

Before the
Library of Congress
U.S. Copyright Office
Washington, DC

In re

Section 512 Study: Notice and Request for
Public Comment

Docket No. 2015-7

COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

Pursuant to the notice of inquiry published by the Copyright Office (the Office) in the Federal Register at 80 Fed. Reg. 81,862 (Dec. 31, 2015), and extended at 81 Fed. Reg. 11,294 (Mar. 3, 2016), the Computer & Communications Industry Association (CCIA)¹ submits the following comments on selected questions from the notice regarding the DMCA’s safe harbor provisions, codified at 17 U.S.C. § 512.

I. Introduction

Investment and innovation in the Internet-enabled economy depend heavily upon the liability limitations found in Section 512 of the Copyright Act. According to the Copyright Office’s records, more than 90,000 websites or service providers have sought to comply with the formalities required to receive the protections of the DMCA safe harbors. An even larger number of individuals, small businesses, and large enterprises rely upon safe-harbor dependent service providers to accomplish their daily activities and engage in commerce. As the

¹ CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion. A list of CCIA members is available at <https://www.ccia.net/org/members>.

Department of Commerce Internet Policy Task Force recognized in its recent White Paper,² Congress’s prescience in enacting the DMCA safe harbors allowed the U.S. Internet economy to develop into a leading export industry,³ even in spite of the chilling effects of current copyright remedies.

II. General Effectiveness of Safe Harbors

1. *Are the section 512 safe harbors working as Congress intended?*

Yes. The safe harbors are working in accordance with Congress’s intentions to provide legal certainty to a broad range of service providers, in order to avoid chilling innovation in the development of online services. Congress was “loath to permit the specter of liability to chill innovation that could also serve substantial socially beneficial functions,” *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1014 (9th Cir. 2013), and enacted Section 512 to guarantee “greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.” *See Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (quoting S. REP. NO. 105-190, at 20 (1998)).⁴ On at least four separate occasions, Congress indicated the intended breadth of the DMCA safe harbors, that they should “protect qualifying service providers from liability for all monetary relief for direct, vicarious and contributory infringement.” H.R. REP. NO. 105-796, at 73 (1998); S. REP. NO. 105-190, at 20, 40 (1998); H.R. REP. NO. 105-551, pt. 2, at 50 (1998).

² Department of Commerce Internet Policy Task Force, *White Paper on Remixes, First Sale, and Statutory Damages: Copyright Policy, Creativity, and Innovation in the Digital Economy* (Jan. 2016), at 79-82, <http://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf>.

³ Matthew Le Merle *et al.*, *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study* (Booz & Co. 2011), at 6, <http://static1.squarespace.com/static/5481bc79e4b01c4bf3ceed80/t/54877560e4b0716e0e088c54/1418163552585/Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>.

⁴ “[B]y limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.” S. REP. NO. 105-190, at 8 (1998).

In addition, the DMCA has also succeeded in fostering voluntary collaboration between service providers and rightsholders, resulting in the development of various DMCA-related content protection efforts. These include best practices for advertisement and payment networks, the Copyright Alert System, and what scholars have referred to as “DMCA-Plus” efforts, which include methods such as filtering against valid reference content and demotion signals in search engines.

While complaints that the DMCA safe harbors “do not work” are at times advanced by rightsholders who would prefer to shift more enforcement costs onto intermediaries, these complaints lack empirical evidence. By contrast, there is substantial economic research demonstrating the widespread use of the DMCA, and a corresponding impact of the safe harbors on investment, innovation, as well as related collaboration between service providers and rightsholders that would not otherwise be possible.⁵

2. *Have courts properly construed the entities and activities covered by the section 512 safe harbors?*

Yes. The Section 512 safe harbors have been correctly interpreted to permit a broad variety of services in the Internet sector to contribute substantially to the U.S. economy.

This is consistent with Congress’s intent that Section 512 be a forward-looking statute, so as to encourage investment in innovative services that did not yet exist in 1998. In litigation over the DMCA safe harbors, courts have explored at length what Congress intended the DMCA to achieve. *See, e.g., UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1021 (9th Cir. 2013) (citing S. REP. NO. 105-190, at 8) (“Further, Congress’ express intention that the DMCA ‘facilitate making available quickly and conveniently via the Internet ... movies, music,

⁵ *See, e.g.,* Matthew Le Merle *et al.*, *see supra* note 3; Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* (Analysis Group 2011), http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/lerner_fall2011_copyright_policy_vc_investments.pdf.

software, and literary works’ — precisely the service Veoh provides — makes us skeptical that UMG’s narrow interpretation of § 512(c) is plausible.”⁶

Some litigants have unsuccessfully urged courts to adopt an “originalist” view of Section 512, construing the statute narrowly and contrary to Congress’s intention. Keeping true to the statute’s goals, however, courts have generally applied it to new services that were not specifically foreseen in 1998. This has included photo and video hosting, image search, real estate listings, and virtual marketplaces, among others. Rulings to the contrary would have had the perverse result of favoring incumbent businesses over new entrants, and disincentivizing newer online services from assisting rightsholders with the expeditious removal of allegedly infringing works.

3. *How have section 512’s limitations on liability for online service providers impacted the growth and development of online services?*

The certainty provided by the DMCA safe harbors has led to a thriving Internet industry. Today, DMCA-reliant Internet services represent a substantial portion of the U.S. economy, and provide critical services to many other segments of the economy.⁷ The DMCA is essential to this Internet economy. The Internet sector and its many users – both individual and commercial – depend upon robust and unambiguous safe harbors. All websites, from the largest to the smallest, that enable user comment are platforms for communication and thus have potential liability exposure. The Copyright Office’s database of online services that have complied with

⁶ See also *Viacom Int’l v. YouTube, Inc.*, 718 F. Supp. 2d 514, 519-24 (S.D.N.Y. 2010) (providing an in-depth analysis of legislative history and Congressional intent in enacting the DMCA).

