

Before the
United States Copyright Office
Washington, D.C.

In re:

Section 512 Study:
Notice and Request for Public Comment

Docket No. USCO-2015-7

**COMMENTS OF
THE INTERNET ASSOCIATION**

The Internet Association is the unified voice of the Internet economy, representing the interests of leading Internet companies and their global community of users.¹ We are dedicated to advancing public policy solutions to strengthen and protect Internet freedom, foster innovation and economic growth, and empower users. Internet platforms are a global driver of the innovation economy, with Internet industries representing an estimated six percent of U.S. GDP in 2014, totaling nearly \$967 billion.²

Balanced copyright law that provides legal certainty has been instrumental and indispensable in the development and success of Internet platforms, which in turn have fueled growth in traditional creative industries and launched digital services not yet imagined when the Digital Millennium Copyright Act (DMCA) was enacted. Under the shared responsibilities of the notice and takedown system, rights holders and digital platforms alike have flourished as consumers increasingly rely on the Internet for access to legal content. Internet Association member companies depend on the certainty and clarity in Section 512 to provide users and creators access to a broad diversity of content available on a variety of platforms. Protecting the foundational balance in Section 512 is critical for innovation to continue to drive our economy and user empowerment in the 21st century.

¹ The Internet Association's members include Airbnb, Amazon, Coinbase, DoorDash, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Google, Groupon, Handy, IAC, Intuit, LinkedIn, Lyft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Snapchat, Spotify, SurveyMonkey, Ten-X, TripAdvisor, Turo, Twitter, Uber Technologies, Inc., Yahoo!, Yelp, Zenefits, and Zynga.

² Stephen Siwek, *Measuring the U.S. Internet Sector*, Economists Incorporated at 4-5 (Dec. 2015).

I. Executive Summary

- Section 512 of the Copyright Act represents a balanced system between diverse stakeholders. By creating a system of shared responsibilities that ensures clarity and legal certainty, Section 512 provides Internet companies, technology industries, rights holders, creators, and users the tools necessary to grow a robust online ecosystem.
 - The shared goals of copyright protection and technological innovation and scalability led to the development of a future-proof framework that two decades later has proven instrumental in U.S. leadership in Internet growth.
- The DMCA safe harbors have achieved the goal established by stakeholders and policy makers: the Internet has survived and thrived, benefiting Internet platforms, creators, users, and the general public interest.
 - Robust protection of the safe harbor framework is needed even more than during the Internet's infancy, as the diversity, scale, and global accessibility offered by the Internet has grown since its early days.
- The safe harbors allow for flexibility, ensuring that the efficacy of the system and collaborative efforts across different private industries can flourish across both time and technical evolution. To accomplish this, policy makers ensured that all parties were incentivized to participate in the notice and takedown system, and provided a flexible yet robust floor of action from which parties could grow and adapt.
 - Copyright policies must prioritize the public interest and ensure that users have access to legal content in order to protect freedom of expression and encourage new forms of follow-on creative works. To accomplish this, Internet platforms require the flexibilities provided for in Section 512, as courts have widely and correctly recognized.
 - Internet companies are taking action beyond the law, partnering with diverse stakeholders on successful voluntary mechanisms that use innovative and collaborative methods to combat infringement. These critical partnerships depend in part on the flexibility and incentives provided under the safe harbor framework.

II. The safe harbors of Section 512 are working as Congress intended, providing shared responsibilities between parties to promote creativity in the digital age.

During the infancy of the Internet, Congress recognized that safe harbors for Internet companies were essential in fostering growth, innovation, and creativity. Companies in the emerging Internet sector “[i]n the ordinary course of their operations . . . engage in all kinds of acts that expose them to potential copyright infringement liability.”³ A safe harbor was necessary to allow new Internet platforms to scale and innovate, which in turn would provide creators new tools to distribute works of authorship.⁴ To accomplish this, policy makers carefully weighed the interests of diverse stakeholders in establishing the modern notice and takedown system. The adoption of Title II of the Digital Millennium Copyright Act (DMCA)⁵ involved negotiations among rights holders, technology companies, and public interest groups to reconcile the needs of Internet companies and rights holders.⁶

Congress’s intent to foster a thriving online environment for all stakeholders through such a balanced regime was clear:

[the law] will facilitate making available quickly and conveniently via the Internet the movies, music, software, and literary works that are the fruit of American creative genius. It will also encourage the continued growth of the existing off-line global marketplace for copyrighted works in digital format by setting strong international copyright standards . . . by 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.⁷

The safe harbors of Section 512 are carefully crafted responsibilities between rights holders and online service providers for their mutual benefit.⁸ As pillars of the modern Internet, the safe harbors provide rights holders with a quick and efficient

³ S Rep 105-190 at 8 (1998).

⁴ *See Id.*

⁵ Codified as 18 U.S.C. § 512.

⁶ *See, e.g.,* Statement of Senator Hatch, 105th Congress, 144 Cong. Rec. S4884-01 (May 14, 1998)(“Title II, for example, reflects 3 months of negotiations between the major copyright owners and the major OSPs, and ISPs.”).

⁷ S. Rep. No. 105-190, The Digital Millennium Copyright Act of 1998, 106 Cong. 2d (May 11, 1998), <http://digital-law-online.info/lpdi1.0/misc/SRep105-190.pdf>.

⁸ The safe harbor provisions of Section 512 were included in Title II of the Digital Millennium Copyright Act of 1998, Pub. L. 105-304

mechanism necessary to protect exclusive rights while giving Internet platforms the legal certainty necessary to develop and thrive.

To facilitate Internet growth, Section 512 limits liability for responsible online intermediaries arising from third-party activities on platforms. These conditional safe harbors are available in four instances, all of which apply to Internet companies: (1) transitory digital network communications; (2) system caching; (3) information residing on systems or networks at the direction of users; and (4) information location tools. The safe harbors are not absolute. Congress was careful to statutorily incentivize responsible companies to take steps to reduce online infringement. The statute enumerates specific responsibilities that an online service provider must meet in order to qualify for protection against copyright liability. These conditions reflect the intent of policy makers to promote the goals of enforcement of intellectual property law and to provide the legal certainty necessary for Internet intermediaries.

Rights holders were provided an extraordinary mechanism to combat infringement. The law ensures that rights holders have readily available information on how to work with Internet companies, requiring that each service provider designate an agent for the purposes of receiving notice from rights holders.⁹ Service providers are required to expeditiously remove infringing content identified by a takedown request, and meet other conditions that require policies and procedures to combat infringement.

Congress clearly and carefully avoided making Internet companies responsible for monitoring or policing the Internet. The DMCA unambiguously stated that nothing in the intent or language of the safe harbors required “a service provider monitor[ing] its service or affirmatively seek[ing] facts indicating infringing activity.”¹⁰ Conversely, policy makers specifically decided that rights holders – not service providers – should make the decisions about infringing material. Congress did not want to put service providers in the position of trying to make legal determinations about the nature of a work of which they were not the makers or owners.¹¹ Additionally, the robust limitations and exceptions that

⁹ 17 U.S.C. § 512(c)(2).

¹⁰ 17 U.S. C. § 512(m).

¹¹ *See, e.g.*, *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir. 2011); *Viacom Intl. Inc. v. YouTube, Inc.*, No. 07 Civ. 2103 (LLS), 2013 WL 1689071 (S.D.N.Y. April 18, 2013).

exist under United States copyright law empower new, creative forms of expression. Any requirement of service providers to police the Internet would require them to make legal determinations about the nature of any given work.

