

Before the
U.S. Copyright Office
Washington, DC

In re

Section 512 Study: Request for
Additional Comments

Docket No. 2015-7

**ADDITIONAL COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION**

Pursuant to the request for comments published by the Copyright Office in the Federal Register at 81 Fed. Reg. 78,636 (Nov. 8, 2016), and the extension published at 82 Fed. Reg. 8,629 (Jan. 27, 2017), the Computer & Communications Industry Association (CCIA)¹ submits the following responses to selected questions in the Office's Request for Additional Comments.

I. Summary

CCIA's views on Section 512 have been conveyed in response to the Office's initial December 31, 2015 Federal Register inquiry;² during the May 2016 New York roundtables;³ in two sets of comments⁴ on the Office's prior notices on DMCA agent designation rulemaking (Docket No. RM 2011-6);⁵ and in the Department of Commerce's Green Paper process, including the multi-year DMCA multi-stakeholder fora which produced the 2015 statement on

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.ccianet.org/members>.

² 80 Fed. Reg. 81,862 (Dec. 31, 2015).

³ U.S. Copyright Office Section 512 Public Roundtable Transcript (May 2, 2016), *available at* https://www.copyright.gov/policy/section512/public-roundtable/transcript_05-02-2016.pdf; U.S. Copyright Office Section 512 Public Roundtable Transcript (May 3, 2016), *available at* https://www.copyright.gov/policy/section512/public-roundtable/transcript_05-03-2016.pdf.

⁴ Comments of Computer & Communications Industry Ass'n, Docket No. RM 2011-6 (Nov. 28, 2011), *available at* <https://www.copyright.gov/docs/online/comments/2011/initial/CCIA.pdf>; Comments of Computer & Communications Industry Ass'n, Docket No. RM 2011-6 (June 23, 2016), *available at* <http://cdn.ccianet.org/wp-content/uploads/2016/06/CCIA-Copyright-Office-Comments-DMCA-512-Designated-Agent-2016.pdf>.

⁵ 76 Fed. Reg. 59,953 (Sept. 28, 2011); 81 Fed. Reg. 33,153 (May 25, 2016).

practices.⁶ Those views remain current; this response supplements CCIA’s prior input with responses to Notice questions where necessary.

As discussed at greater length in CCIA’s initial comments in this docket, economic research demonstrates that the certainty that Congress provided to the then-nascent Internet industry upon enacting the Section 512 safe harbors has encouraged investment and innovation online, enabling a thriving digital economy. Thousands of online services have registered with the Copyright Office in order to receive the protections of the Section 512 safe harbors. Further increasing regulatory compliance burdens, however, will disadvantage small businesses, and might deter them from launching a new service or entering a new market.

II. Characteristics of the Current Internet Ecosystem

1. How should the DMCA system account for diversity of stakeholders

CCIA disagrees with the implication that Section 512 does not already account for stakeholder diversity. A variety of flexible terms in the statute accommodate stakeholders with different capacities. For example, Section 512 uses certain subjective standards, as opposed to fixed requirements, in a way that imposes lighter burdens on less sophisticated stakeholders. It is unlikely that in 1998 service providers would have been able to meet a standard for “expeditious” takedowns measured in hours, but today the average takedown time for many of the larger Internet platforms can be less than one day. Smaller platforms, however, which often lack a dedicated team for DMCA compliance and struggle with takedown demands based on incomplete or ambiguous information, may take longer. The statute’s use of “expeditious” (§ 512(c)(1)(C)) accounts for this: what is “expeditious” for a small Internet startup is unlikely to be “expeditious” for a large global platform. Indeed, this approach also gives large platforms the

⁶ Department of Commerce DMCA Multistakeholder Forum, *DMCA Notice-and-Takedown Processes: List of Good, Bad, and Situational Practices* (Apr. 2015), available at https://www.ntia.doc.gov/files/ntia/publications/dmca_good_bad_and_situational_practices_document.pdf.

flexibility to go beyond their statutory obligations by voluntarily providing more robust tools that vary from the statutory scheme, often integrated into a service-wide content moderation system.

