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*RE: Request for Additional Comments – Section 512 Study [Docket 2015-7]*

## **Introduction**

The Association of American Publishers (“AAP”) is the national trade association of the U.S. book and journal publishing industry. AAP’s nearly 400 members include most major commercial publishers in the U.S., as well as smaller and non-profit publishers, university presses, and scholarly societies, and they publish works in every field and format, including popular books, scholarly journals and monographs, software, websites, and a variety of other electronic publications. Among AAP’s highest public policy priorities are the protection and enforcement of intellectual property rights, defense of the freedom to read and the freedom to publish, and promotion of research, education and literacy.

The AAP and its members appreciate the Copyright Office’s determination to thoroughly consider all stakeholder perspectives regarding the current functioning of

the “safe harbor” provisions in Section 512 of the Digital Millennium Copyright Act, including the efficacy of statutory procedures for copyright owner “notification” to Internet service providers (“ISPs”) concerning alleged online copyright infringement.

The Copyright Office’s latest Notice of Inquiry (“NOI”), which seeks additional comments for its Section 512 Study based on the written submissions and roundtable discussions generated by its initial NOI on this subject, understandably explores a variety of themes that emerged demonstrating the “heterogeneous” nature of content creators and ISPs in terms of their functions, size, resources and business models.<sup>1</sup> It also references the “needs of individual Internet users” in pointing to “questions of balance” concerning the diverse interests, circumstances and capacities of the various kinds of affected stakeholders the Copyright Office must consider in developing recommendations for possible changes to the “safe harbor” provisions of Section 512.<sup>2</sup>

These differences and deviations are undoubtedly important matters to consider with respect to the Copyright Office’s effort to accurately explain and propose solutions for the specific problems reported by dissatisfied stakeholders in their encounters with Section 512. However, these differences have significantly prevented stakeholders from reaching consensus on the nature of the specific problems of Section 512 and potential ways to solve them. We have seen this scenario play out in the last four years, both during proceedings before the House Judiciary Committee<sup>3</sup> and the U.S. Department of Commerce’s Internet Policy Task Force comprised jointly of the U.S. Patent and Trademark Office (USPTO) and National Telecommunications and Information Administration (NTIA).<sup>4</sup> Indeed, as the NOI dryly notes in discussing potential

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<sup>1</sup> Copyright Office, Section 512 Study: Request for Additional Comments – Notice of Inquiry, 81 Fed. Reg. 78636, 78637 (Nov. 8, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-11-08/pdf/2016-26904.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> Section 512 of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Judiciary, 113th Cong. (2014) available at <https://judiciary.house.gov/hearing/section-512-of-title-17/>.

<sup>4</sup> National Telecommunications and Information Administration, U.S. Commerce Department Announces Digital Millennium Copyright Act Multistakeholder Forum Results (Apr. 7, 2015), available at

legislative and non-legislative solutions suggested by study participants for specific cited issues, “it should be understood that these solutions stem only from the subset of stakeholders who suggest or acknowledge in the first instance that the current regime requires or could benefit from changes.”<sup>5</sup>

Because of the complexities and conflicts that are encountered in the attempt to take all these differences into account, such issues were not highlighted by AAP in its initial Comments or roundtable participation regarding Section 512 last year. Instead, AAP emphasized and offered related recommendations to address what its members believe to be a core reason for Section 512’s current inability to fully deliver on the intention of Congress that its provisions would strike a balance between fostering a robust and innovative online environment and protecting the rights of copyright owners:

The safe harbor regime was intended to protect innocent, responsible parties engaged in neutral conduct – i.e., the transmission and routing of online communications; system caching; storage of material on its system or network at the direction of a user; and, use of information location tools to refer or link users to materials at an online location. The safe harbors were not intended to benefit service providers that would traditionally have been held liable for knowing about and facilitating infringing activity, nor those entities that profit from infringement that they have the right and ability to prevent.

Today, however, the safe harbor protections are in fact being used as a shield by many online service providers that do little more than respond to DMCA notices while operating within technological site structures and related business models that invite users to upload infringing material.<sup>6</sup>

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<https://www.ntia.doc.gov/press-release/2015/us-commerce-department-announces-digital-millennium-copyright-act-multistakeholder>.

<sup>5</sup> Section 512 Study: Request for Additional Comments – Notice of Inquiry, at 78639.

<sup>6</sup> *Initial Submission of the Association of American Publishers in Response to Copyright Office’s Request for Comment – Section 512 Study [Docket 2015-7]* at 2 (Apr. 1, 2016) [hereinafter *AAP Initial Comments*].

In these additional comments, we hark back to our previous emphasis on this so-called “whac-a-mole” problem as we address some of the questions outlined in the Copyright Office’s latest NOI on Section 512. We do this primarily in the belief that this problem presents the most serious challenge that publishers, authors and other creators and distributors of works of original expression face as copyright owners based on the existing Section 512 framework and the manner in which it has been construed and applied by some federal courts. However, we also do this in the belief that our proposals to address this problem would help to distinguish “bad faith” ISPs from those that act in good faith in claiming safe harbor protection, and thus ultimately reduce the stress that such bad actors impose on the safe harbor regime by greatly reducing the volume of notifications that their cynical posture compels copyright owners to generate. Moreover, we believe the “whac-a-mole” problem can be addressed while accommodating the diversity of the various categories of stakeholders in the safe harbor regime of Section 512.

*Question 1. As noted above, there is great diversity among the categories of content creators and ISPs who comprise the Internet ecosystem. How should any improvements in the DMCA safe harbor system account for these differences? For example, should any potential new measures, such as filtering or stay-down, relate to the size of the ISP or volume of online material hosted by it? If so, how? Should efforts to improve the accuracy of notices and counter-notices take into account differences between individual senders and automated systems? If so, how?*

*Question 11. Several study participants pointed out that, since passage of the DMCA, no standard technical measures have been adopted pursuant to section 512(i). Should industry-wide or sub-industry-specific standard technical measures be adopted? If so, is there a role for government to help encourage the adoption of standard technical measures? Is legislative or other change required?*

*Question 12. Several study participants have proposed some version of a notice-and-stay-down system. Is such a system advisable? Please describe in specific detail how such a system should operate, and include potential legislative language, if appropriate. If it is not advisable, what particular problems would such a system impose? Are there ways to mitigate or avoid those problems? What implications, if any, would such a system have for future online innovation and content creation?*

The Copyright Office should recommend legislative and policy action conducive to a *notice-and-stay-down* system to address the shortcomings of the existing *notice-and-takedown* system. As we explained in our prior submission, the current statutory framework as applied by the courts creates the conditions for – and does not offer an effective path away from – the cyclical “re-uploading” problem which compels copyright owners to send repeated notices to the same site to take down infringing copies of the same work over and over again.<sup>7</sup> This dynamic is burdensome for both copyright owners and ISPs of all sizes. Therefore, it is necessary and appropriate to implement a stay-down system which will accommodate the diversity of copyright owners and ISPs that currently populate the online ecosystem.

AAP shares the view expressed during the roundtables that one-size-fits-all solutions will be impractical, not only because of the different sizes of ISPs but also because of the wide variety of activities and services that ISPs conduct and provide.<sup>8</sup> As a result, in this section, we propose addressing the “whac-a-mole” problem through a two-pronged approach. First, the Copyright Office should recommend legislative amendments to the definition of standard technical measures (“STMs”) in terms that are flexible and results-oriented to stop and prevent further infringements. ISPs can be

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<sup>7</sup> U.S. Copyright Office, *Transcript of Section 512 Public Roundtable, New York*, at 80 (May 2, 2016) [hereinafter *New York Roundtable Day 1*], available at [https://www.copyright.gov/policy/section512/public-roundtable/transcript\\_05-02-2016.pdf](https://www.copyright.gov/policy/section512/public-roundtable/transcript_05-02-2016.pdf) (statement of Steve Rosenthal, McGraw Hill Education) (“[t]he process of searching for infringing content on many sites is becoming increasingly more difficult with sites taking offensive measures to prevent the automated scraping of their site by limiting metadata that would be used to identify content. It becomes frustrating that after we find infringements on a site, that that reference to a particular file or content in a notice does not necessarily impact all instances of that content on the site.”).

<sup>8</sup> U.S. Copyright Office, *Transcript of Section 512 Public Roundtable, San Francisco* (May 13, 2016) [hereinafter *San Francisco Roundtable Day 2*], available at [https://www.copyright.gov/policy/section512/public-roundtable/transcript\\_05-13-2016.pdf](https://www.copyright.gov/policy/section512/public-roundtable/transcript_05-13-2016.pdf) (statement of Prof. Sean O’Connor, University of Washington at 173) (“[A] major issue that’s going on is one-size-fits-all can’t work. I think that’s a consensus around the table here today. I think that there can be a taxonomy, though, subdividing the entire digital media ecosystem.”); (statement of Mr. Paul Doda, Elsevier at 231) (“[A] single tool mandate [is] inappropriate.... [I]t’s perfectly appropriate to get back to the statute and to recognize that under the statute, it is plural. It’s standard measures. ... 512(i)(2)(c) says that the measure should not impose substantial cost or substantially burden a system... [Y]ou get at, within the language of the statute already, a way to make sure that whatever measures are created are appropriately not crippling startups and small creative companies.”).

allowed sufficient flexibility to develop customized mechanisms that are effective, proportionate, and “do not impose substantial costs on service providers or substantial burdens on their systems or networks” – as the statute already requires.<sup>9</sup> Another benefit of results-oriented provisions would be that ISPs would have the incentive to implement measures that keep up with evolving technologies, business models and forms of infringement. Second, AAP asks the Copyright Office to promptly follow-up those amendments by initiating the collaborative, multi-stakeholder process that the statute prescribes for the development of STMs in 512(i) (2) (A).<sup>10</sup>

#### **a. Amending the Definition of STMs**

To implement a notice-and-stay-down system that would maintain the functioning aspects of the existing U.S. statutory framework while addressing its most pronounced shortcoming, there are two helpful points of reference to envision an amended definition of STM that (a) effectuates the balance Congress intended when it enacted the DMCA, and (b) accommodates the diversity of present and future stakeholders in the online copyright ecosystem. First, Article 13 of the recently announced European Commission Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market (“European Copyright Proposal”) and, second, the 2007 UGC Principles.