Service providers are highly incentivized to comply with the requirements set forth under Section 512. The DMCA's limitations on liability have proven successful in driving Internet companies to rigorously enforce lawful takedowns. The cost of failure to comply is too great a risk for Internet companies; it would threaten the very existence of Internet platforms. The scale of use of the DMCA reflects the success of participation in the notice and takedown system: records at the Copyright Office show that over 90,000 online providers have registered in accordance with Section 512 procedures.¹²

Just as Internet platforms rely on the safe harbors as a foundation of their ability to operate, copyright holders increasingly rely on the safe harbors' protection. The Office's Notice of Inquiry discusses the increasing volume of takedown notices, suggesting that such a rise in volume reflects negatively on the effectiveness of Section 512.¹³ An attempt to correlate the volume of notices with the volume of piracy online asserts a false narrative that fails to capture the context and value of Section 512 notices. In fact, the numbers indicate robust success.¹⁴ Technology has advanced over the past two decades to allow rights holders access to cheaper, faster tools that target online content for takedown requests. In addition, Internet companies are adopting easier-than-ever procedures for rights holders to combat infringement. For example, websites like

¹² U.S. Copyright Office, Directory of Online Service Provider Designated Agents, http://www.copyright.gov/onlinesp/list/a_agents.html.

¹³ See U.S. Copyright Office, Section 512 Study: Notice and Request for Public Comment, (published Dec. 31, 2015) (stating “[t]oday, copyright owners send takedown notices requesting service providers to remove and disable access to hundreds of millions of instances of alleged infringement each year... regardless of increasing technological capabilities, stakeholders frequently voice concerns about the efficiency and efficacy—not to mention the overall sustainability—of the system.”).

¹⁴ In its 2010 case against YouTube, Viacom attempted to show the inadequacy of the system by stating that thousands of takedown requests were sent. The Court readily saw this as an indication of the success and efficiency of the system: “[i]ndeed, the present case shows that the DMCA notification regime works efficiently: When Viacom over a period of months accumulated some 100,000 videos and then sent one mass take-down notice on February 2, 2007, by the next business day YouTube had removed virtually all of them.”¹⁴ *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), vacated in part on other grounds, 676 F.3d 19 (2d Cir. 2012)).

Scribd and Pinterest, among others, offer one-click forms that are readily accessible and usable by rights holders of all sizes and resources.¹⁵ Combined, these factors have created an environment where rights holders are capable of exercising the extraordinary tools provided by Section 512. In 2012, Google received about 2 million takedown requests per week. It now receives as many *each day*, totaling nearly 80 million requests in one month in 2016.¹⁶ Other Internet companies experienced similar growth: from 2012 to 2015, Twitter saw over 500 percent growth in the number of takedown notices received.¹⁷ Section 512 remains a powerful piece of the U.S. copyright system, and takedown notice procedures are cheaper and more accessible to rights holders than ever before.

Section 512 strives to encourage use of the takedown provisions while also preventing abuse of the system and protecting the user community. While Section 512 established a clear and efficient mechanism for the removal of material, it also included provisions that require counter notification procedures so that wrongly removed content could be reinstated. Congress also enacted remedies for abusive takedown requests.¹⁸ These careful considerations ensure that the interests of Internet service providers and rights holders are carefully balanced against the public interest: keeping non-infringing material accessible.

The shared responsibilities and complementary objectives of the DMCA safe harbors reflect an equitable relationship between digital platforms and copyright holders: copyright holders notify an Internet company of infringing content, and digital platforms expeditiously remove content after receiving notice. By emboldening digital innovators with legal clarity, Congress created a landscape for creativity—not litigation.¹⁹ The DMCA is a key reason why the Internet has been a success: providing protection from liability for Internet intermediaries has been crucial for the continued development of

¹⁵ See, e.g., Pinterest Copyright Infringement Notification, <http://www.pinterest.com/about/copyright/dmca/>.

¹⁶ Google Transparency Report, Requests to Remove Content (last visited March 26, 2016) <http://www.google.com/transparencyreport/removals/copyright/>

¹⁷ Twitter Transparency Report, Copyright Notices (2015) <https://transparency.twitter.com/copyright-notices/2015/jan-jun>.

¹⁸ The results of such provisions are discussed in detail in Section VIII of this comment.

¹⁹ Section 512 does not preclude copyright holders from seeking damages from the actual infringers responsible for distributing content.

innovative platforms,²⁰ and the equitable and cooperative relationship between rights holders and Internet platforms.²¹ Section 512 created fair reconciliation between the equally important goals of protecting copyrighted works and ensuring that the public and future creators have access to and can innovate in ways that enrich society. As our ecosystem evolves and lines between traditional industries blur, online business models and partnerships between Internet companies and creators benefit from the equitable balance of goals in Section 512.

III. The safe harbors fuel the growth and development of innovative Internet services and have ushered in an era of unprecedented creativity from diverse stakeholders.

(a) The Internet’s Development under Section 512

Even in 1998, the Internet was too vast and growing too rapidly for intermediaries to police it. The ecosystem of Internet platforms subject to the safe harbors, as well as the global community of users and creators that depend on online services, would be put at risk without Section 512 protection for responsible parties. Section 512 allows the Internet to scale by eliminating the constant threat of litigation that pre-dated the DMCA and by not requiring Internet firms to police content. Under Section 512, the online landscape has grown and diversified.

Section 512 built robust certainty for Internet platforms in the United States, allowing them to become the great American export of the 21st Century. In contrast to the barriers to entry that open-ended liability threatened in the Internet’s early commercial years, Section 512 offers a framework for success in the United States where Internet

²⁰ “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).

²¹ See 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.).

intermediaries have transformed the economy.²² Internet services in the United States that were brought to market under the protections afforded by Section 512 continue to be the leading force in the online sector as partners worldwide experience less success under regimes that offer less legal clarity and certainty or place higher legal compliance burdens on online intermediaries.²³ Studies also suggest that U.S. based companies provide two thirds of the world’s “Web 2.0” functions, including advanced user interaction platforms, which will drive future growth.²⁴

In evaluating the efficacy of Section 512, the Office’s Notice of Inquiry refers to a common – but unfounded - corporate rights holder position that “the volume of infringing material accessed via the internet more than doubled from 2010 to 2012, and that nearly one-quarter of all internet bandwidth in North America, Europe, and Asia is devoted to hosting, sharing, and acquiring infringing material.”²⁵ While this point is frequently used to advance arguments against the efficacy of the safe harbors, it is not taken in context and does not diminish the critical role of the safe harbors. The size of the Internet itself is growing: this is most certainly the case in the U.S. where the growth of the Internet as a whole, and the growth of users connected to the Internet, surpasses the growth of infringing activity on a percentage basis.²⁶ Additionally, this claim looks at worldwide

²² See Stephen Siwek, *Measuring the U.S. Internet Sector*, Economists Incorporated at 4-5 (Dec. 2015)(measuring the economic contribution of Internet industries in the United States).

²³ Organization for Economic Cooperation and Development, ‘The Role of Internet Intermediaries in Advancing Public Policy Objectives’ (June 22, 2011) <http://www.oecd.org/internet/ieconomy/48685066.pdf>.

²⁴ Sven Lindmark, *Web 2.0: Where Does Europe Stand?*, European Commission Joint Research Centre Institute for Prospective Technological Studies,12 (2009) <http://ftp.jrc.es/EURdoc/JRC53035.pdf>.

²⁵ See U.S. Copyright Office, *Section 512 Study: Notice and Request for Public Comment*, (published Dec. 31, 2015) (citing David Price, *Sizing the Piracy Universe at 3* (2013), <https://copyrightalliance.org/sites/default/files/2013-netnames-piracy.pdf>).