Small startups, however, should not be expected to take on voluntary measures that larger service providers may choose to adopt. In short, voluntary measures should remain voluntary. Services without the resources to implement such measures should not be penalized for lacking the resources of their larger competitors. If the safe harbor protections were interpreted otherwise, it would raise barriers to entry for startups, entrenching existing services behind a compliance moat. Section 512 safe harbors were intended to reduce regulatory burdens in order to encourage investment and innovation, not to deter companies from innovating because of fears of incurring costly new obligations.

Similarly, the subjective standard that has been applied to misrepresentations under Section 512(f) means that at present individuals sending unfounded or erroneous takedowns can escape the penalty for doing so, provided the mistake is in good faith. This provision protects rightsholders without the resources to engage professional enforcement vendors who may innocently submit erroneous takedowns. It is CCIA's view that professional enforcement vendors sending incorrect notices for content that does not infringe or does not exist, however, are still susceptible to penalties under Section 512(f).

Just as the statute imposes a greater burden on more capable providers through the "expeditious" standard, it imposes a greater burden on more capable claimants through Section 512(f). Less capable service providers and claimants, by contrast, are subjected to more flexible standards. When viewed in this manner, the statute is already flexible to a diverse group of stakeholders. As noted in CCIA's initial comments, mandates for filtering or so-called "stay-down" proposals continue to be infeasible. Although more sophisticated service providers have

implemented particular filtering tools in specific contexts, these solutions continue to be platform-specific, and are neither foolproof nor universally applicable.

III. Operation of the Current DMCA Safe Harbor System

3. Measuring the effectiveness of the DMCA safe harbor system

In addition to previously submitted data, the effectiveness of the DMCA safe harbor system may be measured by research showing a relative reduction in copyright litigation due to the mechanism for expeditiously removing infringing content (when controlling for relatively recent litigation surges by copyright “trolls”). The fact that troll-like litigation comprises an increasingly larger share of the federal copyright docket suggests that legitimate rightsholders are relying more upon notice-and-takedown and voluntary monetization measures developed within the industry.⁷

4. Barriers to using notice and counter-notice systems

The conclusions that issued from the Department of Commerce DMCA Multistakeholder Forum process represent an existing repository of stakeholder input about perceived barriers to the use of takedown and counter-notification processes.⁸ This existing record already documents views of both DMCA claimants and service providers, and proposes certain practices aimed at resolving various concerns. One conclusion from this process was that due to the diversity of platforms and services subject to Section 512, parties could not recommend a consensus, standardized takedown form that would realistically accommodate all stakeholders without demanding unreasonable amounts of information. This is contrary to the suggestion in the Office’s Federal Register notice requesting additional comments, which implies that “incentives” could yield more standardized processes across the Internet. The statute already requires

⁷ Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 Iowa L. Rev. 1105, 1108-09 (2015).

⁸ Department of Commerce DMCA Multistakeholder Forum, *DMCA Notice-and-Takedown Processes: List of Good, Bad, and Situational Practices*, *supra* note 6.

standardized inputs (§ 512(c)(3)), and the Commerce Department stakeholders did not recommend pursuing a standardized form beyond the standard inputs required by the statute.

7. Penalties for filing false or abusive notices or counter-notices

Penalties for filing fraudulent or abusive notices exist under Section 512(f). Properly construed, Section 512(f) should be sufficient to deter most abuse. While some courts have interpreted this provision in an unduly narrow fashion, a proper interpretation of the statute would provide deterrent remedies for willful misrepresentations in takedowns.