#### **i. European Copyright Proposal Article 13**

In September 2016, the European Commission released a Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market. Article 13 of the proposal “creates an obligation on information society service

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<sup>9</sup> 17 U.S.C. § 512 (i) (2) (C) (2016) *available at* <https://www.copyright.gov/title17/title17.pdf>.

<sup>10</sup> 17 U.S.C. § 512 (i) (2) (2016) *available at* <https://www.copyright.gov/title17/title17.pdf> (“As used in this subsection, the term “standard technical measures” means technical measures that are used by copyright owners to identify or protect copyrighted works and – (A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process; . . .”).

providers storing and giving access to large amounts of works and other subject-matter uploaded by their users to take appropriate and proportionate measures to ensure the functioning of agreements concluded with rights-holders and to prevent the availability on their services of content identified by rights-holders in cooperation with the service providers.”<sup>11</sup>

Under this proposal, ISPs that store and provide public access to large amounts of copyright-protected works uploaded by their users must collaborate with copyright owners in the implementation of “appropriate and proportionate” measures, including “effective technologies”, “to ensure the functioning of any licensing agreements.”<sup>12</sup> The Proposal does not impose specific measures but obligates ISPs that create significant risk of infringement to take effective, appropriate and proportionate steps to prevent infringement of content identified by rights holders.

The approach taken in the European Copyright Proposal could help to delineate a U.S. notice-and-stay-down system that (1) accommodates the existing - and likely increasing - diversity of copyright owners and ISPs, (2) encourages ISPs to cooperate with copyright owners, (3) does not impose a duty to monitor for infringement inconsistent with Section 512(m) of the DMCA, and (4) focuses on the protection of works rather than on the actions of specific users. For instance, the Copyright Office could recommend that ISPs that store and give access to large amounts of copyright-

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<sup>11</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market* (2016/0280 (COD) at 10 (Sep. 14, 2016) [hereinafter *European Copyright Proposal*]; available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0593>.

<sup>12</sup> *Id.* at 20 (“Collaboration between information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users and rightholders is essential for the functioning of technologies, such as content recognition technologies. In such cases, rightholders should provide the necessary data to allow the services to identify their content and the services should be transparent towards rightholders with regard to the deployed technologies, to allow the assessment of their appropriateness. The services should in particular provide rightholders with information on the type of technologies used, the way they are operated and their success rate for the recognition of rightholders' content. Those technologies should also allow rightholders to get information from the information society service providers on the use of their content covered by an agreement.”).

protected works uploaded by their users must cooperate with copyright owners to agree on effective, commercially and technically reasonable measures to stop and prevent the further infringement of works identified by copyright owners through a good faith notice.

## **ii. The Principles for User Generated Content Services**

The Copyright Office should also look to the 2007 Principles for User Generated Content Services (“UGC Principles”) in developing recommendations for implementing a notice-and-stay-down system. A set of sensible guidelines agreed upon by representatives from creative industries and UGC platforms, the UGC Principles provide a good starting point to develop a results-oriented approach for ISPs to effectively address infringement in the cooperative spirit that Congress intended through the DMCA but which has not yet fully materialized.<sup>13</sup> Although AAP members produce literary works, rather than the type of audiovisual content that is the subject of the UGC Principles, the Principles readily apply to sites where AAP members’ works are likely to be uploaded without lawful authorization.

The Principles do not prescribe specific filtering technologies to User Generated Audio and Video Content Services. Rather, they focus on commercially reasonable and highly effective “content identification technology ” as a means for UGC sites to eliminate “all infringing user-uploaded audio and video content for which Copyright Owners have provided Reference Material.”<sup>14</sup> The Principles call for Content Owners and UGC Services to work together “to ensure that the identification technology is

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<sup>13</sup> See User Generated Content Services Principles, *Internet and Media Industry Leaders Unveil Principles to Foster Online Innovation While Protecting Copyrights* (Oct. 18, 2007), available at [http://www.ugcprinciples.com/press\\_release.html](http://www.ugcprinciples.com/press_release.html) (“The principles serve as a comprehensive set of guidelines to help user-generated content (UGC) services and content creators work together towards their collective goal of bringing more content to more consumers through legitimate channels. The principles acknowledge a collective respect for protecting copyrights and recognize that filtering technologies must be effective and are only a part of what is necessary to achieve this goal.”).

<sup>14</sup> Principles for User Generated Content Services, Principle 3, available at <http://www.ugcprinciples.com/index.html> (last visited Feb. 14, 2017).

implemented in a manner that effectively balances legitimate interests in (1) blocking infringing user-uploaded content, (2) allowing wholly original and authorized uploads, and (3) accommodating fair use.”<sup>15</sup> They also allow for the adoption of technological changes and improvements as these become available.<sup>16</sup>

The Principles recognize that the search for identical content files after receipt of a takedown request is a straightforward and reasonable fix to the needless requirement of multiple takedown notifications for the same posted work. The information that copyright owners provide in DMCA-compliant notices would serve as the “Reference Material” that UGC sites can use to establish matches with user-uploaded content.<sup>17</sup>

#### **b. Jumpstarting the Process to Identify and Develop STMs**

Although Congress clearly intended for implemented STMs to be a requirement for safe harbor eligibility, the “open, fair, voluntary, multi-industry standards process” Congress prescribed to reach a consensus on “technical measures that are used by copyright owners to identify or protect copyrighted works”<sup>18</sup> never took place. One of the challenges for initiating such a “voluntary” process has been that ISPs have no incentive to participate; as long as such multi-stakeholder process reaches no agreement on STMs, there is one less requirement for them to meet to be eligible for the 512 safe harbors. In its recommendations to Congress, we urge the Copyright Office to pair a solution for this impasse with the aforementioned amendments to the definition of STMs as key elements of any plan to ameliorate the “whac-a-mole” problem.

The process for developing a variety of STMs does not have to start from scratch. It became apparent during the roundtables convened by the Copyright Office that different technologies exist to address the “whac-a-mole” problem, including those that

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<sup>15</sup> *Id.*, UGC Principle 3(d).

<sup>16</sup> *See id.*, UGC Principle 3 (“UGC Services should enhance or update the Identification Technology as commercially reasonable technology that makes a meaningful difference becomes available.”).

<sup>17</sup> *See id.*, UGC Principle 3(a).

<sup>18</sup> 17 U.S.C. § 512 (i) (2) (2016).

utilize fingerprinting, digital watermarking and hash filters, and that a number of ISPs are already implementing some of these solutions on a voluntary basis.<sup>19</sup> Other significant points of reference can assist in the development of STMs that would be effective and could accommodate potential cases of fair use. In the specific case of books, AAP members' experience with sending notices under the current framework reveals that focusing on full-length works minimizes interference with the bulk of likely instances of asserted fair use and the receipt of counter-notices.<sup>20</sup> Even if the identified solutions need to be calibrated and refined when they are implemented, we believe full-

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<sup>19</sup> U.S. Copyright Office, *Transcript of Section 512 Public Roundtable, New York* (May 3, 2016) [hereinafter *New York Roundtable Day 2*], available at [https://www.copyright.gov/policy/section512/public-roundtable/transcript\\_05-03-2016.pdf](https://www.copyright.gov/policy/section512/public-roundtable/transcript_05-03-2016.pdf) (statement of Mr. Michael Housley, Viacom at 22) (“[T]here are technologies available today that when deployed correctly can be used very well to find especially full-length pieces of content, unedited pieces of content. All of these new technologies need to be assessed and deployed carefully.... There are third parties that will license their fingerprinting technology . . . if websites wanted to filter.”); U.S. Copyright Office, *Transcript of Section 512 Public Roundtable, San Francisco* (May 12, 2016) [hereinafter *San Francisco Roundtable Day 1*], available at [https://www.copyright.gov/policy/section512/public-roundtable/transcript\\_05-12-2016.pdf](https://www.copyright.gov/policy/section512/public-roundtable/transcript_05-12-2016.pdf) (statement of Devon Weston, Digimarc at 209-210) (“The idea of filtering, I think, is a powerful one, and there are certainly vast improvements that could be made in that regard. . . . [F]ingerprinting relies on a database of, you know, files of these works. The onus in those sorts of scenarios really does fall on an OSP or some other provider, whereas the digital watermarking is embedded at the time of distribution. So one of the things that we sort of envision is a method of, you know, digitally watermarking all of this content. These are unique IDs that could be tied to like a unique copyright ID or something of that ilk. The OSPs could be provided with a reader before any user uploads -- content... If it's got that watermark on it, it's just rejected, or it's put into a private mode, or something like that.”); (statement of Ms. Elizabeth Valentina, Fox Entertainment Group at 167) (“But I wanted to turn to your third question on the filtering question. And again, just looking at *Deadpool* -- and we pulled and confirmed 673 unique files, infringing files, that have unique hash values that we were able to confirm. Of those, the top 20 percent of those accounted for 78 percent of the infringements. The top 20 percent of those accounted for 91 percent of the infringements. So I just wanted to give you the context here for a sort of hash filtering regime, or at least as a tool. And then I looked at some of the major host sites like, for example, Google Video, we noticed over 60,000 URLs in 2016. On OneDrive, we noticed 90. On Dropbox, we noticed 17. So hash filtering, no hash filtering -- big difference. So I think there's more we can do to work together here.”); (statement of Mr. Fred Von Lohmann, Google at 199) (“Google has been doing takedown, stay-down longer than any other platform at scale, period. Content ID is a takedown, stay-down system for rightsholders that choose to use it that way. . . . [I]n the comments that have been filed, YouTube, Facebook, Tumblr, Twitch, SoundCloud, Daily Motion, Scribd, all examples of online services who have implemented filtering matching systems.”).