²⁶ The growth in the number of users connected to the Internet and the growth of the Internet as a whole far surpass the growth of infringing material online. Internet users who reportedly sought infringing content in 2013 accounted for only 16% of Internet users that year. Further, from 2010 to 2012 (the period studied for piracy), the number of Internet users grew by nearly half a *billion*, and the number of websites online *more than tripled*. See *Internet Users*, Internet Live Stats, <http://www.internetlivestats.com/internet-users/> (last visited Mar. 31, 2016); *Total Number of Websites*, Internet Live

infringement: the safe harbors of the DMCA are U.S. based law, and only apply domestically. Although not included in the Notice of Inquiry, the same report quoted also notes that “[i]n some regions, legitimate distribution services have significantly altered the online landscape... growth [of] legitimate streaming sites has helped drive overall levels of bandwidth consumption higher within the US. As a consequence, the relative proportion of bandwidth devoted to piracy has fallen.”²⁷

Studies have shown that as subscribers around the world have increased access to and embrace lawful services, the rate of unauthorized downloading and other infringing activities drops significantly.²⁸ In other words, lawful services are clear competitors to piracy so promoting legal platforms has driven, and will continue to drive, an overall downward trend in infringing activity online.²⁹

In sum, the scale of the Internet’s growth is not an indication that the marketplace has changed substantially such that it requires a new framework or operation: to the contrary, the scale of engagement, diversity of content, and the range of Internet models are hallmarks of the DMCA’s success in fostering an innovative digital environment, not its failure.³⁰

Stats, <http://www.internetlivestats.com/total-number-of-websites/> (last visited Mar. 31, 2016).

²⁷ David Price, *Sizing the Piracy Universe* at 3 (2013),

<https://copyrightalliance.org/sites/default/files/2013-netnames-piracy.pdf>).

²⁸ See, e.g., Michael Ho, Joyce Hung, and Michael Masnick, *The Carrot or the Stick? Innovation vs. Anti-Piracy Enforcement*, The Copia Institute (Oct. 2015)(reporting “the data across several countries strongly supports the carrot approach of encouraging and enabling greater innovation, while finding little support for stricter laws (which may also create other unintended consequences”); see also Nelson Granados, *The War Against Movie Piracy: Attack Both Supply and Demand*, *Forbes* (Aug. 31, 2015), <http://www.forbes.com/sites/nelsongranados/2015/08/31/the-war-against-movie-piracy-attack-both-supply-and-demand/#6a45833b772b> (suggesting improving the supply of legal content competes with piracy, and drives users toward lawful content).

²⁹ See Ho et. al. at 5 (reporting piracy rates as tracked by The Software Alliance have decreased by country from 2005 – 2013).

³⁰ David Kravets, *10 Years Later: Misunderstood DMCA is the Law that Saved the Web*, *Wired Magazine* (Oct. 27, 2008) <http://www.wired.com/2008/10/ten-years-later/>.

(b) Benefits to Creators under Section 512

Section 512 benefits creators and right holders by (1) providing unprecedented ways for content creation and consumption, which is particularly beneficial for small and independent creators; (2) contributing to the overall growth of creative industries; and (3) combating illicit activity by providing a mechanism for expeditious removal and providing consumers legal means of content access.

The balanced responsibilities of Section 512's notice and takedown system have facilitated resurgence in content creation. New platforms exist for content distribution and creation that could not have scaled without the legal certainty provided by Section 512. The Internet offers lower barriers to entry for smaller and independent artists to access larger, more diverse sets of consumers. This in turn has fueled a virtuous cycle of expressive and creative works, and it has democratized access and reach at scale. This so-called "long tail"³¹ of creative content simply could not exist without the Internet.

In the United States, 60% of peak downstream traffic is video from Netflix and YouTube. Netflix now has 60 million paid subscribers worldwide, and YouTube has over one billion users—almost one-third of all people on the Internet—and every day people watch hundreds of millions of hours on YouTube and generate billions of views. Amazon Prime now accounts for tens of millions of members;³² Pandora reports over 80 million active listeners per month and has over 250 million registered users;³³ eBay has more than 162 million active users; and PayPal has 165 million active customer accounts. Creators have unprecedented access to communities of users that would not be possible without diverse Internet services and the content delivery channels they created.

Beyond these platforms that were 'born Internet,' the Internet is now a driver of consumption in previously offline entertainment industries. For instance, digital services account for the majority of consumers' music consumption and online streaming is

³¹ The Long Tail: Why the Future of Business is Selling Less of More, Chris Anderson (2008).

³² Ryan Mac, *On Prime Day, A Closer Look at the Numbers Behind Amazon's Membership Program*, Forbes (July 15, 2015), <http://www.forbes.com/sites/ryanmac/2015/07/15/on-prime-day-a-closer-look-at-the-numbers-behind-amazons-membership-program/>.

³³ Pandora, Historical Detailed Financials - Calendar, Q2 2015 (June 30, 2015), <http://investor.pandora.com/phoenix.zhtml?c=227956&p=irol-irhome>.

rapidly growing.³⁴ Music streams in the United States grew by 32% in 2013 alone.³⁵ The shift to the Internet as a primary means of access has contributed to growth in entertainment industries overall. The worldwide entertainment industry has flourished with these technological advancements, demonstrating staggering growth from \$449 billion in 1998 to \$745 in 2010. Music, movie, television, and books all saw increased production, even during an economic recession. The Internet has not threatened the entertainment industry's survival; it has enhanced its growth and fueled new forms of cultural expression.³⁶

The policies of Section 512 have contributed to combating piracy both by providing rights holders an efficient mechanism to identify and remove infringing content and by encouraging the growth of compliant online services, which drive consumers toward non-infringing content and activity. By giving users more ways to lawfully access content, the use of illicit distribution platforms has dramatically decreased and users have embraced lawful platforms instead. For example, only a few years ago, rights holders complained that pirated works using BitTorrent platforms accounted for 50% of Internet traffic in the U.S. That traffic has been replaced largely by Netflix and YouTube, which represent over 50% of prime time viewing traffic, respectively—BitTorrent traffic has dropped to the single digits. In addition, studies indicate that the introduction of lawful online video and music platforms is typically followed by reductions in online infringement by 50% and 80%, respectively.³⁷

³⁴ Michael Masnick et. al., *The Sky is Rising: A Detailed Look at the State of the Entertainment Industry*, Floor64 (Jan. 2012) <https://www.techdirt.com/skyisrising/>; Joshua P. Friedlander, *News and Notes on 2015 RIAA Shipment and Revenue Statistics* Recording Industry Association of America (March 2016) *available at* <https://www.riaa.com/wp-content/uploads/2016/03/RIAA-2015-Year-End-shipments-memo.pdf> (finding for the first time that online streaming sales have now surpassed digital download sales and account for 34.3% of total sales).

³⁵ U.S. Music Industry Year End Review: 2013, Nielsen (Jan. 17, 2014) <http://www.nielsen.com/us/en/insights/reports/2014/u-s-music-industry-year-end-review-2013.html>.

³⁶ See Masnick at 4-6.

³⁷ *Same Script, Different Context: Increased Access to Legitimate Content Reduces Piracy*, Internet Association (Oct. 17, 2014), <http://internetassociation.tumblr.com/post/100255072928/same-script-different-context-increased-access>.

A 2015 study by Copia of the correlations between laws directed at antipiracy efforts and a reduction in illicit content similarly found that “greater innovation, in the introduction of successful authorized services, appears to lead to noticeable and long-lasting reductions in infringement.”³⁸ Eroding policies that encourage the growth and diversity of legitimate online business models and tools that target infringement would be detrimental to efforts to drive traffic to legal platforms during a time when digital consumption is on the rise amongst users.

