Before the
United States Copyright Office
101 Independence Ave. S.E.
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Section 512 Study | Docket No. 2015–7

COMMENTS OF PUBLIC KNOWLEDGE

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I. Introduction

The limitation of copyright liability for internet intermediaries embodied in 17 U.S.C. § 512, often referred to as the 'safe harbor' provision of the Digital Millennium Copyright Act of 1998 (DMCA), is one of the legal bedrocks of the modern internet. Although Section 512 is often viewed as concerning the relationship between online platforms and copyright owners, Section 512 is in fact a tri-partite system, balancing the needs and interests of not just online platforms and copyright owners, but also the needs and interests of internet service users. Much as copyright law's purpose is to ultimately benefit the public,[1] Section 512 does not exist to encourage the proliferation of online platforms for their own sake, but to ultimately benefit the public. As it studies Section 512, we encourage the Copyright Office to consider internet users as key stakeholders, and not merely passive beneficiaries of the law.

Section 512 is intended to serve the public interest in two ways. First, by providing copyright owners with an efficient mechanism for removing infringing materials from online sites and by giving online platforms certainty against exposure to copyright liability, Section 512 has encouraged the development and growth of innovative services that allow internet users to communicate and express themselves in new and creative formats. Second, by providing internet users with appropriate due process safeguards against abuse of removal mechanisms, Section 512 is supposed to protect the speech rights of those users. While the current statutory framework appears to be fulfilling its first public interest purpose, it is failing in its second.

In the digital millennium, online platforms are critical communications tools, enabling the speech and expression of users around the globe. Online communication has evolved well beyond person-to-personal electronic mail, thanks to the rise of online services that host user generated content. These services have enabled and unlocked a wealth of creativity, and give the public unprecedented access to that creativity. Policy makers evaluating any laws that may encourage or discourage the functioning of online platforms should be cognizant of that impact such a law would have on users. The law must strike a balance that ensures that users have access to a diverse array of communications channels.

Public Knowledge welcomes the opportunity to offer these comments to aid in the Copyright Office's study of Section 512, an issue to which Public Knowledge has devoted significant attention over the years.[2]

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[1] "The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'" *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U. S. 340, 349-350 (1991) (citations omitted).

[2] In addition to these comments, we direct the Office's attention to our 2011 Copyright Reform Act report on Section 512, prepared for Public Knowledge by the Samuelson Law, Technology & Public Policy Clinic at the University of California, Berkeley, School of Law: Dena Chen Et Al., *Copyright Reform Act: Updating 17 U.S.C. § 512's Notice and Takedown Procedure for Innovators, Creators, and Consumers* (2011) (*available at* https://www.publicknowledge.org/assets/uploads/blog/4_Notice_Takedown.pdf); and our 2013 Internet Blueprint statutory reform proposal (*available at*: http://internetblueprint.org/wp-content/uploads/2012/08/Strengthening-and-Improving-DMCA-Safe-Harbors-Act.pdf).

II. General Effectiveness of the Safe Harbors

Questions 1 through 5 of the Notice of Inquiry seek comment as to whether Section 512 is working as Congress intended, the impact of Section 512 on online services and copyright owners, and whether an appropriate balance has been struck between the two.

Section 512 is intended to accomplish several interrelated goals: to provide a simple way for copyright owners to alert online hosts and other providers to the presence of infringing content and to request its removal; to encourage the development of online services by providing these services with some protection from liability for users' infringement;[3] and to protect users' free expression interests[4] by limiting service providers' incentives to screen materials prior to posting.[5]

As to the development of online services, it is reasonable to state that Section 512 has achieved this purpose. Online platforms ranging from YouTube, to Facebook, to Tumblr, to Twitter, to Wikipedia, to innumerable subject matter specific discussion forums, have arisen thanks to the legal certainties provided by Section 512. In a recent study of Section 512's notice and takedown provisions in everyday practice in which online service providers and copyright owners were surveyed about their experiences (the "Everyday Practice Study"), the study reported that all online service providers "affirmed the importance of section 512's safe harbor. Indeed, they so strongly rely upon its ability to limit liability and reduce uncertainty that they consider it foundational to their ability to provide intermediary services."[6]

Similarly, Section 512 has certainly made it easier for copyright owners to have content removed. By way of example, the search engine Google reported receiving requests to remove more than 65 million URLs from its search results in a one month period in November of 2015.[7]

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[3] "The OSPs and the ISPs need more certainty in this area [referring to liability] in order to attract the substantial investments necessary to continue the expansion and upgrading of the Internet." 144 Cong. Rec. S11889 (daily ed. Oct. 8, 1998) (statement of Sen. Orrin Hatch).