<sup>20</sup> See answer to Question 7 and Appendix I for a May 2016 sample of AAP Member responses to questions regarding their notification practices.

length work filters are an adequate starting point for practical discussions on implementing STMs for a notice-and-stay-down system.<sup>21</sup>

In its initial comments, AAP asked the Copyright Office to enlist the National Institute of Standards and Technologies (NIST) or another government body with the requisite technical expertise to guide stakeholders from across the copyright ecosystem in identifying and/or devising a range of technically feasible and economically reasonable generic technical measures.<sup>22</sup> AAP acknowledges that the variety in size and operations of ISPs should be a factor that participating stakeholders take into account to develop a “menu” of STMs that can easily be adopted by copyright owners of different sizes for different types of works, and can be implemented by ISPs according to their size, budget and volume of hosted content.<sup>23</sup> We continue to believe this is an important action item that the Copyright Office should pursue to improve the functioning of Section 512.

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<sup>21</sup> During Day 2 of the San Francisco Roundtable, a participant suggested that, because the court in *Authors Guild v. Google* held that the unauthorized use of full-length books was fair use, then building filtering measures focused on full-length works would be inadvisable. See *San Francisco Roundtable Day 2*, *supra* note 8, at 307 (statement of Mr. Michael Masnick). It is important to clarify, however, that Judge Pierre Leval acknowledged the extraordinary nature of the case at hand in the first line of his opinion where he asserted that “[t]his copyright dispute tests the boundaries of fair use.” *Authors Guild v. Google Books*, 804 F.3d 202, 206 (2d Cir. 2015). It would be disproportionate to discard the use of full-length works as a parameter for developing filtering technology or other STMs based on one, extraordinary case.

<sup>22</sup> See *Section 512 of Title 17: Hearing Before the Subcomm. On Courts, Intellectual Property, and the Internet of H. Comm. on Judiciary*, 113th Cong. 260 (2014) (statement of the Association of American Publishers for the hearing record), available at <https://judiciary.house.gov/wp-content/uploads/2016/02/113-86-87151.pdf>.

<sup>23</sup> *San Francisco Roundtable Day 1*, *supra* note 19, at 267 (statement of Mr. Paul Doda, Elsevier) (“We’ve advocated that there should be some sort of government prodding, government guidance towards efforts to do these [Standard Technical Measures]. It’s not a one-size-fits-all... It won’t even be required of every service provider, but rather, we heard this morning about “Classic” sites. Those are probably sites with low volume and no need for some technical measures. On the other hand, there are massive large volume sites that would benefit from some form of stay-down.”); *San Francisco Roundtable Day 2*, *supra* note 8, at 108 (statement of Mr. Steve Marks, Recording Industry Association of America) (“If you’ve got even something that’s so popular as Wikipedia and there are very few instances of infringement and those infringements are handled well and handled by volunteers and they have a very low volume of DMCA notices. I don’t think they should necessarily be burdened with filtering, you know, and a notice-and-stay-down system. I might feel differently about Search, you know? I think part of the issue here is we need to get beyond technology that makes notice sending more efficient. I think we should look at technology in a whole variety of ways beyond just notice-and-takedown.”).

To expand the implementation of STMs to a broader set of ISPs, AAP proposes two alternatives to help jumpstart the multi-stakeholder process for identifying and developing STMs.

One route would be to amend Section 512(i) to require stakeholder participation in dialogues and agreements on STMs for safe harbor eligibility.<sup>24</sup> Once STMs are developed according to the statutory process, sites would lose safe harbor protections if they refuse to implement the resulting STMs that their peers adopt in good faith.

Another route, in a broader reform of safe harbor eligibility based on a factor test rather than strict requirements, would be to “downgrade” the adoption of STMs from a *requirement* for safe harbor protection to a *consideration* related to a broader “good faith” criterion.<sup>25</sup> In that scenario, failure to adopt STMs that meet the statutory definition would not automatically disqualify an ISP from safe harbor protection. Rather, it would be a factor in granting or denying safe harbor protection.

*Question 3. Participants expressed widely divergent views on the overall effectiveness of the DMCA safe harbor system. How should the divergence in views be considered by policy makers? Is there a neutral way to measure how effective the DMCA safe harbor regime has been in achieving Congress’ twin goals of supporting the growth of the Internet while addressing the problem of online piracy?*

The DMCA notice-and-takedown system is not accomplishing its dual goals of (1) fostering a robust and innovative online environment and (2) protecting the rights of content owners. As we explained in our initial comments, recent experience shows that the process does not work effectively and is certainly no longer viewed as a workable solution “over the long run” for many service providers under Section 512(c) and (d). Copyright owners send millions of notifications, yet these collectively have had little impact toward reducing the volume of infringing material available through the

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<sup>24</sup> See e.g. *European Copyright Proposal*, *supra* note 11, at art. 13.

<sup>25</sup> *San Francisco Roundtable Day 1*, *supra* note 19, at 267 (statement of Mr. Paul Doda, Elsevier) (“[A]s long as we talk about standard technical measures as an absolute condition to safe harbor treatment, I don’t think there’s incentive for that cooperation. And so maybe one thing to consider is that adoption versus non-adoption is a factor in safe harbor.”).

numerous sites employing the safe harbors to shield their responsibility for the persistent presence of such material.

During the public roundtables in New York and San Francisco, ISP representatives reiterated their claim that the increasing number of notices shows that copyright owners widely use the system, proving it to be a success. The Internet Association, for instance, claimed that the increasing number of notices indicates success because, without Section 512, copyright owners would be left with a more protracted and costly process and they would be less able to address infringement.<sup>26</sup> Google also reiterated its view that the large number of notices signals success and that “the systems are more efficient.”<sup>27</sup>

These claims are akin to urging that the issuance of an ever-increasing number of traffic tickets for speeding is evidence that the speeding problem is being successfully addressed. Such illogical assertions suggest that the DMCA intends not to deter and prevent online copyright infringement but merely to foster increasingly efficient ISPs or notice-sending technologies for purposes of removing or blocking access to infringing materials or activity online. The DMCA was set up to incentivize cooperation between stakeholders to support the growth of the Internet and address online infringement effectively. An increase in the number of notices might signal progress towards the first goal but not towards the second. We urge the Copyright Office not to view the ballooning number of notices as a sign of success, but as clear evidence that the current

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<sup>26</sup> *New York Roundtable Day 1, supra* note 7, at 20 (statement of Ms. Ellen Schrantz, Internet Association) (“The most fundamental point I think is without that law, creators and long-time owners would not have an expeditious system for removal. They would still be faced with the task of identifying infringing content, except without 512, there wouldn't be that expeditious process to get platforms to take it down. You'd have to get an attorney and face a much longer, more costly process to protect your content. And so, 512 has allowed that and the volume of notices is in fact an indicator of that success creators are using.”).

<sup>27</sup> *San Francisco Roundtable Day 2, supra* note 8, at 77 (statement of Mr. Fred Von Lohmann, Google) (“I disagree with people who think that a large volume of notices is a sign of failure; in fact, quite the contrary. If the notices weren't doing any good, if it was too expensive to send, we would expect the numbers to be falling, not rising. And in fact, we see them rising because the systems are more efficient. We've heard from Digimarc. We've heard from Paramount. We've heard from others that they are able to search the Web more efficiently than they were before. So I think that's all to the good.”).

implementation of the safe harbor scheme neither deters nor prevents online infringement.

A more realistic measure of the success of the DMCA is to look at whether the notice-and-takedown system contributes to the protection of copyright owners' exclusive rights *effectively*. Even if complete eradication of online infringement is not attainable, its reduction would certainly signal a more effective protection of copyright owners' rights. Evidence, however, shows that the overall volume of online infringements is increasing. For instance, according to Digimarc, a vendor that identifies and sends takedown notices on behalf of copyright owners, the increase in the number of notices responds to shifting trends in online infringement as new types of infringing sites emerge and the theft of books beyond trade and textbooks begins to become commonplace.<sup>28</sup> In addition, we would like to reiterate reports of infringing site operators who rely on software that automates the re-uploading of content after it has been taken down in response to a DMCA notification.<sup>29</sup> If this trend continues to grow under the current system, the number of notices will become exponentially higher as a result of an increased "whac-a-mole" problem.

