDT & R St. Initial Comments at 14-16.

²⁵ *Id.*

²⁶ Taylor B. Bartholomew, *The Death of Fair Use in Cyberspace: YouTube and the Problem With Content ID*, 13 Duke L. & Tech. Rev. 66 (2015).

²⁷ Dep't of Commerce DMCA Multistakeholder Forum, *DMCA NoticeandTakedown Processes: List of Good, Bad, and Situational Practices* (2013), available at http://www.uspto.gov/sites/default/files/documents/DMCA_Good_Bad_and_Situational_Practices_Document_FINAL.pdf; CDT & R St. Initial Comments at 15-16.

12. Is “notice-and-staydown” advisable?

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.²⁸ Aside from the problems such a duty would pose to privacy, freedom of expression, and providers’ eligibility for section 512’s safe harbors, a duty to monitor would have powerful negative effects on investments in new innovative services.²⁹ The surest way to avoid these problems is to leave section 512’s well-established systems and relationships intact and support their improvement through the cooperation of rightsholders and service providers.

13. [Question omitted]

14. What is the impact of the recent case law on the effectiveness of section 512?

CDT and R Street believe that no one should be barred from the internet based on accusations of copyright infringement. This notion is especially germane when considering the differences in the application of the DMCA’s “repeat infringer” on hosting services and transit providers. We support the statute’s requirement that providers reasonably implement repeat infringer policies, but believe that ISPs should account for the importance and realities of internet access as they implement those policies. *BMG Rights Management v. Cox Communications* addresses the language of section 512 that provides service providers flexibility in determining the ‘appropriate circumstances’ warranting termination of a repeat infringer’s account.³⁰ 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.³¹

Lenz v Universal Music Corp., a case examining use of the section 512 notice-and-takedown regime, is currently under consideration for certiorari by the Supreme Court.³² Before *Lenz*, the Ninth Circuit held in *Rossi v Motion Picture Association* that an assertion of mere ‘subjective good faith’ in the content’s unauthorized status, without consideration of fair use, is sufficient to support a takedown demand pursuant to subsection 512(c).³³ Now, at least in the Ninth Circuit, notice senders should consider whether use of a work might be protected by fair use before requesting a takedown, or else risk liability for misrepresentation under subsection 512(f).³⁴ If

²⁸ CDT & R St. Initial Comments at 9-11.

²⁹ Booz & Company, *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment A Quantitative Study* at 6, 19 (2011).

³⁰ See *BMG Rights Mgmt, Inc. v. Cox Communications, Inc.*, 149 F.Supp.3d 634 (E.D. Va. 2015).

³¹ Brief for Public Knowledge, the Electronic Frontier Foundation, and the Center for Democracy & Technology as Amici Curiae in support of neither party, *BMG Rights Mgmt, Inc. v. Cox Communications, Inc.* at 6, (4th Cir. No. 16-1972, Nov. 14, 2016) available at <https://www.publicknowledge.org/documents/pk-eff-cdt-amicus-brief-in-bmg-v-cox>.

³² *Lenz v. Universal Music Corp.* 801 F.3d 1126 (9th Cir. 2015); Petition for Writ of Certiorari, *Lenz*, Docket No. 16-217, available at <http://www.scotusblog.com/wp-content/uploads/2016/09/16-217-petition-for-cert.pdf>.

³³ *Rossi v. Motion Picture Ass’n of America*, 391 F.3d 1000, 1004-05 (9th Cir. 2004).

³⁴ *Lenz* at 1129.

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.

The DMCA creates a neutral role for service providers, leaving it to users and rightsholders to assert their legal interests. The courts have continually grappled with striking the appropriate balance between rightsholders' and users' interests. And we expect the courts to continue interpreting the statute in a way which serves the interests of both rightsholders and internet users, while preserving the unbiased role of ISPs.

Conclusion

CDT and R Street caution against any alterations to section 512 of Title 17, the balance of which depends on online service providers remaining unencumbered by obligations to proactively monitor user-generated content. Rather than shouldering the burden of preventing the reappearance of unauthorized material, they should remain free to continue voluntary and cooperative efforts alongside rightsholders to reduce infringing activity online, reduce incentives to engage in infringement, and improve the accuracy of the notice-and-takedown process.

Respectfully submitted,

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