



**BEFORE THE  
U.S. COPYRIGHT OFFICE**

**512 Study Additional Comments**

**Docket No. 2015-7**

**COMMENTS OF THE COPYRIGHT ALLIANCE**

The Copyright Alliance appreciates the opportunity to submit the following comments in response to the U.S. Copyright Office’s Request for Additional Comments regarding its Section 512 Study, published in the Federal Register on November 8, 2016.

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 1.8 million individual creators and over 13,000 organizations in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The individual creators and organizations that we represent rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

## I. Characteristics of the Current Internet Ecosystem

### 1. How should any improvements in the DMCA safe harbor system account for diversity among the categories of content creators and ISPs who comprise the Internet ecosystem?

We recognize that neither ISPs<sup>1</sup> nor content creators are homogenous groups; there are a number of varying—and at times competing—interests between and among these groups, which are relevant to the efficient and effective operation of Section 512. While we do not dispute that there are certainly differences amongst types of content creators and types of ISPs, until we have a better idea what “improvements in the DMCA” are envisioned<sup>2</sup> and how those improvements would be effectuated, we think that it is premature to suggest that changes to the DMCA should treat different ISPs and different content creators differently.

Diversity Among Categories of ISPs: While we appreciate that there may be good reason to treat different ISPs differently in the context of the DMCA standards, we would be concerned if factors like size or the volume of content an ISP hosts were used as the sole or dispositive gauge for comparing ISPs and determining how the DMCA might apply to them going forward. If improvements to the DMCA are made to account for diversity among the category of ISPs, we think that there are a various factors that should be considered in any attempt to distinguish between the obligations and standards of ISPs. All these factors ultimately relate to one thing—the ISP’s potential to cause harm through repeated or flagrant copyright infringement.

Several factors influence an ISP’s potential for harm. A nonexhaustive list of these factors (in no particular order) includes:

- **Size of the ISP:** When we refer to “size” of an ISP we are referring to such characteristics like the number of employees and financial resources. On the one hand, a larger ISP should be held to a higher standard than a smaller ISP because it has more resources to address the infringement issue. For example, a sizeable user-generated video platform is more likely to be able to invest in the creation of a filtering system to reduce

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<sup>1</sup> “ISP” as used through these comments includes any entity within the definition of “service provider” under 17 USC 512(k)(1).

<sup>2</sup> Although the Notice refers to “filtering” and “staydown,” as discussed in our responses to other questions, these terms mean different things to different people and without knowing more about the parameters of the Copyright Office’s use of these terms we are reluctant to take any firm position with regard to different standards attaching to either of these at this time.

the amount of piracy on the site, whereas a smaller platform may not have that capacity. On the other hand, an ISP that is large in size but whose site does not attract much traffic or whose business model does not lend itself as easily to mass infringement should likely not be held to any higher standard than a similarly situated smaller ISP because the potential for the site to cause harm through infringement is reduced.

Similarly, we do not think an ISP should be held to a lower standard simply because it is smaller in size and has less resources to adequately deal with the significant number of takedown notices it may receive or the number of infringements on the site because the site is a haven for online piracy due to its business model or some other reason. An ISP that is smaller in size still has the capacity to cause the same or greater amount of harm than a larger ISP, and it should not be subject to a lesser standard simply due to its size. Further, we would not want to encourage an outcome that would allow a smaller ISP to leverage its relaxed DMCA standards to obtain a competitive advantage over larger, more responsible ISPs, nor should we incentivize the creation of “shell” ISPs aimed solely at availing itself of the relaxed DMCA standards.