Another signal that the DMCA notice-and-takedown system is not working as Congress intended is that the burden on copyright owners and ISPs for sending and receiving notices, respectively, continues to increase. The Internet Archive, for instance, explained that receiving notices is burdensome for a small non-profit and that, in its

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<sup>28</sup> *San Francisco Roundtable Day 1*, *supra* note 19, at 22 (statement of Ms. Devon Weston, Digimarc) ("[O]ur business started working for books publishers in about 2009 ... And since then, we've worked with increasingly more customers. But we've also just seen . . . piracy for book publishers go from existing only on, say, generic file-sharing websites, the cyberlockers of the world that are mixed use to having dedicated book piracy websites that have really sort of taken over, you know, the bulk of what we see for book publishers. So it's really a new diversity of sites, just a huge increase in volume of the number of notices that we send on a daily basis and then, also, sort of the diversity of the content that's being shared -- where it went from potentially, you know, just sort of trade and maybe textbooks to really the entire range of what book publishers are producing.").

<sup>29</sup> See *AAP Initial Comments*, *supra* note 8, at 13 (reference to Andy, *Making Money from Movie Streaming Sites, An Insider's Story*, TORRENTFREAK (Oct 19, 2013), <https://torrentfreak.com/making-money-from-movie-streaming-sites-an-insiders-story-131019/> (an account by a frequent uploader of movie files, noting his use of software to automatically upload infringing content to multiple platforms).

case, it “used to review [DMCA notices] with only one person for about 10 or 15 years, and now the staffing is up to about 5 people. . .” to the detriment of other programs the Archive could pursue.<sup>30</sup> Digimarc, asserted that, from a financial standpoint, “it becomes impossible for a small rights-holder to manage . . . enforcement on their own” because of the sheer variety of requirements for notice submission across thousands of sites.<sup>31</sup>

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

AAP members take significant care to ensure that the notices they send are compliant, targeted to instances of “pure” infringement, and mindful of fair use.<sup>32</sup> Given the high standards that publishers abide by in sending DMCA notices, publishers rarely receive legitimate counter-notifications. As a result, many large AAP members do not actively oppose strengthening the penalties for abusive notices and counter-notices but deem this effort unnecessary given that Section 512 already imposes penalties for those who send non-complaint notifications of either kind. If the Copyright Office decides to recommend legislative action in this area, it should limit stronger penalties to repeat offenders to allow room for good-faith mistakes.

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<sup>30</sup> *San Francisco Roundtable Day 1*, *supra* note 19, at 112 (statement of Ms. Lila Bailey, Internet Archive).

<sup>31</sup> *Id.* at 19-20 (statement of Ms. Devon Weston, Digimarc). For a general discussion of the increasing burden that the existing notice-and-takedown system imposes on copyright owners of all sizes, *see* Transcripts of Panel 1 Day 1 of the Roundtables in New York and San Francisco.

<sup>32</sup> *See* Appendix I for a May 2016 sample of AAP Member responses to questions regarding their notification practices.

*Question 13. What other specific legislative provisions or amendments could improve the overall functioning of the DMCA safe harbor regime? Please be specific, including proposed statutory language as appropriate.*

AAP continues to believe that the Copyright Office should focus its structural statutory recommendations to Congress on addressing the underlying causes of the “whac-a-mole” problem. As in our prior submission, we believe this can be done through (1) the fine tuning of the statutory definition of “online service provider” with respect to eligibility for safe harbor protection; and (2) clarifying the circumstances in which injunctive relief is available under Section 512(j) in cases where an ISP qualifies for the safe harbor for monetary damages.

We urge the Copyright Office to seriously consider recommending revision of the statutory definition of “service provider” in Section 512(k) (1) (B) to include “good faith” as an element of the definition for purposes of safe harbor eligibility.<sup>33</sup> We continue to believe that a legislative approach to this specific issue would go a long way to encourage ISPs who wish to take advantage of the safe harbors to become more engaged in addressing online infringements to an extent that is appropriate to their circumstances.

We also reiterate the need for the Copyright Office to clarify the applicability of Section 512(j) to service providers deemed to operate within the confines of the Section 512 safe harbors.<sup>34</sup> The primary impediment (or inefficiency) to seeking injunctive relief under Section 512(j) seems to lie in its applicability only to service providers that have been found to be: (1) secondarily liable for infringement occurring on their systems but (2) nevertheless protected from monetary liability by the safe harbor protections in Section 512.<sup>35</sup> The costs and risk inherent in bringing suit under these conditions

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<sup>33</sup> AAP Initial Comments, *supra* note 8, Section I (a) and (b).

<sup>34</sup> *See id.* at Section VII – Remedies.

<sup>35</sup> *See* Jan Bernd Nordemann, *Internet Copyright Infringement: Remedies Against Intermediaries – The European Perspective on Host and Access Providers*, 59 J. COPYRIGHT SOC’Y U.S.A., 773, 776 (2012) (“The reason why injunction claims may be raised under Article 8, paragraph 3, of the EU Copyright Directive, is not based on the contribution of the providers; they have not done any legal wrong. But it is the fact that they are in a good position to help. . . This seems to be in contrast to the underlying concept of U.S. law, which even

against an ISP for inducement, contributory infringement, or vicarious liability provide strong disincentives to attempting to seek such injunctive relief. As such, the utility and effectiveness of the provision for purposes of pursuing legal action to address the posting of infringing material online is still untested.

AAP believes that Section 512(j) can provide a meaningful remedy to copyright owners in the case of “structural infringers” – sites that employ “technology [that] is content neutral and generally comply with DMCA takedown notices to claim refuge in the 512(c) safe harbor, [while] their businesses are blatantly structured to encourage an ongoing supply of infringing music, movies, books and other copyrighted content.”<sup>36</sup> Under such a business model, even where the site complies with takedown requests and qualifies for DMCA safe harbor protection, the result is, at best, a temporary disruption in the continued availability of infringing content. For these structural infringers, a court, under section 512(j) (1) (A) (iii), can order any “other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material,” if such relief is “the least burdensome to the service provider among the forms of relief comparably effective for that purpose.”<sup>37</sup> ISPs can comply with this limited injunctive relief by adopting commercially reasonable and effective technical measures or other measures the court may find appropriate to prevent or reduce re-uploads of the same works to the site.<sup>38</sup>

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under the DMCA remains a contribution-based legal system in case injunction claims are raised against Internet service providers.”).

<sup>36</sup> Paul Doda, *Distinguishing “Common Carriers” from “Common Thieves”: Requiring Notice and Stay Down for Structurally Infringing Host Sites that Incentivize Copyright Infringement, and Exploit the DMCA 512(c) Safe Harbor*, 63 J. COPYRIGHT SOC’Y 515, 515 (2016).

<sup>37</sup> 17 U.S.C. §§ 512 (c) and (j) (2016) provide that courts can grant injunctive relief even if monetary relief is precluded by the safe harbor. 17 U.S.C. §512(c)(1) states that “[a] service provider shall not be liable for monetary relief, or, *except as provided in subsection (j)*, for injunctive or other equitable relief.” (emphasis added). 17 U.S.C. §512(j) states that “[t]he following rules *shall apply* in the case of *any* application for an injunction under Section 502 *against a service provider that is not subject to monetary remedies....*” (emphasis added).

<sup>38</sup> See generally Doda, *supra* note 36, for a discussion of how U.S. courts could replicate German and European Court of Justice decisions awarding injunctive relief in cases involving structural infringers that

We urge the Copyright Office to consider the German concept of *Storerhaftung*, whereby, an intellectual property owner may request injunctive relief for both current and future infringements – rather than an award of monetary damages. The concept only applies when a case involves (1) a defendant that is not liable for primary or secondary infringement; (2) an adequate causal link between the acts or omissions of the defendant and an the infringement; (3) a defendant who is able to remove the cause of the infringement; and (4) a copyright violation that is recognizable to the defendant.<sup>39</sup> In applying this concept, German courts “[weigh the burden of removing the infringements committed by others] against the disruption of the defendant’s business such a duty would cause. . . [I]f the defendant tends to encourage illicit behavior, the balancing test weighing the interests of the rights holder against those of the ISP may be tipped in favor of the former.”<sup>40</sup>

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are not subject monetary liability. We discuss some of these decisions below, in our answer to Question 15.

<sup>39</sup> See Annette Kur, *Secondary Liability for Trademark Infringement on the Internet: The Situation in Germany and Throughout the EU*, 37 COLUM. J.L. & ARTS 525, 532 (2014) available at <http://lawandarts.org/article/secondary-liability-for-trademark-infringement-on-the-internet-the-situation-in-germany-and-throughout-the-eu/>; and Jan Bernd Nordemann, *Liability for Copyright Infringements on the Internet: Host Providers (Content Providers) – The German Approach*, 2 JIPITEC 37, 39-40, 44 (2011) (explaining the applicability of the German law principle of breach of duty of care (*Storerhaftung*, literally meaning “disquietor” or “interferer”) as arising for hosting providers when they become aware of infringements and fail to utilize reasonable controlling measures to discourage or prevent further similar infringements; whether a duty of care is “reasonable” depends on a weighing of interests, including intensity of the risk, commercial advantage of the hosting provider from the infringements, weight of interests of the copyright owner, burden of limiting such risk, and lack of or existing possibilities to neutralize the source of the infringement just as effectively in a different way; unreasonableness threshold rises the more the providers, through their behavior, provoke infringements by third parties), available at <https://www.jipitec.eu/issues/jipitec-2-1-2011/2962>.