Section 512 has not only benefitted content providers, but it has helped advance new markets for content creators. In seeking to advance the Internet’s growth, Congress also intended for Section 512 to benefit creators by enabling new means of content production and consumption. Recognizing increasing preferences for online services, Congress carefully crafted Section 512 to balance the responsibilities and benefits of protecting content online. As a result, creative industries are in an era of exceptional growth and success.

(c) Section 512 enables startups and small businesses to develop and scale.

The safe harbors of Section 512 provide legal confidence for stakeholders of all sizes, offering a quick, efficient, and understandable system for the takedown of infringing material. The clarity and certainty of the shared responsibilities in Section 512 are fundamental to the success of all Internet companies, including startups, in the United States.

Startups are particularly vulnerable to the increased legal risk and uncertainty that may be caused by ill-defined liability regimes that act as barriers to online marketplace entry. Startup funding allocations and investment decisions must balance the resources necessary to operate and grow a business with the costs associated with legal risk. When resources are diverted to legal compliance costs associated with increased litigation for intellectual property claims, Internet companies are less likely to launch new business models. They may even be more likely to diminish features that provide opportunities for content creation and marketplace access. Combined, these facts chill innovation and raise entry barriers for startups and creators.

³⁸ Ho et. al. at 5 (Oct. 2015).

Startups depend on willing investors to seed companies with the financing necessary to operate and expand innovative services. Investors, in turn, must thoroughly examine and consider not only the factors internal to a business, but also the external factors, including legal risk and compliance to determine the worthiness of investing in startups. A 2011 analysis by Booz & Company entitled “*The Impact of U.S. Internet Copyright Regulations on early Stage Investment: A Quantitative Study*,” examined the willingness of investors to provide funding to startups under varying degrees of liability limitations provided by different intellectual property infringement regimes. The report interviewed over 200 accredited and prominent angel investors and venture capitalists, which comprise the primary source of early stage funding for entrepreneurial activity in the United States.³⁹ The report found that if online intermediaries were responsible for the content uploaded by users, 81% of angel investors would be less interested in investing in these digital business models.⁴⁰ These results were echoed by a more recent 2014 study by Engine. Of the potential investors surveyed, 85% agreed that potentially legal uncertainty and damages made them uncomfortable as early stage investors in digital content intermediaries.⁴¹

Ambiguity in the law or in the ways service providers can take advantage of the protections of Section 512 similarly threaten online business models. Under Section 512, the bright line rules are sufficiently clear enough that even small and medium sized businesses are able to comply. Startups may lack the technical and legal expertise necessary to effectively manage liability burdens when compliance mechanisms are vague or overly complex. A 2011 study by Oxera, which compared intermediary liability regimes across four countries with varying legal structures, found:

[T]hat a regime with clearly defined requirements for compliance and low associated compliance costs could increase start-up success rates for intermediaries in our focus countries by between 4% (Chile) and 24% (Thailand). Implementing such a regime would also increase the expected

³⁹ Matthew C. Le Merle et al., *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment A Quantitative Study*, Booz & Co (Nov. 2011).

⁴⁰ Id at 6.

⁴¹ Matthew C. Le et al., *The Impact of Internet Regulation on Early Stage Development*, Fifth Era p. 5 (Nov. 2014).

profit for successful start-up intermediaries by between 1% (Chile) and 5% (India).⁴²

Positive investment impacts are also attributable to a sufficiently clear liability framework. The Engine study completed in 2014 found that 88% of potential investors were uncomfortable investing in media platforms that were subject to regulatory ambiguity.⁴³ In the case of secondary intellectual property infringement, 78% of investors surveyed were deterred from investing in certain online platforms based on potential exposure to liability.

These surveys of venture capitalists and angel investors demonstrate that legal frameworks limiting liability for digital content intermediaries liability must be implemented with bright-line compliance rules in order to provide startups and their investors certainty and confidence to invest in innovative technology and compete in a growing sector of the world's economy. Such a system exists under Section 512. Investors are essential to today's innovation economy, with venture capitalists and angel investors focused on early stage investment providing \$54.5 billion in the United States alone in 2014. The startups backed by these investors employ nearly 12 million in the United States in 2012, with continued expected growth.⁴⁴

The shared responsibilities of the notice and takedown system require all parties to devote resources to carry out the obligations established by statute. Internet companies must establish an effective and efficient mechanism for responding to rights holders, and rights holders must sufficiently notice Internet companies of infringing material. The Notice of Inquiry refers to challenges faced by smaller copyright owners contending with the scale of the Internet to protect exclusive rights, stating that "[m]any smaller copyright owners, for example, lack access to third-party services and sophisticated tools to monitor for infringing uses, which can be costly, and must instead rely on manual search and

⁴² The economic impact of safe harbours on Internet intermediary start-ups, Oxera Consulting at p. 2 (Feb. 2015) <http://www.oxera.com/getmedia/cba1e897-be95-4a04-8ac3-869570df07b1/The-economic-impact-of-safe-harbours-on-Internet-intermediary-start-ups.pdf.aspx?ext=.pdf>.

⁴³ Matthew C. Le et al., *The Impact of Internet Regulation on Early Stage Development*, Fifth Era 17-18 (Nov. 2014).

⁴⁴ Id.

notification processes.”⁴⁵ Like the rights holder community, the problems of scale are true for Internet platform creators: startups and small businesses lack the sophisticated resources of larger, more established businesses in responding to takedown requests. More fundamentally, the concern surrounding the natural elements of compliance costs fails to recognize the more critical point. Without Section 512, rights holders would still be faced with the task of searching for infringing content and would not have the benefit of a takedown system for the expeditious removal of content. Instead, each identified instance would require costly litigation.

The reality of these challenges for small stakeholders on both sides of the online platform does not diminish the need for the safe harbors. Conversely, it makes the case for maintaining the safe harbors stronger than ever before. Without the safe harbors, Internet startups would be unable to garner investment and legal certainty, diminishing innovation online. Fewer Internet platforms would harm the ability of small and independent creators to access a wide and diverse audience of users.

IV. The long term effectiveness of the notice and takedown system should not be undermined by attempts to disturb the careful balance that protects Internet companies, rights holders, users, and the public interest.

(a) Notice and “staydown”

Rights holders have advocated for amending the DMCA from a notice and takedown to a notice and staydown regime. Such a change to the law would undermine the basis of the safe harbors: those responsibilities are shared among stakeholders, and platforms should not be required to monitor content. Proponents claim that a mandatory notice and stay down would prevent the “whack-a-mole” situation that arises with the reappearance of certain content online that has already been removed under a takedown notice. However, such a policy would effectively undercut the safe harbors and create a serious threat to online innovation and legal user access and choice.

⁴⁵ U.S. Copyright Office, Section 512 Study: Notice and Request for Public Comment, (published Dec. 31, 2015), (referencing *Section 512 Hearing* at 100; statement of Rep. Doug Collins) (“[I]ndividual songwriters and the independent filmmakers . . . often have limited or no technical expertise or software at their disposal”); *id.* at 88-89 (2014) (written statement of Sandra Aistars, Copyright Alliance) (Independent authors and creators “lack the resources of corporate copyright owners” and instead issue “takedown notices themselves, taking time away from their creative pursuits.”).