⁷ See, e.g., David Dean *et al.*, *The Internet Economy in the G-20: The \$4.2 Trillion Growth Opportunity* (Boston Consulting Group 2012), <https://www.bcg.com/documents/file100409.pdf>; Matthieu Pélissier du Rausas *et al.*, *Internet matters: The Net’s sweeping impact on growth, jobs, and prosperity* (McKinsey Global Institute 2011), http://www.mckinsey.com/insights/high_tech_telecoms_internet/internet_matters; James Manyika & Charles Roxburgh, *The great transformer: The impact of the Internet on economic growth and prosperity* (McKinsey Global Institute 2011), http://www.mckinsey.com/insights/high_tech_telecoms_internet/the_great_transformer.

formalities in order to receive the protections of the DMCA has surpassed 90,000 entries,⁸ ranging from household names to small and medium-sized enterprises (SMEs). The thousands of entities that rely on the 512 safe harbors include a wide breadth of companies and organizations, providing a diversity of services to individuals and other companies. DMCA compliance is critical to the biggest publications and the smallest blogs or personal websites, as well as online communities, social media, and services that allow uploading of user-generated content. This framework is so crucial to the market for online services that it is incorporated as a binding bilateral obligation in numerous U.S. Free Trade and Trade Promotion Agreements so as to remove impediments to market entry.⁹

Not surprisingly, due to the diversity of stakeholders who depend upon the DMCA, a variety of implementation approaches have evolved, with some implementing a “classic” notice-and-takedown system while others build more elaborate systems on top of the DMCA framework, optimized to expedite takedowns on the particular platform in question.

4. *How have section 512’s limitations on liability for online service providers impacted the protection and value of copyrighted works, including licensing markets for such works?*

Section 512 has dramatically increased the ease by which content creators can reach new audiences and markets. The economy-transforming platforms made possible by Section 512 have created extensive new markets for creators that would not have existed otherwise. From software app stores to short- and long-form video platforms, to self-publishing ebook

⁸ See U.S. Copyright Office, *Directory of OSP Designated Agents*, http://www.copyright.gov/onlinesp/list/a_agents.html (last visited Feb. 3, 2016).

⁹ See OECD, *The Role of Internet Intermediaries in Advancing Public Policy Objectives*, at 15 (2011), available at <http://dx.doi.org/10.1787/9789264115644-en>. The growth of U.S. services exports relative to competitors abroad may be attributed in part to the fact that some U.S. trading partners do not sufficiently limit intermediary liability. See Martin H. Thelle & Svend T. Jespersen, “Online Intermediaries: Assessing the Economic Impact of the EU’s Online Liability Regime,” at 7 (2012), <http://www.europeandigitalmedia.org/uploads/Press/documents/Copenhagen%20Economics-Online%20Intermediaries-201201.pdf>.

marketplaces, numerous platforms utilizing Section 512 have disintermediated gatekeepers and dramatically lowered barriers to entry in the content creation sector.¹⁰

At the same time, Section 512 provide individual rightsholders with rapid, *ex parte* extrajudicial remedies to suppress allegedly infringing content with a mere email – action that would have previously required legal counsel to draft demand letters and register works for suit. Today an individual may obtain within hours the equivalent of a preliminary injunction with no legal fees nor legal process at all. In fact, as discussed further below in response Questions 7 and 12, the raw power of this tool is so significant that it is abused with considerable frequency.

5. *Do the section 512 safe harbors strike the correct balance between copyright owners and online service providers?*

The safe harbors strike the balance intended by Congress. The compromise at the heart of the DMCA imposes upon service providers the costs of responding to large volumes of complaints, both justified and unjustified, in exchange for liability limitations. It guarantees to rightsholders rapid, *ex parte* extrajudicial relief from specific acts of alleged infringement upon affirmatively reporting those acts. Congress enacted this regulatory regime that mutually burdens and benefits rightsholders and service providers to provide certainty and encourage “the necessary investment in the expansion” of the Internet.¹¹

Given the lack of official information regarding ownership of works and the licensing of their respective rights, any workable system for extrajudicial enforcement must begin with a notification from a rightsholder, identifying the work and asserting that the use in question is unauthorized. Congress recognized that rightsholders were the only authoritative source of

¹⁰ See generally Michael Masnick *et al.*, *The Sky is Rising 2014*, <https://www.cciacnet.org/wp-content/uploads/2014/10/Sky-Is-Rising-2014.pdf> (surveying new outlets for content creation in various sectors); see also, e.g., Todd Spangler, *New Breed of Online Stars Rewrite the Rules of Fame*, VARIETY, Aug. 5, 2014, <http://variety.com/2014/digital/news/shane-dawson-jenna-marbles-internet-fame-1201271428/>;

¹¹ S. REP. NO. 105-190, at 8 (1998).

ownership and licensing information, and were thereby the “least cost avoider” for purposes of initiating the complaint process.¹²

Prior to that point, however, online intermediaries are not free from burden if they seek to benefit from the safe harbors. For being vendors of neutral technology, service providers have a range of obligations unprecedented in copyright regulation. Service provider obligations include: (1) developing a compliance program that “expeditiously” facilitates the takedown of allegedly infringing content upon actionable notice by rightsholders or their authorized representatives; (2) designating “an agent to receive notifications of claimed infringement,” *see* 17 U.S.C. § 512(c)(2); (3) adopting and implementing a policy to terminate access to repeat infringers, 17 U.S.C. § 512(i); and (4) accommodating “standard technical measures,” should a consensus standard be in use, 17 U.S.C. § 512(i)(B).¹³

III. Notice-and-Takedown Process

6. How effective is section 512’s notice-and-takedown process for addressing online infringement?

Notice and takedown processes are an effective tool for obtaining expeditious removal of specific content, but it would be a mistake to conclude that Congress intended Section 512 to provide a comprehensive panacea to online infringement. As the Commerce Department has noted, the digital distribution of content is a crucial component to ensuring Internet users consume lawfully licensed content.¹⁴ In 1995, the National Information Infrastructure Task Force “White Paper” observed the importance of rightsholders “mak[ing] works available

¹² Courts have “decline[d] efforts] to shift a substantial burden from the copyright owner to the [service] provider”. *See, e.g., Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007).

¹³ Some commenters misinterpret § 512(i) to impose an obligation to create “standard technical measures.” The statute imposes no such obligation. Since technical measures are defined as the product of an inter-industry standard-setting effort, measures unilaterally implemented will not meet the statutory definition. *See* § 512(i)(2)(A).