<sup>40</sup> Kur, *supra* note 39 at 532-533. See generally Nordemann, *supra* note 39.

*Question 14. Several study participants mentioned concerns regarding certain case law interpretations of the existing provisions of section 512. Additionally, two new judicial decisions have come out since the first round of public comments was submitted in April 2016. What is the impact, if any, of these decisions on the effectiveness of section 512? If you believe it would be appropriate to address or clarify existing provisions of section 512, what would be the best ways to address such provisions (i.e., through the courts, Congress, the Copyright Office, and/or voluntary measures)? Please provide specific recommendations, such as legislative language, if appropriate.*

In its Initial Comments, AAP expressed concern over the lack of definition of key terms in the “repeat infringer policy” requirement for safe harbor eligibility in § 512 (i) (1) (A) and asked the Copyright Office to provide guidance regarding who is a repeat infringer and the circumstances under which an ISP may suspend or terminate a user’s account for that reason.<sup>41</sup> In December 2015, the Eastern District of Virginia issued a significant decision on when termination is appropriate for purposes of an ISP reasonably implementing a repeat infringer policy in order to be eligible for the 512 safe harbor.<sup>42</sup> In October 2016, the Second Circuit issued a similarly significant decision establishing parameters for defining the term “repeat infringer.”<sup>43</sup>

AAP believes these decisions in *BMG v. Cox* and *EMI v. MP3Tunes*, respectively, show how clear and meaningful definitions of “repeat infringer” and the “appropriate circumstances” for termination would assist the courts when deciding these issues. In addition, clear definitions would also establish clear guidelines for businesses that enable public access to works protected by copyright – which likely would reduce, in turn, the amount and complexity of related Section 512 litigation. In short, a more certain legal landscape would benefit the overall online ecosystem. We urge the Copyright Office to consider recommending legislative amendments to the ‘repeat infringer’ requirement for safe harbor eligibility that trace the reasoning in these decisions.

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<sup>41</sup> AAP Initial Comments, *supra* note 8, Section V – Repeat Infringers.

<sup>42</sup> See *BMG Rights Mgmt. (US) LLC v. Cox Commcn’s., Inc.*, 149 F. Supp. 3d 634 (E.D.Va. 2015).

<sup>43</sup> See *EMI Christian Music Group, Inc. v. MP3Tunes, LLC*, No. 14-4369-cv(L), 2016 U.S. App. LEXIS 23563, \*1, \*11 (2d Cir. Oct. 25, 2016).

**a. *BMG v. Cox* – The Meaning of “Termination in Appropriate Circumstances”**

In *BMG Rights Management v. Cox Communications*, the Eastern District of Virginia ruled that an ISP was not eligible for 512(a) safe harbor protection because it failed to reasonably implement a repeat infringer policy when it refused to terminate the accounts of users who repeatedly and blatantly infringed copyrights using the service’s high-speed Internet.<sup>44</sup> The court rejected Cox’s argument that a repeat infringer is someone *adjudicated* as such.<sup>45</sup> Adopting the same rule as other courts, the district court ruled that a repeat infringer policy “is unreasonable . . . if the service provider failed to respond when it had *knowledge* of the infringement.”<sup>46</sup> The court determined that notifications of infringement from copyright owners are “powerful evidence of a service provider’s knowledge.”<sup>47</sup> The court also concluded that termination in “appropriate circumstances clearly cover[s] account holders who repeatedly or flagrantly infringe copyright, particularly infringement of a willful and commercial nature.”<sup>48</sup>

Before 2012, Cox had a policy of temporarily terminating accounts of users for whom it had received repeated notices of infringement, but reactivating the account upon the user’s request.<sup>49</sup> After 2012, Cox stopped terminating accounts altogether despite receiving, in some individual cases, over fourteen notifications of infringement.<sup>50</sup> The court deemed Cox’s behavior in both periods as insufficient to comply with 512(i)’s requirement of terminating repeat infringers’ accounts in

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<sup>44</sup> *BMG Rights Mgmt.*, 149 F. Supp. 3d at 653-62.

<sup>45</sup> *Id.* at 654.

<sup>46</sup> *Id.* at 654 (citing *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d, 1102, 1113 (9th Cir. 2010), and *Capitol Records, Inc. v. MP3Tunes, LLC*, 821 F. Supp. 2d 627, 638 (S.D.N.Y. 2011)).

<sup>47</sup> *Id.* at 662.

<sup>48</sup> *Id.* at 654 (adding “this standard cannot be applied in such a way as to impose an affirmative duty on service providers to monitor for infringement [inconsistent with 512(m)].”).

<sup>49</sup> *Id.* at 656 (upon reactivation, Cox gave the user a clean slate).

<sup>50</sup> *Id.* at 659-662.

appropriate circumstances.<sup>51</sup> The court then granted BMG's motion for summary judgment, preventing Cox from claiming liability protection from money damages pursuant to the 512(a) safe harbor.<sup>52</sup>

**b. *EMI v. MP3Tunes* - The Definition of "Repeat Infringer"**

In *EMI v. MP3Tunes*, on the issue of whether an operator of an online music storage site and a site for searching free music online had reasonably implemented a repeat infringer policy to qualify for safe harbor relief, the appellate court vacated and remanded the ruling below on the grounds that the lower court's definition of "repeat infringer" lacked support from the text, structure and legislative history of the statute.<sup>53</sup> The district court had defined "repeat infringer" as "a user who posts or uploads infringing content to the Internet for the world to experience or copy knowing that the conduct infringes another's copyright."<sup>54</sup> The district court had also concluded that those who downloaded music for their personal use could not be repeat infringers pursuant to the statute because they "do not know for certain whether the material they download violates the copyrights of others."<sup>55</sup>

On appeal, the Second Circuit panel read Section 512 as a whole, and observed that Section 512 (m) "explicitly relieves service providers from having to affirmatively monitor their users for infringement—something that would likely be required should MP3tunes have to ascertain its users' knowledge."<sup>56</sup> But the panel then concluded that the legislative history of Section 512 "indicates that a 'repeat infringer' does not need to

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<sup>51</sup> *Id.* at 658 ("to implement the repeat infringer policy contemplated by § 512(i), the penalty imposed by service providers must be termination. . . . Service providers cannot skirt the termination requirement by imposing something short of complete termination of a subscriber or account holder.").

<sup>52</sup> *Id.* at 662. This case is currently on appeal before the Fourth Circuit.

<sup>53</sup> *EMI Christian Music Group*, 2016 U.S. App. LEXIS 23563 at \*11.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*, n.4.

<sup>56</sup> *Id.* at \*12.

know of the infringing nature of its online activities.”<sup>57</sup> The panel ultimately ruled that “plaintiffs could prevail by demonstrating that MP3tunes’ failure to track users who created links to infringing content identified on takedown notices or who copied files from those links evidenced its willful blindness to the repeat infringing activity of its users.”<sup>58</sup>

*Question 15. What approaches have jurisdictions outside the United States taken to address the question of ISP liability and the problem of copyright infringement on the Internet? To what extent have these approaches worked well, or created problems for consumers, content creators, ISPs, or other stakeholders?*

AAP urges the Copyright Office to consider the analyses of the Court of Justice of the European Union and the German Federal Court of Justice to injunctive relief as a tool to address online copyright infringement. In addition, we believe that looking to different approaches to site blocking already undertaken by other countries is also a helpful exercise for the Copyright Office to develop recommendations for legislative action that are consistent with the U.S. legal framework.

**c. European Cases on the Appropriate Scope of Injunctive Relief to Address Online Copyright Infringement.**

AAP and its members believe that several decisions from the Court of Justice of the European Union (“CJEU”) and the German Federal Court of Justice on the liability of ISPs for copyright infringement perpetrated by their users offer helpful guidance to delineate a statutory path to a more sustainable online environment built on a notice-and-stay-down system. The European Directives on which these decisions are based, when read together, are strikingly similar to Section 512.<sup>59</sup> For instance:

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<sup>57</sup> *Id.* at \*13.

<sup>58</sup> *Id.* at \*15.

<sup>59</sup> See Doda, *supra* note 36, at 522 (“Although the DMCA singularly covers the field on [service provider liability privileges and the availability of injunctive relief] and EU law is a patchwork of Directives, implementing legislation and national laws, the US and EU legal regimes are substantially aligned on key issues.”); and Kur, *supra* note 39, at 525 (“[T]he E-Commerce Directive has created a legal framework for exemptions from liability (safe harbor). In that regard, the E-Commerce Directive is the European

- Article 14 of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market <sup>60</sup> closely resembles the safe harbor provision for ISPs that store content at the direction of a user in 17 U.S.C. § 512(c);
- Article 15 of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market <sup>61</sup> and Section 7 (2) of the German Telemedia Act <sup>62</sup> are similar to the prohibition on imposing an active duty to monitor in 17 U.S.C. § 512(m), and
- Article 11 of Directive 2004/48/EC on the enforcement of intellectual property rights<sup>63</sup> and Article 8 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society <sup>64</sup> are similar to 17 U.S.C. § 512(j).