[4] "The WIPO treaties and the DMCA will protect the property rights of Americans in their work as they move in the global, digital marketplace, and, by doing so, continue to encourage the creation of new works to inspire and delight us and to improve the quality of our lives." *Id.*

[5] David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA's Commentary*, 23 Cardozo L. Rev. 909, 918 (2002). See also, H.R. Rep No. 105–796, at 72 (1998) (Conf. Rep.), available at http://www.copyright.gov/legislation/hr2281.pdf ("Title II preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment. At the same time, it provides greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.")

[6] Jennifer M. Urban, Joe Karaganis, Brianna L. Schofield. *Notice and Takedown in Everyday Practice*, 73 (2016) (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628) ("the Everyday Practice Study").

[7] Amy Gesenhues, *Google Received More Than 65 Million URL Takedown Requests In The Past Month*, Search Engine Land, 23 Nov 2015 (available at:

Bringing individual lawsuits to adjudicate each infringement claim would be untenable. Indeed, despite their frustrations, copyright owners interviewed in the Everyday Practice Study "described relying on [Section 512] as a crucial component of policing their copyrights."[8]

It is less clear that users' free expression interests have been adequately protected. As the law currently stands, copyright owners face negligible penalties for over-enforcement, and online service providers are similarly incentivized to accept even questionable takedown notices in order to maintain their safe harbor protections. This conflict of interest that would otherwise leave users without recourse is supposed to be offset by certain provisions, namely §§ 512(f) and (g), the misrepresentation and 'counter notice and put back' provisions, but as discussed further below, these protections have proven inadequate.

The bargain struck by Section 512 appropriately balances the interests of online platforms and copyright owners. As discussed further below, as important as it is to provide copyright owners with tools that enable efficient removal of infringing material, it is also important that any legal regime not be so onerous as to stifle entry into the online service provider marketplace. Where the balance is acutely in need of recalibration, though, is with respect to user rights.

III. Notice-and-Takedown Process

Questions 6-15 of the NOI seek comment with respect to the "notice and takedown" mechanism embodied in Section 512. The recently published Everyday Practice Study, an expansive multi-part study which contains a qualitative analysis based on interviews of online service providers and copyright owners in addition to two quantitative analyses of the notice and takedown system, offers insights and findings on many of these topics.

In particular the Study sheds light on the development of professional and automated enforcement efforts by large scale copyright owners, and in turn the adoption of automated processing systems by online platforms.[9] The rise of automation on both the copyright owner and online service provider sides of the equation raise a number of questions and concerns.

Automation of sending takedown notices raises questions of notice accuracy. The Everyday Practice Study examined a sample of takedown notices uploaded to the Lumen database[10] covering a six month period and found that 4.2% of takedown requests "were fundamentally flawed because they targeted content that clearly did not match the identified infringed work", which would mean that up to 4.5 million takedown requests could be expected to suffer from this defect across the six-month set they sampled from; 28.4% suffered from other defects; more than 15% raised questions about whether they sufficiently identified the infringing

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http://searchengineland.com/google-received-more-than-65-million-url-takedown-requests-in-the-past-month-236763).

[8] Everyday Practice Study, 73.

[9] *Id.*, XXX.

[10] https://lumendatabase.org/pages/about ("Lumen is an independent 3rd party research project studying cease and desist letters concerning online content. We collect and analyze complaints about online activity, especially requests to remove content from online.")

or infringed works in question; 7.3% of takedown requests targeted material that raised questions of potential fair use; and 2.3% complained about non-copyright issues (e.g. defamation or trademark).[11]

One recent example of how this kind of poor quality control plays out occurred in August of 2015, when an enforcement agent erroneously targeted multiple videos with takedowns for infringing Columbia Pictures' film "Pixels" merely because the videos contained the word "Pixels" in their titles.[12] That the videos were restored within a day owes more to the copyright owner withdrawing the takedowns after the negative press coverage, than to a well functioning DMCA. Under the DMCA put back rules, each individual video owner would have had to file a counter notice under penalty of perjury, and wait at least 10 days before their videos could have been put back.