¹⁴ Department of Commerce Internet Policy Task Force, *Copyright Policy, Creativity, and Innovation in the Digital Economy* (July 2013), at 77-78, <http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf>.

through the NII”.¹⁵ Indeed, enabling digital distribution is the White Paper’s primary rationale for legal protection for technological protection measures. In the absence of reasonable digital distribution strategies, Section 512 alone cannot be expected to generate sales of content.¹⁶

One frequent but counter-intuitive complaint about Section 512 is that the increasing volume of complaints indicates that the system is not useful in combating piracy. Online services’ transparency reports and other data bear out that takedowns are increasing in volume; research from 2014 found that the number of DMCA notices processed by Google increased 711,887% in four years, from 62 in 2008 to 441,370 in 2012.¹⁷ One cannot deduce that the DMCA does not “work” from the fact that more rightsholders are using it with greater frequency, however.

Setting aside the inherent contradiction in contending that takedown submitters derive no value from something they do at an increasing rate, this complaint advances a logical fallacy: that more notices correlates with more piracy. This is not the case. As technology and enforcement vendors make sending notices more efficient and less expensive, the rate of notices has risen. The growth in notices thus does not reflect an increase in infringement. Rather, it illustrates that free, automated tools developed by service providers and a growing market of enforcement vendors have reduced cost, increased efficacy, and thus increased demand for takedowns. At least one startup is now providing a (currently free) web-based takedown tool.¹⁸ Even rightsholder entities are now investing directly in antipiracy tools to maximize the value of notice and takedown systems: PRS for Music, for example, recently announced a notice and

¹⁵ Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* (Sept. 1995), at 10, 178; <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf>

¹⁶ See S. REP. NO. 105-190, at 66 (1998); H.R. REP. NO. 105-551, pt. 2, at 21-23 (1998).

¹⁷ Daniel Seng, *The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices*, 18 VA. J.L. & TECH. 369 (2014).

¹⁸ See <https://blasty.co/> (last visited Mar. 25, 2016).

takedown forwarding tool for its members, providing further evidence that the DMCA is a useful component of the copyright system.¹⁹

A strong defense in the form of DMCA systems must be complemented by a strong offense in the form of lawful digital distribution. Research has found that piracy rates have been falling steadily since 2005,²⁰ particularly when legitimate services such as Spotify and Netflix enter the market.²¹ This substantiates the point that a strong marketplace offense is the best defense. Unfortunately, all too frequently digital distribution is relegated to the tail end of long scheduled of “windowed” releases, such that some users are less willing to pay a premium price for digital services that lack access to premium content.²² While licensors often point to a large volume of licensed *services*, this says nothing about whether those services have access to sought-after works. Many do not. In fact, the selective withholding of high-profile artists or works often results in content being available on no platform.²³ Ultimately, the raw number of digital distributors alone is not an adequate indicator of the success of online distribution strategies. If a large quantity of stores are sparsely populated with content, that should be regarded as a policy failure, not an accomplishment.

¹⁹ Music Business Worldwide, *PRS For Music launches new anti-piracy tool MAPS*, Mar. 1, 2016, <http://www.musicbusinessworldwide.com/prs-for-music-launches-new-anti-piracy-tool-maps/>.

²⁰ NPD Group, *Increased use of free music streaming services takes a bite out of illegal peer-to-peer music file sharing activity.*, (Feb. 2012), <https://www.npd.com/wps/portal/npd/us/news/press-releases/the-npd-group-music-file-sharing-declined-significantly-in-2012/>.

²¹ Will Page, *Adventures in the Netherlands*, Spotify, July 17, 2013, <http://press.spotify.com/uk/2013/07/17/adventures-in-netherlands>; Sophie Curtis, *Spotify and Netflix Curb Music and Film Piracy*, THE TELEGRAPH, July 18, 2013, <http://www.telegraph.co.uk/technology/news/10187400/Spotify-and-Netflix-curb-music-and-film-piracy.html>.

²² Economists and analysts suggest that in addition to inducing more piracy, the windowed distribution model may result in a net loss for industry, *see, e.g.*, Michael Smith & Rahul Telang, *Delaying content leaves money on the table*, THE HILL, Nov. 29, 2011; Ryan Lawler, *Survey says: Hollywood could make more money without windows*, GIGAOM, Feb. 3, 2012, <https://gigaom.com/2012/02/03/cmon-hollywood-collapse-windows/>.

²³ *See* Ben Sisario, *So Much Streaming Music, Just Not in One Place*, N.Y. TIMES, March 18, 2016, <http://www.nytimes.com/interactive/2016/03/16/business/media/so-much-music-streaming-just-not-one-place.html>.

7. *How efficient or burdensome is section 512's notice-and-takedown process for addressing online infringement? Is it a workable solution over the long run?*

While the volume of DMCA takedowns has increased over time, which represents an increasing burden for online service providers, most in the industry recognize DMCA compliance as a mark of good corporate citizenship. The increased volume of DMCA takedowns and the rise of the enforcement vendor industry indicates that rightsholders see utility in submitting them, and also generally illustrates the overarching importance of the Internet in the modern economy. The Internet has grown in significance over the intervening 15 years, and now enables almost \$8 trillion in commerce each year.²⁴

To the extent that the volume of takedown notices can be reduced, it is best minimized by (a) reducing misuse of the DMCA system, (b) ensuring that consumers have more options for lawful access to content, given that a significant portion of online infringement results from the lack of lawful options in the marketplace, and (c) embracing new business models for content distribution.

In the Department of Commerce multistakeholder process and subsequently, several CCIA members have expressed a view to the effect that ‘99% of DMCA response resources are spent on 1% of the takedowns.’ Recently released research by Urban *et al.* confirmed this sentiment in an industry survey; one online service indicated that 7-8% of takedown demands referred to material not on its servers.²⁵ In fact, the authors’ research identified that during a 6-

²⁴ See Dean *et al.*; du Rausas *et al.*; James Manyika *et al.*, *supra* note 7.

²⁵ See Jennifer Urban *et al.*, *Notice and Takedown in Everyday Practice*, at 39 (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628 (“staff invests a great deal of time and effort evaluating notices that eventually prove to be ‘false positives’”; another respondent “stating that some senders send takedown requests for material that was removed a year or two before the notice was sent”).

month period, just five submitters collectively issued *over 70,000* takedown demands regarding websites that had been offline for over 18 months.²⁶

Incorrect, incompetent, or incomplete notices, not to mention willful abuse of the system, occupy a disproportionate share of DMCA compliance resources that might otherwise be directed to providing expeditious service to responsible submitters. The time in which a competent, complete, and accurate takedown can be processed is relatively low. The costs associated with proving that an incorrectly identified file *does not exist*, or with documenting that the submitter is a company attempting to suppress the website of a competitor, are far greater. These costs are borne by all users in the form of less expedient responses. Because DMCA notices are free to submit and penalties for incompetence and malicious takedowns are trivial, all submitters are faced with a collective action problem, which encourages inefficient use or misuse of a shared resource.