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equivalent of the U.S. Digital Millennium Copyright Act (DMCA), with the notable distinction that the E-Commerce Directive applies horizontally, thus encompassing trademark infringement.”).

<sup>60</sup> Directive 2000/31, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, O.J. (L 178), art 14 and 15, *available at* <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=EN>.

<sup>61</sup> Directive 2000/31, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, O.J. (L 178), art 14 and 15, *available at* <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=EN>.

<sup>62</sup> Telemediengesetz [TMG] [Telemedia Act], Feb. 26, 2007, as amended May 31, 2010, *unofficial translation available at* [http://www.cgerli.org/fileadmin/user\\_upload/interne\\_Dokumente/Legislation/Telemedia\\_Act\\_TM A\\_.pdf](http://www.cgerli.org/fileadmin/user_upload/interne_Dokumente/Legislation/Telemedia_Act_TM A_.pdf).

<sup>63</sup> Directive 2004/48, of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, O.J. (L 195), art. 11, *available at* [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0048R\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0048R(01)&from=EN).

<sup>64</sup> Directive 2001/29, of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, O.J. (L 167), art 8, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>.

In *L'Oréal SA v. eBay AG*<sup>65</sup> (“*L'Oreal*”), *Scarlet Extended SA v. Société Belge des Auteurs, Compositeurs et Éditeurs SCRL*<sup>66</sup> (“*SABAM I*”), and *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*<sup>67</sup> (“*SABAM II*”), the CJEU has established parameters for acceptable forms of injunctive relief that balance the rights of copyright owners, the legitimate interests of ISPs, and the users’ right to access lawful information online. Similarly, in *Rapidshare et al. v. Walther de Gruyter GmbH & Co. et al.*<sup>68</sup>, the German Federal Court of Justice ruled on the scope of acceptable monitoring obligations of an ISP after a copyright owner has sent a notification of infringing content.

In *L'Oréal*, a case involving trademark infringement in an online auctions site, the CJEU ruled that national courts, pursuant to Article 11 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, “are able to order the operator of an online marketplace to take measures which contribute, not only to bringing to an end infringements of those rights by users of that marketplace, but also to preventing further infringements of that kind. Those injunctions must be effective, proportionate, and dissuasive and must not create barriers to legitimate trade.”<sup>69</sup> The CJEU found that such injunctions would not

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<sup>65</sup> Case C-324/09, *L'Oréal SA et al. v. eBay International AG et al.*, E.C.R. I-06011 (2011), available at <http://curia.europa.eu/juris/document/document.jsf?sessionId=9ea7d2dc30d54a8445083723481c9c11a1dbdd890761.e34KaxiLc3qMb40Rch0SaxyKch10?text=&docid=107261&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=509514>.

<sup>66</sup> Case C-70/10, *Scarlet Extended SA v. Société Belge des Auteurs, Compositeurs et Éditeurs SCRL*, 2011 E.C.R. I-11959 (2011) (“*SABAM I*”), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=115202&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=510056>.

<sup>67</sup> Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, (2012) (“*SABAM II*”), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=119512&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=512485>.

<sup>68</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 15, 2013 (No. I ZR 79/12) (Ger.), available at [http://stichtingbrein.nl/public/2013-08-15%20BGH\\_RapidShare\\_EN.pdf](http://stichtingbrein.nl/public/2013-08-15%20BGH_RapidShare_EN.pdf).

<sup>69</sup> *L'Oréal* at ¶ 144. See Nordemann, *supra* note 35, at 800 (explaining that *L'Oréal* “sets the standard” of the “diligent economic operator” with respect to injunction claims against hosting providers in regard to

violate Article 15 (1) of Directive 2000/31, which prohibits Member States from imposing a duty on sites to actively monitor for infringing activity on their sites.<sup>70</sup>

In *SABAM I* and *SABAM II*, cases involving the liability of an Internet access provider and a social media platform, respectively, for copyright infringement of musical and audiovisual works, the CJEU concluded that certain injunctions are inappropriate if they do not meet the standards delineated in *L'Oréal* and do not strike a fair balance between the protection of intellectual property rights of copyright holders, and ISPs' freedom to conduct business.<sup>71</sup> In both cases, plaintiffs were seeking an injunction that would obligate defendants, at their own cost, to preventively filter *all* user communications for plaintiff's existing and future works. The CJEU found this form of injunctive relief would be contrary to the prohibition against imposing an obligation to actively monitor for infringement in Article 15 (1) of Directive 2000/31.<sup>72</sup> The CJEU also deemed such an injunction to violate European standards on privacy and electronic communications.<sup>73</sup>

In *Rapidshare et al. v. Walther de Gruyter GmbH & Co. et al.*<sup>74</sup>, the German Federal Court of Justice ruled that, after receiving a valid notice for the infringement of two of plaintiffs' literary works, "the Defendant [hosting site] was not only obligated to immediately block the specific offers, but was also obligated to take precautions to ensure that, if possible, further similar infringements would not occur."<sup>75</sup> The court clarified that monitoring obligations *in specific cases* were not excluded by Section 7 (2) of the German Telemedia Act which provides that "service providers are not obligated to monitor the

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whether, after they have been notified of infringement, they have acted reasonably to ensure an end to such infringement and also act to prevent further infringement of the same kind).

<sup>70</sup> *Id.* at ¶¶138- 44.

<sup>71</sup> See *SABAM I* at ¶¶ 36, 47-49, *SABAM II* at ¶¶42-52.

<sup>72</sup> See *SABAM I* at ¶ 40; *SABAM II* at ¶ 38.

<sup>73</sup> See *SABAM I* at ¶ 50; *SABAM II* at ¶¶ 48-49.

<sup>74</sup> For a similar case involving Rapidshare and the videogame *Alone in the Dark*, see Bundesgerichtshof [BGH] [Federal Court of Justice] July 12, 2012, (No. I ZR 18/11) (Ger.).

<sup>75</sup> *Rapidshare* at 13.

information transferred or stored by them, or to search for facts which indicate the existence of unlawful activities.”<sup>76</sup> The court held that the prevention of further infringements should take place through commercially and technically reasonable measures.<sup>77</sup> The court clarified that the identity of the infringing user was irrelevant regarding the issue of an ISP’s obligation to monitor its system because, just as the infringement itself, such obligation is related to the copyrighted work rather than to a specific user.<sup>78</sup>

These four cases illustrate reasonable parameters for engaging the cooperation of ISPs to effectively address online infringement in the U.S. The similarity of the legal provisions being interpreted and the existing provisions in Title 17, as well as the CJEU’s and German Federal Court of Justice’s careful consideration of only allowing injunctions that strike the right balance between the exclusive rights of copyright holders, the right of ISPs to conduct legitimate businesses and the right of users to access lawful information online, make these cases suitable examples of how U.S. law could be amended or, where appropriate, interpreted, to ensure that Congress’ intent when it implemented the DMCA in 1998 is realized in the face of rapidly evolving technologies and business models.

#### **a. Site-blocking**

During the debates surrounding the Stop Online Piracy Act and the PROTECT IP Act<sup>79</sup> in 2011 and 2012, enabling U.S. courts to order ISPs to block U.S. access to domain names of infringing sites operated outside of the U.S. was highly controversial. AAP

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<sup>76</sup> *Id.* at 8-9.

<sup>77</sup> *Id.* at 13 (“The Defendant violated the examination obligations incumbent upon it as an indirect infringer, as, after the notification of December 2, 2009, it failed to do everything which was reasonable from a technical and commercial point of view in order to prevent further infringements on its servers with regard to the works protected for the Claimants.”).

<sup>78</sup> *Id.*

<sup>79</sup> Stop Online Piracy Act of 2011, H.R.3261, 112th Cong.; Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011. S. 968, 112th Cong.

realizes that any new discussions of site-blocking are likely to re-ignite those debates, which asserted objections to such legislation that were more emotional than legally or technically sound. Nevertheless, we believe the experience from the reported 25 countries<sup>80</sup> that have since adopted judicially-construed site-blocking legislation to address online copyright infringement provides the right backdrop for having a frank discussion on whether appropriately scoped and constitutionally-sound site-blocking legislation is a viable option for the U.S. to move towards an online ecosystem that is more sustainable for all stakeholders.<sup>81</sup>

Below, we provide an overview of the legislative approaches that the U.K., Australia, and Spain have taken to carefully implement site blocking to address online copyright infringement. These examples show that there is no single path to site blocking – each country implements legislation that is consistent with the rest of its legal framework and tradition. We also reference a case in which the CJEU upheld an Austrian court’s action ordering the blocking of an infringing site as a form of injunctive relief, yet another alternative for considering how site-blocking may be carefully utilized to address online infringement. We ask the Copyright Office to consider this sample – as well as the

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<sup>80</sup> Nigel Cory, *How Website Blocking is Curbing Digital Piracy Without “Breaking the Internet”*, INFORMATION TECHNOLOGY AND INNOVATION FOUNDATION at 13 (Aug. 2016) (listing Australia, Argentina, Austria, Belgium, Chile, Denmark, Finland, France, Germany, Greece, Iceland, India, Indonesia, Ireland, Italy, Malaysia, Norway, Portugal, Russia, Saudi Arabia, Singapore, South Korea, Spain, Turkey, and the United Kingdom), available at <http://www2.itif.org/2016-website-blocking.pdf>.