Another recent instance that highlights the incredibly creative and valuable expression that users can use online platforms to engage in, involved the "Every Single Word" video series, where popular mainstream films are edited down to only feature the (often very few) words spoken by people of color. The Every Single Word videos serve as a powerful critique of the racial disparities in casting for significant roles in mainstream feature films, and are paradigmatic cases of fair use. Nevertheless, the Every Single Word series eventually attracted a (likely) automated takedown.[13] While the copyright owner in this instance (Warner Bros) retracted their block, the Electronic Frontier Foundation's Parker Higgins raised an important point in the aftermath: "And what about videos that aren't as high-profile as "Every Single Word", where a takedown doesn't make for bad optics and public attention?"[14][15]

Unfortunately the law does little to discourage these kinds of "takedown first, ask questions later" practices. Public Knowledge has proposed a number of reforms to encourage copyright owners to exercise greater care in sending takedown notices. First, Congress can increase notice sender accountability by modestly amending § 512(c)(3)(A)(vi)'s notice requirement. Second, Congress should strengthen the § 512(f) remedy for misrepresentations in notices. Third, Congress should authorize the creation or designation of a public repository for takedown notices.

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[11] Everyday Practice Study, 11-12.

[12] Sam Machkovech, *DMCA takedown laser brings down Vimeo videos with "Pixels" in title*, Ars Technica, 9 Aug. 2015 (*available at*: http://arstechnica.com/tech-policy/2015/08/dmca-takedown-laser-brings-down-vimeo-videos-with-pixels-in-title/).

[13] http://everysinglewordspoken.tumblr.com/post/132542672758.

[14] https://twitter.com/xor/status/663461686356000768.

[15] A 2010 Center for Democracy and Technology report *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (*available at*: https://cdt.org/files/pdfs/copyright_takedowns.pdf) highlighted instances of political campaigns having their content erroneously taken down. While a national political campaign might be able to have an erroneous takedown corrected, less high-profile campaigns may not be so fortunate. Leaving that distinction aside, it should be self-evident that the speech interests of an ordinary citizen are just as important as those of candidates for elected office.

When a copyright owner, or the owner's agent, sends a takedown notice, the notice must meet certain statutory requirements in order to be valid. Among the requirements is that the notice sender certify, under penalty of perjury, that they are authorized to act on behalf of the copyright owner whose work is allegedly being infringed. In order to encourage notice sends to take greater care in sending notices, Public Knowledge recommends that Congress amend § 512(c)(3)(A)(vi) so that the notice sender must certify all statements in the notice under penalty of perjury.[16] This would in fact come closer to mirroring the burden currently imposed on users wishing to file a counter-notice, who are required to certify under penalty of perjury that their work is non-infringing.

Congress can also help curb abuse by strengthening §512(f), which holds notice senders who make misrepresentations in their notices accountable.[17] In particular, by changing the standard in § 512(f) from "knowing" to "reckless," Congress would give notice targets more meaningful protection under § 512(f) and, as a result, would discourage notice senders from sending notices with reckless misrepresentations. This slight lowering of the standard for relief would encourage copyright owners to either review notices generated by automated technologies or to design company protocols to reasonably protect against erroneous or deficient infringement claims. At the same time, a "reckless" standard is sufficiently high to avoid penalizing notice senders who are merely mistaken, reasonably aggressive, or even negligent, in their takedown practices. In addition to modifying the standard, Congress should also amend §512(f) to permit an award of statutory damages to victims of recklessly misrepresentative takedown notices.

Finally, a third tool for helping curb abusive or problematic takedown notices is to guarantee that these otherwise private communications will be exposed to public scrutiny.[18] Congress should authorize the creation or designation of a public takedown notice repository, and require all senders of takedown notices to file a copy with the repository in order for the takedown to be considered valid. The utility and transparency provided by the Lumen database, which, for example, enabled the researchers who produced the Everyday Practice Study to review a sufficiently large sample in order to draw meaningful conclusions, is apparent. However, the Lumen database is built on the voluntary participation of a number of online service providers who submit copies of notices they receive to the database. A comprehensive database would enable more research into the effectiveness of and trends in takedown notices, and also provide greater transparency as to how Section 512 is being used.