The theory of notice and staydown advanced by corporate rights holder interests would ultimately require service providers to monitor material online by blocking future uploads of uncontested takedowns. A statutory obligation of online services to filter content was a role that Congress was careful to directly avoid in the creation of the safe harbors as expressed through Section 512(m).⁴⁶ Such a requirement would effectively shift the burden of content identification and monitoring to service providers, rather than rights holders, placing the burden of content monitoring on the party least qualified to determine actual infringement.⁴⁷

The purported ‘notice and staydown’ mandate would be overbroad and affect legitimate distribution models. A mandated ‘staydown’ that blocked future uploads of content ignores critical provisions like fair use, which allows users legal access to content in certain circumstances and helps foster new forms of follow-on creative works. Policies that disregard the flexibilities of copyright law and user protections crucial to online speech run counter to the public interest and the constitutional goals of copyright law. While the Internet Association fully supports efforts to combat online infringement, misguided policies that mandate monitoring obligations on platforms would ultimately fail to advance the effectiveness of Section 512 for all stakeholders and would substantially harm a thriving, legal online ecosystem. Strong enforcement of exclusive rights and equally robust promotion of limitations and exemptions in copyright law are

⁴⁶ 17 U.S.C. § 512(m).

⁴⁷ A recent example considered “...the example of Disney’s global smash-hit movie, Frozen, and its accompanying soundtrack. According to the Wall Street Journal, “[t]here are about 60,000 fan-made versions of ‘Let It Go’ alone, and they’ve been viewed more than 60 million times.” The online phenomenon has fed the gift-buying and impulse purchases that drive the soundtrack’s continued sales, says Ken Bunt, president of Disney Music Group.” And those fan-made versions frequently contain the entirety of this now-famous song, often set to original video content. The YouTube video entitled “[MMD] Disney’s Frozen ‘Let It Go’—Idina Menzel—[Animation],” for example, has been viewed more than one million times and sets the entire song against an original animation that looks very much like something taken from the film. In light of these realities, how would an employee based in Bangalore or Singapore who is reviewing that video for non-copyright reasons be expected to know if the video is infringing?” Brief for Google Inc., Facebook Inc., Yahoo! Inc., and Microsoft Inc. as Amicus Curiae supporting Defendants-Appellants-Cross Appellees at p. 10, *Capitol Records, LLC v. Vimeo, LLC*, No. 14-1048 (2nd Cir. April 9, 2014).

complementary- not conflicting- policy goals that combined create the best environment for legal distribution and consumption as well as new creative works.

For example, the posting of a music video online, without permission, may be an act of infringement that is subject to takedown. However, a posting of clips of the video with new audio as part of a remixed work would be fair use of a work that could easily be filtered by a “staydown” provision that did not consider what the new clips were being used for or the context of the video.

Advancements based on commendable voluntary efforts should not be inferred to mean that ‘notice and staydown’ is technologically feasible or effective as a long-term policy solution. ContentID, a system employed by YouTube, exemplifies the cooperative, beneficial efforts of Internet companies and rights holders to combat infringement without a ‘notice and staydown’ regime. Google, which owns YouTube, has invested tens of millions of dollars to develop the system, which allows rights holders to upload reference files that are compared to uploaded content. The technology then identifies matching content and allows the rights holder to choose how to exercise his exclusive rights over the content; he can monetize, track, or remove it. In the years since its inception, over 4000 participants have used the system.

However, ContentID or other technology-based solutions are not feasible options for many platforms and users, and should not be required by law. YouTube was only able to put ContentID in place after significant development and financial investment. Young startups would be unable to fund or implement similar systems, and legal mandates to do so would effectively shut down the market for online innovation, potentially building a regulatory moat around incumbent platforms. Additionally, ContentID works only for material stored on its own servers. The system does not work for service providers using information location tools, which do not possess the files that are linked. In addition to the technological limitations of the system, ContentID is not a perfect system, and sometimes it captures incorrect files or fails to detect exact matches. Attempts to ascribe mandated uses of technology through the safe harbor’s requirements would prevent the technological flexibility that has enabled the creation of systems like ContentID. ContentID should serve an example of cooperation in a rapidly developing digital ecosystem, not as a justification for forced technological mandates that will

ultimately reduce the effectiveness of the notice and takedown system and increase litigation.

Service providers have had great success in implementing technology that provides rights holders advanced assistance in combating infringement. Internet companies serving a variety of user communities across diverse platforms and varying scales are implementing systems above and beyond the requirement of Section 512 to deter infringement and foster legal creativity and distribution appropriate to their specific needs and capabilities. Such voluntary investments and actions⁴⁸ are a powerful mechanism for encouraging cooperative relationships. These investments provide greater flexibility for the size and specific operations of platforms that legislative or regulatory mandates would be unable to accomplish.

The DMCA's safe harbors recognized that by providing flexibility, stakeholders of all sizes would be incentivized to comply with the safe harbor's statutory requirements for liability protection and to engage in cooperative endeavors to combat infringement online. A notice and staydown mandate would disrupt the shared responsibilities of Section 512 and threaten lawful online content and speech.

(b) Representative Lists

Specificity by rights holders in identifying online infringing material is fundamental to the effectiveness of the safe harbors in both preventing illicit content on the Internet and ensuring user access to legal content. "Representative lists" may be submitted by rights holders when multiple violations are noticed. However, such a list is only effective when it contains exact location information that allows service providers to expeditiously remove the infringing material.⁴⁹

For example, providing a URL, without further descriptors, will likely be overbroad and include both infringing and non-infringing material without providing the service provider exact location and information on the exact material that violates an owner's exclusive rights to that material. The creative community could also be harmed

⁴⁸ Outlined in Section VII of this comment.

⁴⁹ See *UMG Recordings*, 665 F.Supp.2d 1109-10.

if non-specific or vague lists included material that was lawful content from smaller rights holders.

The District Court in *Viacom v. Youtube* noted that any reading of the “representative list” language that would allow for generalized information, without the exact site location, would “eviscerate the required specificity of notice” and “put the provider to the factual search forbidden by Section 512(m).”⁵⁰

One URL may contain links to hundreds of pages and sources of content. Additionally, a list that attempts to remove “all content by X” ignores crucial limitations and exceptions in copyright law and assumes service providers will affirmatively filter content to fulfill the request. Without specific location information from rights holders, who ultimately bear the responsibility of infringement identification, service providers are faced with a difficult or unworkable task of removing illicit content and ensuring that users still have access to lawful material. The allowance for a representative list must be read in context with Section 512(c)(3)(A)(iii), which requires that such notice must provide information “information reasonably sufficient to permit the service provider to locate the material.”⁵¹ Without this information, a representative list would run afoul of the boundaries set forth by Congress in the takedown requirements on Section 512(c)(3) and the unambiguous statement of Section 512(m) that the statute should not be read to require service providers to act as monitors of online content.

The Office’s Notice of Inquiry notes that the “de-listing” of websites has also been debated in the context of removal of infringing material.⁵² Wholesale de-listing of websites would be ineffective and would inevitably result in the censorship of lawful online content, thus harming the public interest. Websites may contain thousands of links to various materials, and de-listing denies users meaningful access to lawful content that is merely bundled with or co-exists on the same page or within the same site as infringing

⁵⁰ *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 528 (S.D.N.Y. 2010), vacated in part on other grounds, 676 F.3d 19 (2d Cir. 2012).

⁵¹ 17 U.S.C. 512(c)(3)(A)(iii).

⁵² U.S. Copyright Office, Section 512 Study: Notice and Request for Public Comment, (published Dec. 31, 2015) (“In addition, there is debate about whether search engine services must disable access to (*e.g.*, “de-list”) entire sites that copyright owners report as consisting largely of infringing material.”).

content. For these and other reasons, indiscriminate de-listing of entire sites was most recently rejected by policymakers and the public in the 2012 SOPA/PIPA debate.

A wholesale delisting requirement would substantially harm the incentivized, fair system constructed by the notice and takedown system, and should be rejected. Instead, continued cooperation through successful voluntary initiatives should be examined and encouraged.