<sup>81</sup> The Supreme Court has repeatedly concluded there is no conflict between copyright protection and the First Amendment. *See e.g.* *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (“The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to promote the creation and publication of free expression. . . . In addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations.”), and *Harper & Row Publ’r’s v. Nation Enter.*, 471 U.S. 539, 558 (1985) (“[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”). *See also* SEAN M. O’CONNOR, *THE INTERNET DOES NOT RESET THE COPYRIGHT-FREE SPEECH BALANCE 2* (Center for the Protection of Intellectual Property 2013) (“[F]ree speech is about *self-expression*: if I am simply copying someone else’s expression, I am not really engaging in self-expression.”) (emphasis in original), available at <http://cpip.gmu.edu/2013/11/21/the-internet-does-not-reset-the-copyright-free-speech-balance/>.

approaches of other jurisdictions<sup>82</sup> – as a basis for starting a new conversation on whether site blocking is an option to effectively reduce online copyright infringement that is compatible with the U.S. legal framework.

### **i. United Kingdom**

In the UK, the High Court is able to order ISPs to block access to infringing sites since 2003.<sup>83</sup> Pursuant to Section 97A of the Copyright, Designs and Patents Act of 1988, the High Court may grant an injunction against an ISP if that ISP has actual knowledge of another person using their service to infringe copyright. The court takes into account whether blocking a site, *vis a vis* other available measures, is necessary, effective, dissuasive, not necessarily complicated or costly, avoids barriers to legitimate trade, fair and equitable, and proportional.<sup>84</sup> For instance, in *Cartier et al. v. British Sky Broadcasting Ltd.* (2016), the England and Wales Court of Appeal dismissed the appeals against a landmark 2014 High Court order that required five major ISPs to block sites that sold counterfeit goods.<sup>85</sup> The court found that, *inter alia*, site blocking made access to the infringing sites difficult to achieve; it discouraged internet users from accessing the sites; it was more efficient to require ISPs to take action to prevent infringements that occurred using their services than to require rights holders to take direct action against the infringers; alternative measures such as notice-and-takedown were unlikely to achieve anything more than temporary disruption of the infringing sites; and, that the costs of

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<sup>82</sup> See e.g. BUNDESGERICHTSHOF [BGH] [Federal Court of Justice of Germany], Nov. 26, 2015, GEMA, No. I ZR 3/14 (Ger.) (reportedly ruling that ISPs have a duty to cooperate in combating infringement when the infringing site operator is unknown), report *available at* [https://www.gema.de/en/aktuelles/bgh\\_bestaetigt\\_sperrung\\_von\\_piraterie\\_webseiten\\_ist\\_grundsaeztlich\\_zulaessig/](https://www.gema.de/en/aktuelles/bgh_bestaetigt_sperrung_von_piraterie_webseiten_ist_grundsaeztlich_zulaessig/).

<sup>83</sup> Copyright, Designs and Patents Act 1988, §97A (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/1988/48/section/97A>. This provision was implemented following EU Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society 2001/29/EC of May 22, 2001.

<sup>84</sup> See *Cartier et al. v. British Sky Broadcasting Ltd.* [2016] EWCA (Civ) 658 [¶¶ 100-128] (Eng.); *available at* <http://www.bailii.org/ew/cases/EWCA/Civ/2016/658.html>.

<sup>85</sup> *Id.* (affirming *Cartier Int'l. et al. v. British Sky Broadcasting et al.*, [2014] EWHC (Ch) 3354 (Eng.)), *available at* <http://www.bailii.org/ew/cases/EWHC/Ch/2003/3354.html>.

implementation were relatively small and could be regarded as incidental to running an ISP business.<sup>86</sup>

Because it is results-oriented rather than technology specific, Section 97A has allowed the UK High Court to order the blocking of sites featuring evolving forms of infringement – from sites that host infringing content to sites that catalogue and index infringing content to applications that allow users to find infringing content.<sup>87</sup> Recent studies show that site-blocking in the UK, when pursued broadly, effectively reduces online infringement.<sup>88</sup>

## ii. Australia

In 2015, the Australian Parliament approved the Copyright Amendment (Online Infringement) Act 2015 allowing copyright owners to apply to the Federal Court for an injunction to require a “carriage service provider to take reasonable steps to disable access to [an] online location” without having to first establish the [carriage service provider]’s liability for copyright infringement.<sup>89</sup> The legislation is results-oriented in the sense that the Federal Court may order whatever technical means it deems appropriate for the

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<sup>86</sup> *Id.*, at ¶¶ 129-183 (pursuant to Section 97A and European Directives 2000/31 (e-Commerce), 2001/29 (Information Society), and 2004/48/EC (Enforcement)).

<sup>87</sup> See NIGEL CORY, HOW WEBSITE BLOCKING IS CURBING DIGITAL PIRACY WITHOUT “BREAKING THE INTERNET” 22 (Information Technology and Innovation Foundation, 2016), available at <http://www2.itif.org/2016-website-blocking.pdf>.

<sup>88</sup> See generally BRETT DANAHER ET. AL, WEBSITE BLOCKING REVISITED: THE EFFECT OF THE UK NOVEMBER 2014 BLOCKS ON CONSUMER BEHAVIOR (2016) (finding that the 2014 blocking of 53 infringing sites “caused a 90% drop in visits to the blocked sites while causing no increase in usage of unblocked sites. This led to a 22% decrease in total piracy for all users affected by the blocks (or a 16% decrease across all users overall). We also found that these blocks caused a 6% increase in visits to paid legal streaming sites like Netflix and a 10% increase in videos viewed on legal ad-supported streaming sites like BBC and Channel 5.”), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2766795](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2766795).

<sup>89</sup> Copyright Amendment (Online Infringement) Act, 2015 (Austl.), available at [http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r5446](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5446)); and Parliament of the Commonwealth of Australia, Copyright Amendment (Online Infringement) Act 2015 Revised Explanatory Memorandum, ¶ 36 (2015) [hereinafter “Australia Explanatory Memorandum”], available at [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5446\\_ems\\_1599ec23-c036-4dee-9562-a8a2e4d3d6fe%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5446_ems_1599ec23-c036-4dee-9562-a8a2e4d3d6fe%22) (“The term ‘online location’ is intentionally broad and includes, but is not limited to, a website, and would also accommodate future technologies.”).

carriage service to effectuate the site blocking. As background for the legislation, the Parliament recognized that,

where online copyright infringement occurs on a large scale, copyright owners need an efficient mechanism to disrupt the business models of online locations operated outside Australia that distribute infringing copyright material to Australian consumers. In addition, a consequence of fewer visitors at the particular online location may also impact the advertising revenue, which is often an integral element of the business models of these types of entities. . . The proposed amendments are intended to create a no-fault remedy against CSPs where they are in a position to address copyright infringement.<sup>90</sup>

The amendment incorporated enough safeguards to avoid unduly interfering with the right to freedom of opinion and expression, and the right to a fair hearing pursuant to the International Covenant of Civil and Political Rights.<sup>91</sup> For example, the legislation allows the Federal Court to order injunctions only in cases where such a measure is “a reasonable, necessary and proportionate response to the problem of protecting the rights of creators and their licensees from infringing material being distributed to, or accessed by, persons in Australia.”<sup>92</sup> The court can only order injunctions to prevent access to online locations that have the *primary* purpose of infringing or facilitating infringement – which excludes legitimate sites that happen to host a small amount of infringing content and does not interfere with access to sites where content is legitimately available.<sup>93</sup> In

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<sup>90</sup> Australia Explanatory Memorandum, *supra* note 81, at ¶¶ 9, 10.

<sup>91</sup> *Id.* at ¶¶ 12-26.

<sup>92</sup> *Id.* at ¶ 20.

<sup>93</sup> *Id.* at ¶¶ 38, 39 (“This is an intentionally high threshold for the copyright owner to meet as a safeguard against any potential abuse. For example, the ‘primary purpose’ test would prevent an injunction to disable access to an art gallery website operated outside of Australia that may contain an unauthorised photograph. Thus, a website such as [www.youtube.com](http://www.youtube.com) or [www.blogger.com](http://www.blogger.com) would not prima facie satisfy the test as being an online location that infringes or facilitates infringement of copyright. Technology and technological change is not to be chilled or targeted by this amendment. The primary purpose test would also prevent an injunction to block an online location operated overseas that provides legitimate copyright material to individuals within another geographic location, but are not licensed to distribute that copyright material in Australia. For example, the United States iTunes store does not operate with the primary purpose of infringing copyright or facilitating the infringement of copyright and therefore access to this online location would not be disabled under an injunction.”).

terms of procedural safeguards, the carriage service provider is able to contest the injunction; the copyright owner seeking the injunction is required to notify the operator of the online location of the application and, in turn, the operator can apply to be joined as a party to the proceedings.<sup>94</sup> In December 2016, the Federal Court of Australia made its first rulings pursuant to the 2015 site blocking amendment.<sup>95</sup>

### iii. Spain

In Spain, a statutory amendment allowing the Second Division of the Intellectual Property Commission to order site blocking entered into force on January 1, 2015.<sup>96</sup> Article 158ter establishes a three-step process. First, the rights holder has to make a takedown request to an information society service that is hosting an infringing copy of a specific work.<sup>97</sup> Second, if the information society service fails to comply with the request, the Second Division of the IP Commission can order the removal of the infringing content and the implementation of measures to prevent further infringement of the work in question.<sup>98</sup> Third, if the information society service fails to remove the infringing content, then the Commission may order the third party payment and advertisement providers to stop working with the infringing site and/or the technical blocking of the site. In making its decision, the Commission must weigh what measure is most effective and proportional.<sup>99</sup>

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<sup>94</sup> *Id.* at ¶¶ 25, 42.