Combined, these three reforms would discourage the worst abuses of the notice and takedown system while still permitting copyright owners acting with at least a modicum of care to benefit from it.

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[16] *Copyright Reform Act,* 14-15; Internet Blueprint, Strengthening and Improving DMCA Safe Harbors Act § 3 (*available at*: http://internetblueprint.org/wp-content/uploads/2012/08/Strengthening-and-Improving-DMCA-Safe-Harbors-Act.pdf).

[17] *Copyright Reform Act,* 8-14; Internet Blueprint, Strengthening and Improving DMCA Safe Harbors Act § 2.

[18] *Copyright Reform Act,* 17-19; Internet Blueprint, Strengthening and Improving DMCA Safe Harbors Act § 4.

One other avenue of non-statutory reform that would help alleviate some of the erroneous take down notices is better education of the public as to the limits of copyright law, and the exceptions to the exclusive rights granted to authors, such as fair use, de minimis copying, the difference between trademark (or defamation) and copyright, etc. While a great deal of effort has been expended by copyright owners to educate the public about copyright piracy,[19] perhaps education about the full scope of copyright, including its boundaries and the rights of the public would help eliminate many of these faulty takedown notices. It would free copyright owners to focus on legitimately infringing material, and free online platforms to focus on responding expeditiously to legitimate takedowns.

In addition to the rise in automated takedown services, the Everyday Practice Study identified a trend of sophisticated online service providers adopting automated systems for handling intake of takedown notices.[20] Critically, the majority of online service providers interviewed by the study authors, have not shifted towards automation, because they do not receive large volumes of takedown notices.[21] Many of these smaller online service providers viewed any shift towards automation or filtering as a competitive issue, as larger online service providers would be better able to afford the costs of such systems.[22]

In Question 9 of the NOI, the Office seeks comments on the role and feasibility of automated notice and takedown processes. The perspectives offered by small online service providers in the Everyday Practice Study suggest that conditioning the availability of the Section 512 Safe Harbor on the implementation of automated response or filtering based systems would necessarily erect a significant obstacle for smaller online service providers who would be unable to afford complex (and unnecessary in many cases) compliance systems and would be left to either close down or accept frighteningly high levels of copyright liability exposure.

Such a scenario would have a deleterious effect on the long tail of the internet ecosystem, negatively impacting diversity and user choice, as only deep-pocketed incumbent online service providers would be able to continue operating with the limitations on liability that have encouraged so much growth to date.

IV. Counter-Notifications

Questions 16 and 17 of the NOI seek comment on the effectiveness and burden of Section 512's counter-notice or 'put back' provisions. Section 512's counter-notice procedures, as embodied in Section 512(g), are a vital procedural safeguard for platform users. The viability of Section 512 as an efficient but balanced alternative dispute mechanism hinges on robust protections for platform users. This is particularly important in light of the scale of deficient

[19] Mike Masnick, *How Lobbyists Turned Big US Education Reform Bill Into The 'No Copyright Propaganda Left Behind' Act*, Techdirt, 2 Feb. 2016 (*available at*: https://www.techdirt.com/articles/20160129/00010533456/how-lobbyists-turned-big-us-education-reform-bill-into-no-copyright-propaganda-left-behind-act.shtml)

[20] Everyday Practice Study, 53-54.

[21] *Id.*, 73-74.

[22] *Id.*, 64-65.

takedown notices, and the extent to which platforms favor taking down material, even where a notification is deficient, as discussed above. However, it is clear that 512(g) has proven deficient in serving this critical balancing role, and that to the extent Section 512 is amended, strengthening user protections should be a key focus of any such amendments.