While many online services have sophisticated web-based DMCA systems with elaborate APIs to enable automation, DMCA compliance for many smaller services involves manual processing.²⁷ Intermediaries are invariably compelled to receive and process some percentage of takedown notices manually using email, fax, or other contact information obtained from the Office's OSP database, whereas rightsholders — including individuals — will increasingly submit automatically using various software tools and enforcement vendors.

8. *In what ways does the process work differently for individuals, small-scale entities, and/or large-scale entities that are sending and/or receiving takedown notices?*

As is the case with most complex regulatory systems, smaller enterprises and individuals will find compliance with the DMCA process more difficult than larger ones. Larger

²⁶ *Id.* at 90, fig. 6. This behavior violates the Commerce Department's Statement of Practices. *See infra* note 29.

²⁷ *Id.* at 29-30.

rightsholders may outsource the task of issuing takedowns to more specialized entities, and larger online services can deploy expensive systems like YouTube's ContentID. Individuals and SMEs, on the other hand, generally must send and respond to notices manually. As noted in response to Question 7, smaller submitters may more easily automate than smaller receivers. Whereas enforcement vendors may be enlisted by SME content producers, including representative societies and associations, small intermediaries cannot as easily automate their actions in response to takedown requests, which may arrive by multiple channels and may be incomplete, erroneous, or fraudulent. Compared to the pre-DMCA environment, however, the status quo is nevertheless a marked improvement for individuals and small creators, and certainly preferable to general civil litigation.

The statute partially anticipates that DMCA submitters and recipients will have different degrees of sophistication. It uses the term "substantially" to avoid cases where mere formalistic objections might invalidate notices, or counter-notices under § 512(g)(3). Individuals and SMEs who make trivial errors in notices are not penalized regarding notices that are nevertheless sufficient to enable the service provider to locate the allegedly infringing material. Agent designations under § 512(c)(2) are also governed by a substantial compliance standard. The statute also uses the term "expeditious" to characterize the speed with which notices must be processed. What constitutes "expeditious" will naturally vary, such that small service providers or individuals are not held to the same standard as large service providers.

9. *Please address the role of both "human" and automated notice-and-takedown processes under section 512, including their respective feasibility, benefits, and limitations.*

See, in pertinent part, CCIA's responses to Questions 7 and 12.

10. *Does the notice-and-takedown process sufficiently address the reappearance of infringing material previously removed by a service provider in response to a notice? If not, what should be done to address this concern?*

Yes. Existing processes sufficiently address the reappearance of content. Considering the statutory processes in isolation from the array of inter-industry processes and mechanisms that surround DMCA compliance (including those referred to as “DMCA-Plus”) will present an incomplete picture, however. Further, given the broad diversity of platforms envisioned by the DMCA, no one response to this question can describe the processes of thousands of services that rely upon the DMCA.

While complex systems designed to filter against rightsholder-supplied reference content can work in some contexts, many platforms cannot afford to deploy schemes like YouTube’s \$60 million-dollar Content ID system,²⁸ and any obligation to do so would merely entrench a few platforms behind a steep barrier to entry. Moreover, any system that attempts to permanently prevent content from being uploaded (sometimes described as “notice-and-staydown”) risks censoring legitimate uses. Preventing content from being re-posted will foreclose fair uses and other permissible uses of copyrighted material that are contextually permissible (*e.g.*, while a clip from a film or song may infringe, the identical segment may nevertheless be permissible cultural criticism, commentary, review, parody, or classroom use).

11. *Are there technologies or processes that would improve the efficiency and/or effectiveness of the notice-and-takedown process?*

As the Office is aware, the Department of Commerce recently spearheaded an extensive multi-year effort engaging a range of large and small stakeholders around the country with

²⁸ See Testimony of Katie Oyama, Sr. Copyright Policy Counsel, Google Inc. House Judiciary Subcomm. on Courts, Intellectual Property, and the Internet, *Hearing on Section 512 of Title 17*, Mar. 13, 2014, at 6, <https://judiciary.house.gov/wp-content/uploads/2016/02/031314-Testimony-Oyama-1.pdf>; see also Urban *et al.*, *supra* note 25, at 121, 125 (noting that surveyed small and medium-sized intermediaries fear technology mandates that only their larger competitors can afford to implement).

interests in the DMCA safe harbors. These entities, having experience in sending and receiving notices, participated in a series of multistakeholder meetings organized by Commerce’s Internet Policy Task Force to discuss ways to improve practices under the DMCA safe harbors. Participants ultimately released a final document last year.²⁹ The Office should take advantage of this work product, which was the result of considerable investment in the resources of a diverse group of stakeholders.

12. *Does the notice-and-takedown process sufficiently protect against fraudulent, abusive or unfounded notices? If not, what should be done to address this concern?*

No. The notice-and-takedown process does not sufficiently protect against abuse. Academic research published some years ago using a limited dataset found that “over half—57%—of [DMCA takedown] notices sent to Google to demand removal of links in the index were sent by businesses targeting apparent competitors”.³⁰ More recently, a 2015 study identified the various types of errors, both “technical” and “substantive,” made by content providers and their agents when issuing takedowns.³¹ This research found that 8.3% of takedown demands in the study period failed to comply with the statutory requirements of Section 512(c)(3). In addition, more than 1% of demands were “substantively” improper. These takedown demands, nearly 800,000 during the study period alone, misidentify the rightsholder,

²⁹ Department of Commerce DMCA Multistakeholder Forum, *DMCA Notice-and-Takedown Processes: List of Good, Bad, and Situational Practices* (Apr. 2015), http://www.uspto.gov/sites/default/files/documents/DMCA_Good_Bad_and_Situational_Practices_Document-FINAL.pdf.

³⁰ Jennifer M. Urban & Laura Quilter, *Efficient Process or 'Chilling Effects'? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621 (2006).