(c) Repeat Infringer Policies

Section 512 provides Internet service providers discretion for policies that terminate repeat infringers “in appropriate circumstances.”⁵³ The statute allows individual providers to develop their own policies, which correctly allows for flexibility and innovation.

The safe harbors, however, do not, and should not, improperly shield sites that fail to fulfill their responsibilities under the safe harbors. In order to meet Section 512(i)’s requirements, a provider must demonstrate that it “has a working notification system, a procedure for dealing with DMCA-compliant notifications,” and that it “does not actively prevent copyright owners from collecting information needed to issue such notifications.”⁵⁴ These criteria are appropriately flexible enough to preserve both the incentives for compliance and the necessary protections of Section 512 as the online environment continues to develop. A statutory scheme mandating more specific, inflexible action by service providers would merely serve as a gateway for litigation rather than allowing parties to develop and advance more effective technology and systems of combating repeat infringers, and would reduce any incentive to experiment and innovate with new ways to handle repeat infringers.

Online platforms were never intended to strictly police their sites—rather, the policies underlying Section 512(i) incentivize sites to avoid becoming conduits for repeated, flagrant infringement by complying with the safe harbor conditions. Nothing in the safe harbors requires that providers “must investigate possible infringements, monitor

⁵³ 17 U.S.C. §512(i).

⁵⁴ UMG Recordings, 665 F.Supp.2d 1109.

its service, or make difficult judgments as to whether conduct is or is not infringing.”⁵⁵ Attempts to misconstrue the requirements and intent of Section 512(i) or to rewrite policies by shifting the burdens of the safe harbors away from rights holders would impair the current incentives for compliance with safe harbor conditions and undercut the success of the current collaborative and flexible system.

The consequences of shifting the infringement enforcement burden have been consistently recognized by the courts:

Were we to require service providers to terminate users under circumstances other than those specified in Section 512(c), Section 512(c)'s grant of immunity would be meaningless. This interpretation of the statute is supported by legislative history. See H.R. Rep., at 61 (Section 512(i) is not intended "to undermine the . . . knowledge standard of [Section 512](c).").⁵⁶

Rigid repeat infringer policies mandated by statute would endanger the critical limitations and exceptions in copyright, such as fair use. Removal of language allowing for action against repeat infringers “in appropriate circumstances” would eliminate the necessary flexibility that service providers require to protect speech and legal content online.⁵⁷ Internet intermediaries require statutory flexibility to advance the shared goals of protecting both exclusive rights and lawful uses.⁵⁸ Blind termination requirements ignore these lawful limitations and exemptions, which the U.S. has consistently supported as critical to the copyright system and beneficial to the public interest and promotion of new creative works.⁵⁹

⁵⁵ Sen. Rep. No. 105-190 at 52.

⁵⁶ *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1111 (9th Cir. 2007).

⁵⁷ For example, service providers remove content in responses to notices, even in circumstances when the content is subject to fair use. In the absence of a counter notice, such a takedown should not count as an instance of “repeat” infringement.

⁵⁸ For example, content that is infringing in one context may be lawful under fair use in another context. If fair use content is removed due to a takedown notice and no counter notice is filed, an inflexible statutory regime on repeat infringer policies may consider the lawful content an instance of repeated infringement.

⁵⁹ *See Fogerty v. Fantasy, Inc.* 510 U.S. 517, 525-27 (1994); *see also* Statement of U.S. Delegation, WIPO Standing Committee on Copyright and Related Rights, 19th Sess., Dec. 14-18, 2009, <<http://www.wo.ala.org/districtdispatch/wp-content/uploads/2009/12/WIPOStatement.pdf>>

The long-term efficacy and clarity of repeat infringer policies require flexibility and discretion for the rapidly changing digital world. The DMCA ensures that voluntary actions by Internet companies would be properly incentivized and constantly evolving to protect both exclusive rights and lawful online content.

(b) Abuses of notice and takedown

The unfortunate abuse of the takedown system by some rights holders threatens the overall effectiveness of the Section 512 framework, stifling online speech, and denies meaningful access to legal content. While Section 512 provides some mechanisms to ensure users can combat unlawful takedowns,⁶⁰ additional protections are needed.

The safe harbors of Section 512 provide rights holders with an extraordinary remedy: the mere allegation of copyright infringement via takedown notice results in the removal of material by compliant service providers. In most cases, takedown notices are sent in a good faith effort to remove infringing material. Unfortunately, some actors seek to exploit the system to remove unwanted, unflattering, competitive, or otherwise undesirable but lawful speech online have diverted the resources of service providers and threatened the rights of users. Examples of these abusive notices include:

- A frequent DMCA takedown filer requested the takedown of a screenshot of an Internet discussion criticizing his frequent DMCA takedown abuses.⁶¹
- A physician sent a takedown notice regarding documents related to the suspension of his medical license, claiming copyright on his signature.⁶²
- Attorneys for a musical band used takedown procedures to remove a political ad on a recent San Francisco ballot measure, which included a parody of a popular music song to educate voters on a local policy proposal.⁶³

⁶⁰ See 17 U.S.C. § 512(g).

⁶¹ Brief for Automattic Inc, Google, Twitter and Tumblr as Amicus Curiae Supporting Plaintiff-Appeallee at p. 12, *Lenz v. Universal Music Corp.*, 801 F.3d 1129 (9th Cir. 2015)

⁶² *Id.* at 11.

⁶³ Elliott Harmon, *Once Again, DMCA Abused to Target Political Ads*, Electronic Frontier Foundation (Nov. 17, 2015) <https://www.eff.org/deeplinks/2015/11/once-again-dmca-abused-target-political-ads>.

- A major news broadcast network sent a takedown notice just one week before the 2008 presidential election targeting a McCain political video that used brief excerpts from recent news footage.⁶⁴
- A Harvard professor's lecture about copyright law, though clearly available under the educational fair use exemption, was removed by a large music corporation due to the snippets of Jimi Hendrix covers used in the lecture.⁶⁵

Additional studies have shown high rates of flawed, misdirected, and abusive notices. One study found that nearly a third of takedown notices were flawed, inaccurate, or target legal content.⁶⁶ In 10.6% of notices, the allegedly infringing material could not be located because the data provided led to a URL search page or an aggregator page; in addition, one out of 14 notices presented a question of fair use.⁶⁷ Because of the unlikelihood that a substantial amount of content was recovered through counter notice procedure,⁶⁸ these figures provide a powerful insight to the threat of abuse notices.

Service providers have become increasingly burdened by flawed, abusive notices that shift the focus away from specific instances of infringement and to a system that is flooded by efforts to quash speech and creativity, and failure to exercise discretion in applying copyright law.⁶⁹

⁶⁴ Brief for Automattic et. al. at 10.

⁶⁵ 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> .

⁶⁶ Joe Karaganis and Jennifer Urban, *The Rise of the Robo Notice*, Communications of the ACM 28-30 (Sept. 2015) <https://content.byui.edu/file/f4a98e9d-d51f-4242-aada-49856e8495ec/1/p28-karaganis.pdf>.

⁶⁷ Id.

⁶⁸ Jennifer M. Urban, Joe Karaganis, and Brianna L. Schofield, Notice and Takedown in Everyday Practice 44 (March 29, 2016), SSRN: <http://ssrn.com/abstract=2755628>

⁶⁹ The rise of automated systems have contributed to the flood of illegitimate notices in the system, as system are unable to properly evaluate data, are not updated, or experience other factors leading to vague notices. Additionally, the system is easily exposed to abusive at the hands of even a small group of individuals: in a smaller pool of samples, one study found that nearly half of a pool of takedown notices, a majority of which raised substantive concern, were sent by just one individual. Id. at 98.

VI. Judicial review of the safe harbors has been largely effective in preserving the effectiveness of the notice and takedown system.

