

February 21, 2017

**Submitted By Online Submission Procedure**

Karyn Temple Claggett  
Acting Register of Copyrights  
U.S. Copyright Office  
101 Independence Ave., SE  
Washington, DC 20559-6000

**Re: DMLA Additional Comments To Section 512 Study  
(78 F.R.13094) (Docket No. 2015-7)**

Dear Acting Register:

**I. Background**

The Digital Media Licensing Association, Inc. (“DMLA”),<sup>1</sup> together with an ad hoc group of various visual artists associations, previously submitted responses on April 1, 2016 to the Copyright Office’s Notice of Inquiry regarding the Office’s Section 512 Study (“512 Study”) concerning the impact and effectiveness of the DMCA safe harbor provisions under 17 U.S.C. § 512. DMLA also participated in round table hearings held in New York City in May of 2016. DMLA appreciates the opportunity to submit these additional comments, and plans to supplement its comments in March 2017 with the results of an empirical survey DMLA conducted among its members and their rosters of visual artists on the effectiveness of Section 512 (the “DMLA Survey”). In addition, the DMLA supports the Copyright Alliance’s additional comments to the 512 Study.

**II. Additional Comments**

**A. *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 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 is difficult to measure and it is unclear what is intended by “size” – as it could mean employees or resources. The size of an ISP should not be used as an excuse to limit any takedown requirements. For example, an ISP with few employees that does not operate for financial gain could cause substantial market harm by offering massive amounts of unauthorized content for free that is available for licensing by DMLA members on legitimate sites. With regard to “size,” the amount of infringing content hosted by an ISP may be a more relevant

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<sup>1</sup> Founded in 1951 as PACA, DMLA’s membership includes 150+ companies worldwide that are engaged in the archiving and distribution of images, footage, animation, and illustrations for purposes of licensing.

consideration when determining what reasonable technical measures an ISP should employ to take advantage of the safe harbor.

Cooperation between ISPs and content owners was at the heart of Section 512 when it was enacted. Unfortunately, not enough cooperation has been fostered, particularly with smaller content owners, and specifically with image creators and image libraries. Image fingerprinting technology is widespread and readily available, and so it does not seem unreasonable for ISPs hosting a substantial amount of visual content to work with DMLA members to filter infringing content so as to keep the infringing content off the ISPs' websites. The purpose of Section 512 was not to unduly burden either ISPs or content owners and their representatives with endless and repetitive notices for the same material. Instead, DMLA members and ISPs with visual content should be cooperating and working with digital databases to both reduce infringements and the number of takedowns that are sent.

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? Operation of the Current DMCA Safe Harbor System.*

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.

## **B. 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?*

To answer this question DMLA intends to submit the results of the DMLA Survey.

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. In the European Union ("EU"), the divergence between the ISPs and the content industry has been referred to as the "value gap" and legislators in the EU are attempting to remedy this gap, which results from online platforms benefiting from content that creators have made without sharing any of the revenue.

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.)?*

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.

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?*

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. For example, copyright registration is not a requirement to send a takedown notice, nor should it be. However, copyright registration is a requirement to commence litigation. It is not possible to get a registration within 10 days without paying excessive expedited registration fees, no less to hire an attorney who can commence the federal action. This is particularly unrealistic with infringing visual content where there is a high frequency of low-value infringements in light of the relative value of a license fee. This makes the cost of federal litigation impractical for the vast majority of individual creators. 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.

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?*

The results of the DMLA Survey, which DMLA will submit to supplement this response, addresses the disincentives of the DMCA notice and counter notice process, and the effect those have on creators' willingness to send takedown notices or respond to counter notices. The main complaint of DMLA members from prior surveys and responses to Copyright Office Notices of Inquiry 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. As noted in the response above, the 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.

7. *Some participants recommended that the penalties under section 512 for filing false or abusive notices or counter-notices be strengthened. How could such penalties be strengthened? Would the benefits of such a change outweigh the risk of dissuading notices or counter-notices that might be socially beneficial?*

The 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. In fact, there does not seem to be any real evidence that the numbers of false or abusive notices or counter notices are anything but a very small fraction of the overall notices and counter notices sent on a daily basis. The amount of improper notices sent by non-lawyers could be improved if there was clear information explaining to non-lawyers the difference between copyright, trademark, right of privacy/publicity, and defamation disputes. There should be no requirement that notices under Section 512 be sent by non-lawyers, but it cannot be expected that all non-lawyers will always understand the differences between copyright and other areas of intellectual property law. These types of innocent misunderstandings should not trigger liability.

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? Potential Future Evolution of the DMCA Safe Harbor System.*

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.

### ***C. 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?*

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 as mentioned in response to Question #7 above.

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?*

Voluntary measures to reduce the volume of infringements should be incentivized and not discouraged. ISPs have been granted immunity for copyright damages, which to a large extent has made their businesses fuller, while at the same time disincentivizing legitimate licensing and thereby harming the sources of licensed content and creators, who earn a living by licensing their content. The balance cannot be tipped so that this immunity does not encourage a strong licensing system and a copyright system that encourages the creation of new content by allowing markets to also flourish. In order to be

rewarded with the benefit of such immunity, 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. This is inefficient and can be greatly reduced by voluntary measures developed by the parties and the use of technology that can improve the detection, filtering and blocking of infringing content.

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?*

DMLA supports the adoption of standard technical measures on an industrywide or sub-industrywide basis. The fact that there are no standard technical measures adopted to date, based on the definition of “standard technical measures” under Section 512(i), shows that ISPs will not voluntarily adapt technical measures without either legislative change or the courts conditioning immunity on the adoption of reasonable and readily available technical measures. There are already industry-specific standard technological measures to identify content, such as audio fingerprinting for music and image recognition software for photographs and videos. But without the participation of ISPs, these measures do not qualify under Section 512(i) because they were adopted by the particular industry and were not “developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process.” Given this definition, ISPs have no incentive to participate and in fact have a disincentive insofar as if they do not participate they can prevent the implementation of much-needed standard technical measures to help slow the unauthorized use of content online. This seems to be a failure of the DMCA – based on its history, which contemplated cooperation between ISPs and content providers – but in fact there is no incentive for ISPs to participate in developing these standards due to the way Section 512(i) was drafted.

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.

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?*

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.

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 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.

#### **D. 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.*

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.

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?*

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.

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

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. While Section 512 offers a takedown process, it is not ultimately a low cost option

because of the resources necessary to search for infringements and locate the agent for sending a proper takedown notice. This process is extremely burdensome and does not encourage licensing that supports individual creators.

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 rely on software to identify infringing content and send proper requests for removal without fear of penalties under Section 512(i).

### **Conclusion**

We thank you for the opportunity to participate in the 512 study and plan to supplement these responses with empirical information next month.

Respectfully submitted,

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