³¹ Daniel Seng, *'Who Watches the Watchmen?' An Empirical Analysis of Errors in DMCA Takedown Notices*, at 32, Jan. 23, 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2563202.

provide incorrect data, or otherwise showed evidence of being an erroneous automated demand which no human had considered before its transmittal.³²

The most recent data published by Urban, Karaganis, and Schofield discussed above and in response to Question 7, *supra*, confirm what these preceding studies illustrate: a serious and widespread problem. These scholars' review of over 100 million takedown demands found serious flaws. Among many other concerns, the review found that over 4% of demands (an estimated 2 to 7 million takedowns) "were fundamentally flawed because they targeted content that clearly did not match the identified infringed work."³³ The study also found that 28.4% of takedown demands – an estimated 28 to 33 million – "had characteristics that raised clear questions about their validity, based solely on the facial review."³⁴

In a separate survey of Google Image Search takedown requests, Urban *et al.* report equally troublesome findings. Thousands of demands sent to Google Image Search during the survey period came from one European individual attempting to suppress content that she alleged to be defamatory or harassing (not infringing). Even when the authors controlled for this individual, the study still found that a large percentage of the remaining notices were improper. A significant number of the requests raised substantive concerns, including possible fair use defenses (11.6%), attempts to use the DMCA to address improper subject matter like privacy concerns or defamation (15.1%), issues with who owned the copyright (6.1%), a failure to appropriately identify material (2.9%), or material being public domain or otherwise not

³² *Id.* at 45.

³³ Urban *et al.*, *supra* note 25 at 88; *see also* Caitlin Dewey, *How We're Unwittingly Letting Robots Censor the Web*, WASH. POST, March 29, 2016, <https://www.washingtonpost.com/news/the-intersect/wp/2016/03/29/how-were-unwittingly-letting-robots-censor-the-web/>.

³⁴ *Id.* at 93-97.

copyrighted (1%).³⁵ Counting this individual, 70.2% of the takedown demands raised substantive questions, and even without considering her demands, 36.8% of demands still raised other substantive issues. For example, notwithstanding conventional understandings regarding the territoriality of copyright law, Urban *et al.* observed what might be considered “takedown tourism,” where large numbers of demands originate from foreign rightsholders and are aimed at non-U.S. originating content.³⁶ Ultimately, the authors concluded that “mistakes and misuse were a disappointingly strong feature of the [Image Search] notices.”³⁷ The consistent theme of the empirical research presents a cautionary tale regarding overreliance on unsupervised automated takedown generators. They also dispel unsubstantiated claims that cases of errors or misuse of the DMCA are infrequent or small in number.

These empirical findings are consistent with substantial anecdotal evidence of businesses, governments, and individuals using the DMCA to stifle speech and competition. Since the 2004 *Online Policy Group v. Diebold* decision, in which a voting machine manufacturer attempted to use DMCA takedowns to suppress leaked corporate emails revealing the company knew of security flaws in its products,³⁸ numerous examples of fraudulent or at least incompetent takedowns of political speech have been well-documented. Particularly egregious examples in more recent years include what appears to be deliberate state-directed censorship by a Spanish firm on behalf of the Ecuadorian government,³⁹ takedowns of the State of the Union address

³⁵ Many of these behaviors violate the Commerce Department’s Statement of Practices, *see supra* note 29, at sec. II.B.2-7.

³⁶ *Id.* at 100-02.

³⁷ *Id.* at 110.

³⁸ 337 F. Supp. 2d 1195 (N.D. Cal. 2004).

³⁹ Alexandra Ellerbeck, *How U.S. copyright law is being used to take down Correa’s critics in Ecuador*, COMMITTEE TO PROTECT JOURNALISTS BLOG, Jan. 21, 2016, <https://cpj.org/blog/2016/01/how-us-copyright-law-is-being-used-to-take-down-co.php>; Simeon Tegel, *Ecuador: Is President Using U.S. Law To Silence Online Critics?*, NBC NEWS, Jan. 19, 2015, <http://www.nbcnews.com/news/latino/ecuador-president-using-u-s-law-silence-online-critics-n288881>; Maira Sutton, *State Censorship by Copyright? Spanish Firm Abuses DMCA to Silence Critics of*

from cached WhiteHouse.gov pages by a British recording industry association,⁴⁰ and an attempt by an anti-gay group to suppress an interview that reflected poorly on the group's agenda.⁴¹ The ill-fated dating service Ashley Madison attempted to use the DMCA's notice and takedown mechanism as a form of damage control after a data breach led to customer records being made available online.⁴² Terrorists have allegedly tried to use the DMCA to silence online critics.⁴³ A state law enforcement organization attempted to use a takedown to de-index from search engines its own web-based login page.⁴⁴

Takedown submitters have targeted content for which no protection is available. For example, Ashley Madison's attempt to address its data breach with the DMCA, and an oil industry group successful effort to prevent traders from sharing sensitive price data on Twitter both flouted the well-established principle that copyright does not extend to mere data.⁴⁵

Takedown submitters also target content they do not own. In covering a popular Twitter account being harassed by a "troll" with false takedown demands, the Washington Post observed that the situation "has raised some serious questions about whether it's simply too easy for pranksters to

Ecuador's Government, ELECTRONIC FRONTIER FOUNDATION, May 15, 2014, <https://www.eff.org/deeplinks/2014/05/state-censorship-copyright-spanish-firm-abuses-DMCA>.

⁴⁰ DMCA (Copyright) Complaint to Google from BPI (British Recorded Music Industry) Ltd on behalf of BPI LTD MEMBER COMPANIES, Lumen Database, Dec. 3, 2015, Copyright claim #38, <https://www.lumendatabase.org/notices/11559468>.

⁴¹ Alex Hern, *WordPress pulls interview with anti-gay group Straight Pride UK*, THE GUARDIAN, Aug. 13, 2013, <http://www.theguardian.com/technology/2013/aug/13/wordpress-straight-pride-uk>.

⁴² David Kravets, *Ashley Madison abusing DMCA "to put genie back in the bottle," EFF says*, ARS TECHNICA, Aug. 27, 2015, <http://arstechnica.com/tech-policy/2015/08/ashley-madison-abusing-dmca-to-put-genie-back-in-the-bottle-eff-says/>.

⁴³ Rob Price, *Terrorists are using DMCA notices to hunt down their YouTube critics*, DAILY DOT, Nov. 6, 2014, <http://www.dailydot.com/politics/dmca-youtube-terrorism-dox-al-hayat/>.

⁴⁴ Tim Cushing, *Police To Google: Make Our Site More Secure By Delisting It*, TECHDIRT, Feb. 17, 2016, <https://www.techdirt.com/articles/20160213/12053033594/police-to-google-make-our-site-more-secure-delisting-it.shtml>.