(a) Red Flag Knowledge Requirements

Section 512 provides limited liability protections to service providers who are not “aware of facts or circumstances from which infringing activity is apparent.”⁷⁰ The courts have interpreted this ‘red flag’ test narrowly, so as not to render the safe harbors meaningless.⁷¹

Rights holders have frequently argued that the red flag knowledge test under Section 512 should impose greater responsibilities on Internet platforms when there is general awareness that infringement exists on a platform.⁷² However, the law deliberately ensured that Internet services were not required to actively monitor or filter online content. Instead, the statute purposefully ensured that rights holders have the responsibility of identifying infringing content online for reasons explained previously.⁷³

Courts have explicitly rejected attempts to shift the burden for content identification from the rights holder to the service provider. In *Perfect 10 v. CCBill*, the court found that inadequate requests from Perfect10 were insufficient to require the defendant, an Internet service provider, to remove content or to further examine the content and make determinations about infringement, a responsibility that rested squarely with the requesting rights holder.⁷⁴ Courts have consistently rejected attempts to shift the obligations of infringement identification under the actual knowledge requirement.⁷⁵

Judicial interpretation has squarely held that red flag knowledge requires narrow, specific knowledge and necessarily establishes a high burden in order for the safe harbors

⁷⁰ 17 U.S.C. § 512(d)(1)(B).

⁷¹ *See, e.g.*, *Viacom*, 676 F.3d at 31; *Perfect 10, Inc. v. CCBill L.L.C.*, 488 F.3d 1102, 1111–14 (9th Cir. 2007); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 n.2 (9th Cir. 2001); *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1111 (C.D. Cal. 2009)

⁷² *See Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), vacated in part on other grounds, 676 F.3d 19 (2d Cir. 2012)).

⁷³ *Perfect 10, Inc. v. CCBill L.L.C.*, 488 F.3d 1112-1113 (9th Cir. 2007).

⁷⁴ *Id.* at 1111-1113.

⁷⁵ *See UMG Recordings, Inc. v. Shelter Capital Partners LLC*, No. 09-55902 (9th Cir. March 14, 2013)(revising 667 F.3d 1022 (9th Cir. Dec. 20, 2011)).

to retain meaning.⁷⁶ The court in *UMG Recordings, Inc. v. Shelter Capital Partners LLC* stated that intermediaries are entitled to broad protection under the safe harbors.⁷⁷ The court specifically addressed the condition of red flag knowledge, finding that "merely hosting a category of copyrightable content, such as music videos, with the general knowledge that one's services could be used to share infringing material, is insufficient to meet the actual knowledge requirement under Section 512(c)(1)(A)(i)." In addition to identifying the plaintiff's call for weakened knowledge requirements as contradictory to statute and legislative intent, the court found that online intermediaries could not be held to a higher-level requirement than those carefully laid out in law stating otherwise "safe harbor would be rendered a dead letter."⁷⁸

Adopting a broader standard for the red flag knowledge test would substantially harm Internet companies and digital startups by increasing legal uncertainty. Shifting the burden of identifying infringing content online to service providers under a generalized, broad knowledge test would unravel the shared responsibilities at the heart of the DMCA and remove the strong incentives in place for compliance with conditions that combat infringement.⁷⁹

(b) Application of the willful blindness doctrine

Some rights holders have also attempted to substitute willful blindness for the actual knowledge requirement of the safe harbors. This proposal would deprive Internet service providers of liability protections and would improperly impose legal burdens on them contrary to the successful policies underlying Section 512.

⁷⁶ *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 524–25 (citing *Perfect 10*, 488 F.3d at 1114, the district court's decision in *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1108 (C.D. Cal. 2009), and *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1108 (W.D. Wash. 2004)).

⁷⁷ *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, No. 09-55902 at 33 (9th Cir. March 14, 2013)(revising 667 F.3d 1022 (9th Cir. Dec. 20, 2011)).

⁷⁸ *Id.* at 30.

⁷⁹ *See* S. Rep 105-190 at 20 (1998)("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."), *see, e.g.* *Content ID, YouTube*, <http://www.youtube.com/t/contentid> (Last visited February 10, 2016).

In the *Viacom v. YouTube* case, the plaintiff argued that the common law doctrine of willful blindness should be applied in a manner that would implicate liability for YouTube merely from the presence of generalized knowledge. Viacom argued that willful blindness should impute knowledge when the service provider “was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.”⁸⁰ Viacom further asserted that repeat notices to YouTube were enough to impute knowledge. While the Second Circuit found that the application of the doctrine of willful blindness was appropriate in certain circumstances, on remand the court carefully identified that “[i]n imputing the willfully disregarding fact, one must not impute more knowledge than the fact conveyed.”⁸¹ The court rejected Viacom’s attempts to assert that generalized knowledge or awareness could disqualify service providers from protection under the safe harbors. Where the specific and actual infringement is not identified, the service provider is not obligated to undertake additional action to seek out infringing content.

Courts, in promotion of the efficacy the system, have been clear that “[w]e do not place the burden of determining whether [materials] are actually illegal on a service provider,” and “[w]e impose no such investigative duties on service providers.”⁸² A willful blindness doctrine that rests on generalized knowledge or imposes monitoring requirements on service providers would directly contradict the statutory language that no such obligation be placed on providers under Section 512(m), which necessarily helps form the frameworks of clarity fundamental to long-term success of the safe harbors.

Like attempts to broaden the red flag knowledge test, attempts to broaden Section 512 to include a willful blindness provision would undermine the law’s meaning and effectiveness in promoting an ecosystem conducive to innovation and positive growth for all stakeholders.

⁸⁰ *Viacom Int’l Inc. v. YouTube LLC*, 676 F.3d 35 (2d Cir. 2012)).

⁸¹ *Viacom Intl. Inc. v. YouTube, Inc.*, No. 07 Civ. 2103 (LLS), 2013 WL 1689071, at * 4 (S.D.N.Y. April 18, 2013).

⁸² *UMG Recordings*, 718 F.3d at 1023.

(c) Financial Benefit and Right to Control

Congress struck the right balance when it allowed service providers that do not exert substantial influence or control over the activities of users to qualify for the safe harbors of Section 512. Most service providers merely act as digital content intermediaries or neutral conduits for the content that third-party-users post online. As such, those providers do not exercise creative, editorial, or other control over the content their technology makes available. The courts have clarified that the amount of control required to disqualify a provider from the safe harbors requires “something more than” the basic ability to remove or block access to infringing materials; otherwise, the safe harbors are meaningless.⁸³ In order to facilitate the unhindered availability and dissemination of lawful content online, Section 512 protects these providers from liability that may arise out of the third-party content posted on their sites. Even where a provider “has the right and ability to control such activity,” Section 512 provides a shield against intermediary liability for service providers if they do “not receive a financial benefit directly attributable to the infringing activity.”⁸⁴

VII. Remedies

The success of Section 512 in combating infringement and fostering a growing online ecosystem depends on the system of shared responsibilities amongst stakeholders, who must act in good faith to protect the public interest. A takedown is an extraordinary remedy available to rights holders, many of whom make good faith efforts to remove only infringing content. Unfortunately, illegitimate and fraudulent takedown requests exist in today’s system. In extreme cases, businesses may be forced to consider shutting down due to takedown notices aimed at manipulating the Internet rather than combating illicit content.⁸⁵ Actors seeking to quash non-infringing content can easily abuse the

⁸³ U.S. Copyright Office, Section 512 Study: Notice and Request for Public Comment, (published Dec. 31, 2015) (citing *UMG Recordings*, 718 F.3d at 1029-31 (quoting *Viacom*, 676 F.3d at 38)).