The Everyday Practice Study observed that "the targets of notices—Internet users—are often lost in this struggle over duties. As a practical matter, the targets of notices are at the mercy of others, and appear to be at risk of being subsumed by rightsholders' more immediate priorities of removing infringing content and of OSPs' need to avoid liability"[23] Online service providers observed that the counter-notification process is intimidating, requiring users to certify under penalty of perjury that there material is not infringing, a daunting prospect for anyone not versed in the nuances of copyright law.[24] Furthermore, the process suffers from a lack of notification for any user who is targeted on the basis of a search engine delisting instead of a takedown from a user-generated-content hosting platform, as a search engine has no relationship with the operators of its search result listings.

Public Knowledge supports a number of reforms that would help ameliorate the shortcomings of § 512(g). First, online service providers should be required to notify targets of takedown notices that their content is being removed, and to inform them of their right to counter-notice the takedown.[25] Second, the mandatory ten day waiting period before taken down content can be replaced after receipt of a counter-notice should be eliminated.[26] Timely commentary or commercial revenue from potential views should not be delayed if a counter-notice has been properly issued. Third, the establishment of a central repository and requirement that copies of all takedown notices be filed there as described earlier in these comments would help to alleviate some of the lack-of-notice concerns that arise in the search engine delisting context – targets of a takedown would be able to find the notice that affected them and counter-notice if appropriate.

Without robust protection of the speech interests of internet users, Section 512 becomes a tool that effectively chills speech without consequence – delisting search engine results without notice, or leaving users unfamiliar with their rights too intimidated to respond. As the Everyday Practice Study authors poignantly state, "In the end, counter notice and putback give the appearance of due process for targets without the necessary components of definite notice of the claimed transgression, a reasonably exercisable ability to respond (preferably before action is taken), and an unbiased adjudicator… further expansion of the notice and takedown model, or changes to it, should take into account the fact that targets' expression rights are fragile in a system with strong removal incentives for complainants and intermediaries, but with such limited countervailing incentives to preserve or reinstate improperly targeted speech."[27]

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[23] *Id.*, 74.

[24] *Id.*, 44-46.

[25] *Copyright Reform Act,* 15-17. Internet Blueprint, Strengthening and Improving DMCA Safe Harbors Act § 6.

[26] *Id.*

[27] Everyday Practice Study, 118.

V. Repeat Infringers

Section 512 conditions the availability of the safe harbor on the adoption and implementation of a policy that "provides for the termination in appropriate circumstances of subscribers or account holders… who are repeat infringers."[28] The requirement of such a policy is reasonable, in so far as it is clear that "repeat infringers" is limited to those subscribers or account holders who have been determined by a court of law to have repeatedly infringed a copyright. Section 512's notice and takedown regime exists as a deliberately conceived alternative to adjudication of copyright claims in court, and the remedies it affords copyright owners are accordingly limited (i.e. the removal of adequately identified material from a platform).

The repeated targeting of a particular user with takedown notices that go unchallenged does not lead to a legal conclusion that that user has in fact repeatedly infringed. This is especially true in light of the deficiencies in the counter-notification system that discourage users from disputing incorrect or inadequate takedown notices discussed above. Only a court of competent jurisdiction can make a determination as to whether an infringement has occurred as a matter of law.

VI. Other Issues

In Question 29 of the NOI, the Office seeks comment as to any reports or studies on the effectiveness of the Section 512 Safe Harbors. We direct the Office to the recently released report, *Notice and Takedown in Everyday Practice*, referenced throughout this comment.[29]

With respect to reforming Section 512, Public Knowledge has also advocated for a number of reforms in addition to those already mentioned in this comment. They include 1) harmonizing §512 by expanding the scope of the safe harbor to cover violations of §§ 1101, 1201, or 1201 by users of the service[30]; and 2) easing the administrative burden on online service providers with respect to designating an agent in order to qualify for the safe harbor.[31]

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[28] 17 U.S.C. § 512(i)(1)(A)

[29] Jennifer M. Urban, Joe Karaganis, Brianna L. Schofield. *Notice and Takedown in Everyday Practice*, (2016) (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628).

[30] *Copyright Reform Act,* 4-6. Internet Blueprint, Strengthening and Improving DMCA Safe Harbors Act § 7.

[31] *Copyright Reform Act,* 6-7. Internet Blueprint, Strengthening and Improving DMCA Safe Harbors Act § 5.

VII. Conclusion

In conclusion, we hope that the Copyright Office gives serious consideration to concerns and calls for reform as raised in this comment.

Respectfully submitted,

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