Properly construed, Section 512 should also entitle service providers to disregard notices from entities known to submit in bad faith. For example, some enforcement vendors pack takedown demands with URLs where no infringing content resides, based on guesses or algorithmic generation, such that DMCA agents may receive numerous demands for allegedly infringing content that does not exist.⁹ While larger online platforms may be able to automate responses to fictitious takedown demands, CCIA members with fewer resources devote considerable attention to chasing down fictitious allegations which could be devoted to more expediently processing real takedowns.

In addition, several felons convicted of fraud have attempted to use the DMCA to censor content in which they do not hold rights, multiple times.¹⁰ Criminal actors are unlikely to be deterred by a statutory penalty, and those engaged in fraudulent schemes may benefit from

⁹ Andy, *Pirate Site With No Traffic Attracts 49m Mainly Bogus DMCA Notices*, TorrentFreak, Feb. 19, 2017, <https://torrentfreak.com/pirate-site-with-no-traffic-attracts-49m-mainly-bogus-dmca-notices-170219/>.

¹⁰ Tim Cushing, *Another Convicted Felon Tries To Use The DMCA Process To Erase DOJ Press Releases About His Criminal Acts*, Techdirt, Jan. 10, 2017, <https://www.techdirt.com/articles/20170108/10023336436/another-convicted-felon-tries-to-use-dmca-process-to-erase-doj-press-releases-about-his-criminal-acts.shtml>; Tim Cushing, *Convicted Fraudster Follows Bogus DMCA Takedowns With Bogus DMCA Takedown Targeting Techdirt Post About His Bogus Takedowns*, Techdirt, Aug. 12, 2015, <https://www.techdirt.com/articles/20150811/08060431909/convicted-fraudster-follows-bogus-dmca-takedowns-with-bogus-dmca-takedown-targeting-techdirt-post-about-his-bogus-takedowns.shtml>. In fact, it is entirely possible that these individuals may have succeeded in suppressing information on other platforms without leaving any public record of the accomplishment.

suppressing information during the 10-day period following a counter-notification during which content may nevertheless not be reposted. Accordingly, service providers should not be compelled to process takedown claims from entities known to invoke Section 512's powers in bad faith. Continuing to allow fraudulent actors to submit illegitimate notices without any penalty wastes resources that could be devoted to legitimate rightsholders' needs.

IV. Potential Future Evolution of the DMCA Safe Harbor System

10. Voluntary measures

As stated above, "voluntary" measures risk discouraging competition and disadvantage smaller services and startups because a service's compliance capacity varies with size and scale. CCIA believes that market participants already have adequate cause to deploy more efficient and less costly mechanisms for removing infringing content. Additional regulatory incentives are not required to motivate stakeholders to optimize DMCA implementation.

12. "Stay-down"

Even the most elaborate voluntary content identification systems will demonstrate some false negatives and positives. Smaller services with limited resources should not be forced to shoulder liability for inevitable false negatives. "Stay-down" obligations would also impose false positive costs on users. Because online content such as commentary and parody may require using pre-existing content in ways permitted by limitations and exceptions, "stay-down" obligations are likely to lead to suppression of content making lawful use of works that were previously the subject of takedown demands.

In this regard, the notice seeking additional comments perpetuates an ambiguity appearing in the first Federal Register notice, regarding the term "stay-down." Comments in

roundtables and citations in the prior notice¹¹ indicate a lack of consensus about what the term “stay-down” refers to. This is attributable to the fact that the term has no basis in Title 17 or international copyright law. Some stakeholders appear to regard “stay-down” as an obligation to prevent all reappearances of a particular protected work, whereas others appear to view the term as referring only to infringing reappearances of that content. Because the notice does not resolve this ambiguity, commenters cannot arrive at a common understanding. As noted above, “stay-down” is not feasible in most cases, would impose costly compliance burdens on service providers, especially startups, and risks harming users due to over-breadth.

Respectfully submitted,

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¹¹ See 80 Fed. Reg. 81,862, 81,865 n.35 (Dec. 31, 2015).