⁸⁴ 17 U.S.C. § 512(c)(1)(B).

⁸⁵ *See Design Furnishings, Inc. v. Zen Path, LLC*, No. Civ. 2:10-02765, 2010 WL 4321568, *1 (E.D. Cal. Oct. 21, 2010) (accused infringer alleged a § 512(f) violation by arguing that if the notice sender “[was] not stopped from submitting repeated notices of claimed infringement . . . then [the user’s] entire business [would] cease to exist”).

takedown system, which offers little due process to ensure that legal content remains available. Such abuse ultimately chills free speech and innovation, acting to the great detriment of the public interest.

Section 512(f) is insufficient to deter individuals and entities from such behavior. Congress enacted Section 512(f) to allow service providers or users to combat parties exploiting the notice and takedown system. Unfortunately, the exercise of this mechanism has resulted in years of litigation over the ability to hold abusive filers accountable for such notices. The courts have considered how Section 512(f) can be implemented, but recent cases appear to skew the burden against the rights holder instead of the accuser, contrary to congressional intent. For example, in 2004, the *Rossi v. Motion Picture Association of America* court held that the knowledge test for misrepresentation under Section 512(f) was a subjective test, requiring “actual knowledge” of the misrepresentation.⁸⁶ Most recently, the now famous case of *Lenz v. Universal Music Corp* was a more than 7-year David versus Goliath ordeal to combat the abusive notices sent by Universal over a YouTube video of plaintiff Lenz’s children dancing to a Prince song. The court ultimately found that the filer must consider fair use before sending a notice, but that Lenz should be awarded only nominal damages.⁸⁷

The high burdens imposed on challengers of abusive notices will do little to effectively deter abusers. A recent study on abusive notices noted that “[i]n contrast to the statutory penalties for infringement, which can run to \$150,000 per infringed work, fraudulent or abusive takedown incurs only proven damages.”⁸⁸ The combination of costly litigation, slow court process, high legal standards of proof, and minimal cost recovery make remedies for abusive notices highly unattainable and unlikely to be pursued.⁸⁹ Even absent the direct threat of litigation, many individuals do not take advantage of the counter notice procedure.⁹⁰ For example, for anonymous critics

⁸⁶ *Rossi v. Motion Picture Ass'n of Am. Inc.*, 391 F.3d 1000 (9th Cir.2004).

⁸⁷ *Lenz v. Universal Music Corp.*, 801 F.3d 1134 (9th Cir. 2015)

⁸⁸ Jennifer M. Urban, Joe Karaganis, and Brianna L. Schofield, Notice and Takedown in Everyday Practice 43 (March 29, 2016), SSRN: <http://ssrn.com/abstract=2755628>.

⁸⁹ *Id.*

⁹⁰ *Id.* at 44 (noting that “by all accounts, the actual use of counter notices is extremely infrequent.”).

engaged in political speech or whistleblowing, the requirement to include personal information will deter filings to reinstate legal content.⁹¹

Ultimately, the mutually beneficial goals of protection of exclusive rights and legal and operational certainty for Internet platforms are best served when all stakeholders are incentivized into good faith participation in the flexible system that has proven foundational to economic growth in the digital age. The remedies provided against abusive actors filing takedown notices that chill speech and creativity harm both Internet companies with limited resources and rights holders who desire resources to be spent most effectively on infringing content. Continued cooperation between private sector parties to enhance efficiencies in the constant, yet imperfect, ecosystem must include substantive attention to the high levels of abuse that fail to serve the interests of Internet companies, rights holders, users, and the public.

VIII. Internet companies are correctly incentivized under Section 512 to engage in successful and evolving voluntary measures to combat online infringement and promote creativity.

Rights holders and service providers have adopted voluntary practices to address online infringement beyond the requirements of Section 512 and are constantly evolving their practices in a rapidly evolving marketplace. But the successful implementation of current voluntary measures, and the potential for future developments, relies on the certainty enacted under the DMCA. By providing a flexible, future-proof floor for action and a system on which service providers receive legal confidence, responsible parties are able to scale and devote resources to combating infringement rather than needless litigation.

For example, eBay has developed the Verified Rights Owner (VeRO) program, which is used by more than 40,000 rights owners to quickly and easily report instances of alleged intellectual property infringement.⁹² eBay promptly investigates and takes appropriate action in response to reports of alleged intellectual property

⁹¹ Brief for Automattic Inc, Google, Twitter and Tumblr as Amicus Curiae Supporting Plaintiff-Appellee, *Lenz v. Universal Music Corp.*, 801 F.3d 1129 (9th Cir. 2015)

⁹² See VeRO Participant Profiles, eBay, (last accessed March 28, 2016) <http://vero.ebay.com/>.

infringement. Moreover, all eBay users can report unlawful activity to the eBay customer support team via a link provided on each listing page.

Some companies have also developed tools that allow for a simple, streamlined, and transparent notice and takedown process. For example, Etsy provides a user-friendly tool for rights holders to submit a notice of intellectual property infringement.⁹³ Upon receipt of the notice, Etsy's legal team personally reviews each case and directs sellers to educational resources available on the platform. Etsy continuously invests in robust in-line educational programming that allows for sellers and rights holders to learn best practices and legitimate uses of copyrighted works.⁹⁴

Internet companies have also worked to ensure that digital platforms are maximizing the ability of rights holders to benefit from creative works. Pinterest allows users to create visual bookmarks of content on the Internet. Without the protection of the DMCA safe harbors, such a service might never have been given an opportunity to develop. Section 512 allowed Pinterest to scale into a popular Internet service that provides value to both users and content creators. Pinterest has developed tools that give publishers and photographers more control over whether and how their content appears on Pinterest.

For example, Pinterest has developed tools like the "nopin" option, which prevents certain content from being saved to Pinterest. In collaboration with partners like Getty and National Geographic, Pinterest also built the attribution program, which ensures that content from participating partners receives attribution on the platform. In this way, Pinterest has formed a cooperative relationship with creators that allows the platform to flourish, while at the same time providing valuable traffic and revenue streams for content creators.

There is no one size fits all model to prevent infringing content from appearing on the Internet. Service providers, creators, rights holders, and other stakeholders are best positioned to determine appropriate and feasible measures that encourage a vibrant online ecosystem. Amending the statute to disrupt the shared and balanced responsibilities of

⁹³ See Etsy Intellectual Property Infringement report
<https://www.etsy.com/legal/IP/report>.

⁹⁴ Intellectual Property Policy, Etsy (last accessed March 28, 2016)
<https://www.etsy.com/legal/ip>.

Section 512's notice and takedown system risks disrupting and dis-incentivizing successful efforts to combat infringement.

IX. Conclusion

The Section 512 safe harbors laid the foundation necessary for two decades of successful growth and development of the Internet, and they continue to offer a flexible framework to provide substantial benefit to stakeholders. The safe harbors are a system of legal certainty that remains the gold standard worldwide for fostering innovative online ecosystems beneficial to creators and service providers alike.

The safe harbors were established to support two goals: the protection of exclusive rights through actions to combat infringing use and the legal clarity necessary for online services to scale and develop. Over time, these goals have proven to be mutually reinforcing principles that together advance the best interests of the public through sound policy. The courts have sensibly recognized the value of the safe harbors as a base for achieving complementary goals, encouraging the continued efforts of private sector stakeholders to collaborate and foster a thriving ecosystem.

Internet companies are rapidly developing new partnerships and platform-based tools that enhance the ability to promote legal content creation and distribution online, bolstering the value of creative content and allowing global communities greater access than imagined just two decades ago. As the lines between interested stakeholders continue to blur with the advent of new forms of online content creation, maintaining the robust protections and certainty of Section 512 is even more critical.