⁴⁵ Georgi Kantchev, *Twitter Deletes Oil-Data Tweets Following Industry Complaints*, WALL ST. J., Mar. 9, 2016, <http://www.wsj.com/articles/twitter-deletes-oil-data-tweets-following-industry-complaints-1457566322>;

successfully remove content from the Internet by abusing the copyright claim process.”⁴⁶ Even copyright law professors are not immune from being targeted by ill-considered takedowns,⁴⁷ including by rightsholders who should be sophisticated enough to differentiate between an infringer and clips used in a video of a copyright law class.⁴⁸ Automated enforcement vendors have even targeted their clients’ own websites.⁴⁹ Improper takedowns are particularly problematic during election cycles. A 2010 paper documented numerous election-related takedowns,⁵⁰ and similar examples have arisen during more recent campaigns.⁵¹

When hundreds of thousands of substantively improper demands are transmitted in a matter of months, and when terrorists and censorious governments utilize the DMCA to accomplish nefarious ends, it strains credulity to dismiss DMCA misuse as anecdotal or insignificant, simply because the put-back mechanism is impractical – a subject upon which nearly all service providers agree.⁵² While it would be unwise to penalize innocent errors by

⁴⁶ Abby Ohlheiser, *The Internet’s most famous dog rater keeps disappearing from Twitter*, WASH. POST, Feb. 11, 2016, <https://www.washingtonpost.com/news/the-intersect/wp/2016/02/11/the-internets-top-dog-rater-keeps-disappearing-from-twitter/>.

⁴⁷ Mike Masnick, *Not Smart: Warner Music Issues DMCA Takedown On Larry Lessig Presentation*, TECHDIRT, Apr. 28, 2009, <https://www.techdirt.com/articles/20090428/1738424686.shtml>; Mike Masnick, *Larry Lessig Threatened With Copyright Infringement Over Clear Fair Use; Decides To Fight Back*, TECHDIRT, Aug. 23, 2013, <https://www.techdirt.com/articles/20130822/22593124287/larry-lessig-threatened-with-copyright-infringement-over-clear-fair-use-decides-to-fight-back.shtml>.

⁴⁸ Mike Masnick, *Sony Music Issues Takedown On Copyright Lecture About Music Copyrights By Harvard Law Professor*, TECHDIRT, Feb. 16, 2016, <https://www.techdirt.com/articles/20160214/08293233599/sony-music-issues-takedown-copyright-lecture-about-music-copyrights-harvard-law-professor.shtml>.

⁴⁹ Todd R. Hambridge, *The Danger Of Outsourcing DMCA Take-Down Notices*, MONDAQ, Aug. 22, 2013, <http://www.mondaq.com/unitedstates/x/258334/Trademark/The+Danger+of+Outsourcing+DMCA+TakeDown+Notices>.

⁵⁰ Center for Democracy & Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (Sept. 2010), https://www.cdt.org/files/pdfs/copyright_takedowns.pdf.

⁵¹ See, e.g., Ethan Chiel, *The Trump Kids video has been removed from YouTube due to a mysterious copyright claim*, FUSION, Jan. 26, 2016, <http://fusion.net/story/259216/trump-freedom-kids-song-youtube-takedown/>; Matt Schruers, “On Video Takedowns and Copyright’s Temporary Monopoly,” DISRUPTIVE COMPETITION PROJECT, July 20, 2012, <http://www.project-disco.org/intellectual-property/on-video-takedowns-and-copyrights-temporary-monopoly/>.

⁵² Urban *et al.*, *supra* note 25 at 44. (“While some rightsholders expressed some faith in the counter notice process, OSPs mostly considered it a dead letter — impractical and rarely used. All OSPs and at least one

individuals and small enterprises, the DMCA’s penalties for willful misuse can be strengthened. One solution for deterring abuse of the DMCA, proposed by CCIA, is to amend 17 U.S.C.

§ 512(f) to provide statutory awards for willful misrepresentations under the DMCA, similar to the Copyright Act’s penalty for willful infringement under 17 U.S.C. § 504(c).⁵³

13. *Has section 512(d), which addresses “information location tools,” been a useful mechanism to address infringement that occurs as a result of a service provider’s referring or linking to infringing content? If not, what should be done to address this concern?*

This question is addressed by CCIA’s responses to Question 6 and 7.

14. *Have courts properly interpreted the meaning of “representative list” under section 512(c)(3)(A)(ii)? If not, what should be done to address this concern?*

Yes, they have. Section 512’s use of the term “representative list” refers to the work infringed. Courts have consistently and correctly rejected suggestions that a representative list may substitute for the separate statutory requirement of identifying the location of the infringing material.⁵⁴ Were courts to hold otherwise, it would shift onto service providers a burden to affirmatively monitor upon receiving a “representative list,” a burden that would be inconsistent with Section 512(m) and the general structure of the notice and takedown system.

15. *Please describe, and assess the effectiveness or ineffectiveness of, voluntary measures and best practices—including financial measures, content “filtering” and takedown procedures—that have been undertaken by interested parties to supplement or improve the efficacy of section 512’s notice-and-takedown process.*

While content filtering may provide some utility in contexts where rightsholders affirmatively supply signatures or other reference content against which a specific platform can

rightsholder agreed that the counter notice procedure’s practical ability to protect targets is limited. All agreed that the process has major deficiencies.”)

⁵³ CCIA, *Copyright Reform for a Digital Economy* (2015), at 16-17, <https://www.cciagnet.org/wp-content/uploads/2015/08/Copyright-Reform-for-a-Digital-Economy.pdf>.

⁵⁴ See, e.g., *Viacom Intern. Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 529 (S.D.N.Y. 2010); *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1110 (C.D. Cal. 2009); *Capitol Records, Inc. v. Mp3tunes, LLC*, 821 F. Supp. 2d 627, 643 (S.D.N.Y. 2011).

filter, affirmative monitoring is not required by the DMCA, nor should it be. While some larger service providers may have the resources to implement algorithmic mechanisms, smaller competitors do not. Where services have both cause and capacity to affirmatively monitor user-submitted material, Section 512 of the DMCA should not be interpreted to either mandate or dissuade these activities. Services that are capable of moderating user content should be empowered to do so, with the recognition that across the diverse Internet, different services have different capacities. Even if an authoritative database of reference content and rights information existed, certain services are technically constrained, and many lack the resources to affirmatively monitor or filter the nearly incomprehensible volume of communication online. In light of this, Congress did not compel sites to monitor,⁵⁵ but it did not intend to deter moderation by services that could do so. Online services that take more aggressive steps in attempting to moderate online content should not be penalized for these efforts, since “[i]t is clear that Congress intended the DMCA’s safe harbor for ISPs to be a floor, not a ceiling, of protection.” *Costar Group v. LoopNet, Inc.*, 373 F.3d 544, 555 (4th Cir. 2004).