<sup>95</sup> *Roadshow Films Pty Ltd v Telstra Corporation Ltd.* (2016) (Austl.), *available at* <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2016/2016fca1503>.

<sup>96</sup> Ley 21/2014, de 4 de noviembre, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil [Law No. 21/2014 of November 4, 2014, Amending the Consolidated Text of the Law on Intellectual Property, approved by Royal Legislative Decree No. 1/1996 of April 12, 1996, and Law No. 1/2000 of January 7, 2000, on Civil Procedure (Nov 5, 2014)] Art. 158ter; *available at* <http://www.wipo.int/wipolex/en/details.jsp?id=15435>.

<sup>97</sup> *Id.* at 90426.

<sup>98</sup> *Id.* at 90427.

<sup>99</sup> *Id.* at 90428.

#### iv. European Union - Site-blocking as a Form of Injunctive Relief

In *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, et al.*<sup>100</sup> (“Telekabel”), an Austrian court ordered an Internet access provider to block its users from accessing a website that made available infringing copies of films without specifying the means for such blocking. The CJEU found this form of injunctive relief was acceptable pursuant to EU Directive 2001/29.<sup>101</sup>

In particular, the court concluded that the “results-oriented” injunction allowed the ISP to implement specific measures that best suit “the resources and abilities available to him and which are compatible with other obligations and challenges which he will encounter in the exercise of his activity.”<sup>102</sup> The court also ruled that such injunction would allow the ISP to implement reasonable measures that “do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available.”<sup>103</sup>

In addition, the court dismissed Telekabel’s argument that any measure to block the infringing site could be circumvented and, therefore, would be ineffective.<sup>104</sup> The court indicated that the measures for implementing the injunction

must be sufficiently effective to ensure genuine protection of the fundamental right at issue, that is to say they must have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter made available to them in breach of that fundamental right.<sup>105</sup>

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<sup>100</sup> Case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, et al.* (2014), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=149924&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=514901>.

<sup>101</sup> Telekabel at ¶66.

<sup>102</sup> *Id.* at ¶ 52.

<sup>103</sup> *Id.* at ¶64.

<sup>104</sup> *Id.* at ¶ 63.

<sup>105</sup> *Id.* at ¶62.

## Conclusion

AAP has responded to the latest NOI on the Study of Section 512 by reiterating its previously stated belief that the Copyright Office should focus its efforts in this proceeding on how it should advise Congress to ameliorate the so-called “whac-a-mole” problem. This issue has emerged as the primary illustration of the a corruption of the statutory scheme that Congress intended to promote cooperation between ISPs and the creators and distributors of popular cultural works in order to combat online infringement so the Internet could flourish as a uniquely abundant and accessible marketplace. It is within this specific priority item that the Copyright Office should frame its concern with how to accommodate the diversity of type and size of actors in the online ecosystem as it attempts to develop recommendations for possible changes to improve the operation of the safe harbor provisions of Section 512 of the DMCA.

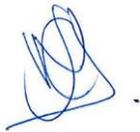
Through Congressional hearings, legislators have a basic understanding of the “whac-a-mole” problem and how it thwarts the twin goals of Section 512. The time is now ripe for them to consider specific ideas on what they might do to resolve it. AAP’s reply comments present on such ideas, particularly those conducive to an effective notice-and-stay-down framework. We have included (1) proposals to amend Section 512 to fix and clarify key concepts that Congress built into its statutory scheme, such as standard technical measures, repeat infringers and the appropriate circumstances for their termination, online service provider, the scope of injunctive relief; (2) proposals to initiate the multi-industry process to identify and develop STMs; and, (3) a sample review of proven approaches from jurisdictions outside the United States to improve the cooperation of ISPs and copyright owners to address online infringement.

We are eager to continue cooperating in the Copyright Office's completion of its Study and any legislative action that results from such effort.

Sincerely,



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## APPENDIX I - SAMPLE RESPONSES FROM AAP MEMBERS ON NOTIFICATION-SENDING PRACTICES

### What percentage of your takedown notices engender counter-notices?

- *Large educational publisher 1* – From June 2015 to May 2016, the outsourced vendor did not receive any counter notices. During that same timeframe, the vendor received notices from host sites where the vendor had sent a DMCA takedown that indicated misidentification of content regarding one or more URLs.
- *Outsourced vendor servicing a large scholarly publisher and a large trade publisher* – <0% of the notices we issue engender counternotices. Those that are received are often due to a difference of opinion with the rights holder, not a legitimate claim to the content, fair use, etc.
- *Large university press* – A negligible amount of notices we (or [outside vendor]) issue lead to counternotices. The handful that we have received have been due to a clearly spurious claim of fair use rather than a valid right to use the content.
- *Outsourced vendor servicing a large scholarly publisher* – I have never received a counter notice. And we have sent in excess of 2 million notices in the past 3 years.
- *Large educational publisher 2* – Negligible – less than 10 in a dozen years.

### What do you do to try to protect against erroneous takedown notices?

- *Large educational publisher 1* – All URLs require human review by data analysts who are trained to recognize instances of piracy and are also trained on issues related to fair use. We maintain a list of known pirate host and link sites to prevent action on legitimate, non-pirate sites. Quality checks and audits are performed on a regular basis.
- *Outsourced vendor servicing a large scholarly publisher and a large trade publisher* – As a vendor, we do everything possible to assure our work focuses on full, infringing copies of works to which rights belong to our publishers. Every single link found is validated by a member of our trained customer-service team to avoid sending notices on excerpts and otherwise add a human element to the process BEFORE enforcement actions are taken. [We are] extremely rigid in [our] exclusion of public-domain works from coverage. We have developed and actively filter out known or possible cases of public-domain works from the title-lists sent to us by publishers, and try to educate our publishers about excluding these from the service to begin with. We also have a set of basic criteria for avoiding sending

takedowns on cases of possible fair use, which we train our customer-service representatives on in order to additionally reduce the risk of validating/enforcing upon such case.

- *Large university press* – [Our vendor] works hard to ensure notices are only sent for full, infringing copies of works to which rights belong to their publishers (i.e. no notices sent for excerpts). They exclude public domain works from the notices (they filter out those works from any lists which publishers send them). Importantly, they add a human check into each action before a notice is sent - every single link found is validated by a member of [the vendor's] customer-service team. That team is trained on fair use and on criteria for avoiding sending notices for possible cases of fair use. Where notices are served directly from OUP, they are reviewed by several internal departments to ensure permission has not been granted, and that the notice is being sent to the correct target.
- *Outsourced vendor servicing a large scholarly publisher* – We instruct our third party anti-piracy services to validate against very granular data we send them. We send ONIX records of all the titles we scan for, which includes all bibliographic data available at a detailed level. Suspected infringements must match our ONIX data closely to be validated as infringements. We also instruct third parties to scan only the known piracy platforms, a list which we can add to as we do our own investigations – this avoids sending notices to bona fide ecommerce sites. Much effort is put into ensuring false positives remain at a minimal level.
- *Large educational publisher 2* – Manual review of all links prior to generating a C&D; no C&Ds sent for obvious phishing/spoofing links.

### **What combination of automation and human verification do you use?**

- *Large educational publisher 1* -- All URLs require human verification. Currently we do not provide any fully-automated verification for e-books or readers. Human review is machine-assisted, based on content found on the potential infringing webpages (machines identify and highlight positive and negative keywords). Our URL processing involves two stages: (1) Pre-processing (normalization of URLs to format URLs in a consistent manner; deduplication to remove redundant URLs); Automated exclusion based on specific criteria; global rules to remove found URLs that do not lead to actual web resources; industry rules to remove URLs which lead to irrelevant content such as video content found in a publishing project; Project rule which are client-determined rules on what does not constitute an infringement for a specific title or project) and (2) Human verification (content system highlights positive and negative matching keywords; and analyst reviews URLs and associated metadata to determine infringement status.)

- *Outsourced vendor servicing a large scholarly publisher and a large trade publisher* – All links/ files discovered are subject to at least one round of human verification (over 90% are subject to two rounds of independent human verification).
- *Large university press* – All links/files discovered by [our vendor] are subject to at least one round of human verification (over 90% are subject to two rounds of independent human verification). OUP has access to the UK Publishers Association Copyright Infringement Portal, which combines automatic scanning and display of results with entirely manual verification and takedown.
- *Outsourced vendor servicing a large scholarly publisher* – Automation for the majority, but validated against granular data. Human verification for the grey areas.

**What periodic reviews do you do with your vendors to improve the accuracy of your takedown notices?**

- *Large university press* – We meet with [our vendor] to address any emerging issues, such as unresponsiveness of particular hosts or any changes in requirements/processes.