IV. Counter Notifications

In response to Questions 16-18, CCIA refers to Urban *et al.*, discussed *supra* at note 52, and the response to Question 26, *infra*, regarding the subject of the DMCA’s 10-day put-back delay.

⁵⁵ “This legislation is not intended to discourage the service provider from monitoring its service for infringing material. Courts should not conclude that the service provider loses eligibility for limitations on liability under section 512 solely because it engaged in a monitoring program.” H.R. REP. NO. 105-796, at 73 (1998).

V. Legal Standards

19. *Assess courts' interpretations of the "actual" and "red flag" knowledge standards under the section 512 safe harbors, including the role of "willful blindness" and section 512(m)(1) (limiting the duty of a service provider to monitor for infringing activity) in such analyses. How are judicial interpretations impacting the effectiveness of section 512?*

Judicial interpretations of the Section 512 safe harbors have been essential to giving meaningful effect to the statute's protection. Service providers will invariably have general awareness of the possibility that a site can be used to infringe; the very act of establishing a DMCA compliance program and registering an agent for receipt of notices with the Copyright Office indicates such awareness. Given that general knowledge of infringement is likely possessed by all service providers, it is irrelevant to the applicability of the safe harbors. Even in the case of specific uses of specific works, service providers are rarely in a position to know whether a use is licensed, unauthorized, or tolerated because it fits with a marketing strategy.⁵⁶

As noted in CCIA's response to Question 15, Congress was also cognizant of this fact, and limited service providers' liability to cases where they "turned a blind eye to 'red flags' of obvious infringement."⁵⁷ Courts have largely been faithful to Congress's goal. The twin requirements of a blind eye and obvious red flags effectuate Congress's desire to create a high standard for imposing liability, where "general knowledge that [a site] hosted copyrightable material and that its services could be used for infringement is insufficient to constitute a red flag." *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1023 (9th Cir. 2013). While the Second Circuit stated in *Viacom* that a "willful blindness" plays a role in the analysis, see *Viacom Int'l v. YouTube, Inc.*, 676 F.3d 19, 34-35 (2d Cir. 2012), this exact language does not appear in the statutory text. Insofar as a willful blindness standard is applied

⁵⁶ See Tim Wu, *Tolerated Use*, 31 COLUM. J. L. & ARTS 617, 619 (2008).

⁵⁷ S. REP. NO. 105-190, at 48, 52 (1998); H.R. REP. NO. 105-551, pt. 2, at 58 (1998).

to Section 512, it is a necessary but not sufficient condition for waiving the safe harbors' protection; a plaintiff must also demonstrate that the service provider was willfully blind with respect to red flags that indicated obvious infringement. Any interpretation to the contrary would contradict § 512(m)'s unambiguous language that service providers have no obligation to monitor.

20. *Assess courts' interpretations of the "financial benefit" and "right and ability to control" standards under the section 512 safe harbors. How are judicial interpretations impacting the effectiveness of section 512?*

As in the case of the "red flag" requirement, courts' interpretations of the safe harbors have been essential to giving Congress's protections meaningful effect. Plaintiffs have frequently pointed to § 512(c)(1)'s use of terms that resemble common law tests for secondary copyright liability, effectively arguing that allegations which satisfy theories of secondary liability deprive intermediaries of the safe harbors. But it would be absurd to hold this; secondary liability theories were exactly what Congress intended to protect intermediaries from with the DMCA. If a *prima facie* claim of secondary liability could defeat DMCA safe harbors, Congress's effort would be largely meaningless.⁵⁸ Accordingly, courts have understood § 512(c) to necessarily require "something more" than mere allegations of secondary liability, namely, "purposeful, culpable expression and conduct" or "exerting substantial influence" over the specific infringing activity of a user. *See Viacom Int'l*, 676 F.3d at 38.

Were courts to allow plaintiffs to plead past the DMCA safe harbors and impose liability on lawful services that comply with takedown demands, DMCA compliance would wane. Many intermediaries' DMCA compliance programs are implemented in order to receive the benefits of the safe harbors. If the DMCA safe harbors were construed so narrowly as to not apply to lawful

⁵⁸ While it is true that "the limitations on liability contained in 17 U.S.C. § 512 protect secondary infringers as well as direct infringers," *see Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1175 (9th Cir. 2007), the vast majority of cases in which the safe harbors' limitations are relevant include claims of secondary liability.

services, fewer companies would invest in compliance, and a rightsholder whose work was being infringed may not have access to expeditious extra-judicial takedowns. Similarly, if intermediaries abandoned DMCA compliance, the broad industry of enforcement vendors would also likely wither, for there would be little value in retaining a vendor to send takedowns if those takedowns were not honored by some segment of intermediaries. In short, court decisions that have given robust interpretation to § 512(c) have been essential to the safe harbors' effectiveness.

VI. Repeat Infringers

22. *Describe and address the effectiveness of repeat infringer policies as referenced in section 512(i)(A).*
23. *Is there sufficient clarity in the law as to what constitutes a repeat infringer policy for purposes of section 512's safe harbors? If not, what should be done to address this concern?*

In response to Questions 22 and 23, CCIA notes that repeat infringer policies have been implemented far more rigorously than is required by law. Indeed, many service providers and a handful of courts that have considered this question have construed § 512 to refer to repeat *alleged* infringers, instead of repeat *infringers*, the plain language of § 512(i) notwithstanding. That is, the assumption is that the policy should operate when users are accused of infringement, rather than being found to have infringed. It is notable that Congress did not direct intermediaries to terminate repeat *alleged* infringers, but rather repeat *infringers*.

When evaluating repeat infringer programs, it is important to distinguish between different services that may rely upon § 512(a) and those that may rely on §§ 512(b)-(d). The DMCA safe harbors protect a broad diversity of services. While some §§ 512(c)-(d) services provide relatively mundane services, such as casual web forums and comment sections, others provide email services which may be the primary point of contact for government, health care,

and employers. Similarly, a person's broadband services may provide the platform for E-911, home security, and self-employment. In short, terminating access to broadband and communications is not the same as terminating a comment section handle. Having contemplated this possibility in some form, Section 512 uses flexible terminology, allowing service providers to implement "reasonable policies," so as to act on demands "expeditiously," a term that may have different force depending upon the resources of the service provider in question.

VII. Standard Technical Measures

24. *Does section 512(i) concerning service providers' accommodation of "standard technical measures" (including the definition of such measures set forth in section 512(i)(2)) encourage or discourage the use of technologies to address online infringement?*
25. *Are there any existing or emerging "standard technical measures" that could or should apply to obtain the benefits of section 512's safe harbors?*

In response to Questions 24 and 25, CCIA observes that service providers and notice submitters use many technologies to address online infringement. Some services have deployed sophisticated custom technology solutions to provide responsible, verified rightsholders direct access to content, in addition to standard DMCA compliance. As is evident in the discussion of false positives and errant takedown demands, *see* Response to Question 12, *supra*, a wide variety of automated solutions may be found in the marketplace, used both by enforcement vendors and rightsholders themselves. The use of these various technologies is not affected by Section 512(i), which contemplates technical measures developed by an inter-industry standard-setting effort.

CCIA is unaware of any successful or emerging inter-industry technological effort that satisfies the requirements of Section 512(i)(2). In light of the fact that Section 512(i) amounts to a private sector technology mandate that would govern many thousands of diverse platforms, it should not be surprising that no one-size-fits-all system meeting the statute's high standard has

evolved. Voluntary, “DMCA-Plus” measures predominate because the realities of a given service and the local scope of the problem vary greatly. The absence of an inter-industry standard suggests that service providers’ customized solutions, in combination with services provided by the enforcement vendor industry, are satisfying the demand for protection online.

Independent of technical measures, the recent multi-year Department of Commerce multistakeholder project is also relevant to this inquiry, despite not satisfying the statutory language. This agreed statement on practices provides further evidence that voluntary, inter-industry efforts are producing progress toward more efficient and effective takedown administration.⁵⁹

VIII. Remedies

26. *Is section 512(g)(2)(C), which requires a copyright owner to bring a federal lawsuit within ten business days to keep allegedly infringing content offline—and a counter-notifying party to defend any such lawsuit—a reasonable and effective provision? If not, how might it be improved?*

While the Section 512(g) provision may assist rightsholders in keeping content offline while preparing for litigation, it also has the perverse effect of reinforcing the DMCA’s capacity to function as a “heckler’s veto.” Because Section 512(g)(2) makes no exception for fraudulent takedowns, a literal reading of the statute might lead a court to conclude that content must be suppressed for 10 days, even in cases of DMCA misuse, in order to preserve protection under the safe harbors. This can prove problematic when timely access to information is essential, such as political campaigns. For example, in 2008 political advertisements of Sen. McCain’s presidential campaign (among various others) were targeted by ill-considered DMCA takedowns. In response, the McCain campaign complained that the Act does

“not contemplate re-posting of the video until at least 10 and up to 14 days following the receipt of a counternotice — even where the notice is frivolous and

⁵⁹ See List of Practices, *supra* note 29.

the counternotice entirely sound ... But 10 days can be a lifetime in a political campaign, and there is no justification for depriving the American people of access to important and timely campaign videos during that period.”⁶⁰

While the campaign’s proposed solution to this problem—special treatment for political candidates—would only address the injuries of a small fraction of DMCA abuse victims, the complaint nevertheless articulated sound objections to Section 512(g)’s “cooling off period.” This no-reposting period may restrain further communication of the content while the rightsholder evaluates whether to sue, but as the McCain campaign discovered, can also result in the suppression of lawful, socially significant speech for a long period of time. A resolution to this problem could be achieved by enabling service providers to repost content immediately upon receipt of a valid counternotice. Another partial solution, as described in CCIA’s response to Question 12, *supra*, would be to provide statutory remedies for willful misuse of the DMCA process.

28. *Are the remedies for misrepresentation set forth in section 512(f) sufficient to deter and address fraudulent or abusive notices and counter notifications?*

As noted in response to Question 12, CCIA has proposed amending 17 U.S.C. § 512(f) to provide statutory awards for willful misrepresentations under the DMCA, just as the Copyright Act provides for willful infringement under 17 U.S.C. § 504(c).

IX. Other Issues

29. *Please provide any statistical or economic reports or studies that demonstrate the effectiveness, ineffectiveness, and/or impact of section 512’s safe harbors.*

The recently released study by Urban *et al.*, “Notice and Takedown in Everyday Practice,” is directly relevant to this inquiry.⁶¹ In addition, CCIA’s response identifies empirical

⁶⁰ Austin Modine, *McCain begs for YouTube DMCA takedown immunity*, THE REGISTER, Oct. 15, 2008, http://www.theregister.co.uk/2008/10/15/mccain_campaign_wants_youtube_dmca_special_treatment/; Sarah Lai Stirland, *YouTube to McCain: You Made Your DMCA Bed, Lie in It*, WIRED, Oct. 15, 2008, <http://www.wired.com/2008/10/youtube-to-mcca/>; see also *Campaign Takedown Troubles*, *supra* note 50.

research in response to Questions 1, 6, and 12. In addition to this evidence, any literature survey should also reflect the economic value of the DMCA safe harbors. Economic research and surveys of the venture capital sector found that removing safe harbor protections would have a negative impact on investment, and estimated that increasing websites' liability for user-generated content would reduce venture capital investment by more than 80 percent.⁶² A 2014 investor survey confirmed these findings, with 85% of participants agreeing that the risk of large secondary liability judgments, arising from third-party conduct, were a significant concern when investing in digital content intermediaries.⁶³

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⁶¹ See *supra* note 25.

⁶² See Matthew Le Merle *et al.*, *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study* (Booz & Co. 2011), at 19, <http://static1.squarespace.com/static/5481bc79e4b01c4bf3ceed80/t/54877560e4b0716e0e088c54/1418163552585/Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>.

⁶³ Matthew Le Merle *et al.*, *The Impact of Internet Regulation on Early Stage Investment* (Fifth Era 2014), at 20, <http://engine.is/wp-content/uploads/EngineFifthEraCopyrightReport.pdf>.