- **Volume of Content the ISP hosts:** The amount of content that an ISP hosts is certainly relevant to the potential harm that an ISP may cause to copyright owners, but it needs to be considered along with many other factors listed here. For example, a user-edited online encyclopedia may have a significant volume of content but is less likely to be abused by users for the purpose of copying or distributing copyrighted content than a cloud-based remote storage service with the the same volume of content because of the different business models and functionality employed by each.
- **Business Model Employed by the ISP:** An ISP’s business model will have significant effect on the potential for infringement on the site. For example, user-generated video platforms often embrace business models based on social interaction and engagement with the platform, which encourages content sharing and maximizes distribution. This type of business model is more susceptible to infringement and more amenable to user education, filtering and others steps to preclude infringement on the site.

- **How an ISP Markets its Site or Services:** Since the Supreme Court’s decision in *Grokster*, courts have focused on the way an ISP markets its site and services to its user community as an indicator of how susceptible the site is to infringements by those users and by the site itself.<sup>3</sup> Thus, if a site encourages users to engage in infringing activity, regardless of size of the ISP or volume of content on the ISP’s site, that is an important factor in determining whether a different standard of accountability ought to apply. Conversely though, the fact that an ISP does not openly market its site or service as one that can be used for infringement should not be a factor that weighs against the application of a different standard. For example, a website that encourages and provides users with tools to “cut” photographs and other images from third-party websites to manipulate those images on its site is a platform that markets itself in a manner that invites, and is more prone to be used to engage in, infringement.
- **Amount of Website Traffic:** In our view, this factor, along with the site’s business model, is among the most significant factors because this factor relates to how many people have access to the infringing material or activity. As greater numbers of people have access to the site or service, the potential harm caused by infringement increases exponentially, especially when the website’s primary draw is the ability to access infringing material.
- **Subscribers and Users:** The number of users and subscribers is certainly significant. A large number of account holders who are posting materials or using the service has the potential to result in more harm in the event of infringement. On the other hand, even a few users engaging in infringement can cause a a lot of harm if the site draws lot of traffic. While both the amount of website traffic and the number of account holders demonstrate the potential reach of infringement, unlike general website traffic, account holders represent those with whom ISPs have an ongoing relationship. This ongoing relationship makes ISPs appropriately situated to step in and prevent repeated abuse.
- **Steps an ISP Takes (or Does Not Take) to Combat Infringement:** This is also one of the more significant factors. If, based on the factors identified above, an ISP’s site or service

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<sup>3</sup> 545 US 913 (2005).

is ripe to cause harm due to infringing material or activity on the site, the way to counter that is for the site to proactively take steps to reduce the likelihood of such harm. Thus, the effectiveness and comprehensiveness of such steps would seem to be an extremely relevant factor to be considered in determining how the DMCA safe harbor system should apply if such factors are to be considered.

In sum, while we are not advocating for different standards, in response to the question, we feel it is important to stress that to the extent that new distinctions among ISPs are determined to be appropriate, such distinctions should account for all of these factors, not just the two factors identified in the Notice.

Diversity Among Categories of Copyright Owners: Efforts to improve the accuracy of notices and counternotices should take into account the differences between individual senders. The language of the statute sufficiently accounts for differences between notice senders by imposing subjective, rather than objective, standards of intent where appropriate. For example, section 512(c)(3)(A)(v) explains that the sender of a takedown notice must have “a *good faith belief* that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.”<sup>4</sup> Section 512(g) requires a similar “good faith belief” to effectuate a counternotice. Such a subjective standard takes into account the relative sophistication of an individual or entity.

As we discuss further in response to question 7, we ask the Copyright Office to clarify that, under a proper reading of the statute, the “knowing material misrepresentation” language in 512(f) clearly indicates that courts should apply a subjective standard.

2. *Are there specific issues for which it is particularly important to consult with or take into account the perspective of individual users and the general public? What are their interests, and how should these interests be factored into the operation of section 512?*

The internet has been a catalyst for the development of new industries, business models, and distribution channels through which copyright holders can disseminate and monetize their work. Creators, ISPs and the general public share a common interest in a safe digital environment where copyright holders can distribute, and users can access, creative content.

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<sup>4</sup> Emphasis added.

However, rampant piracy has been linked to the spread of malware and other nefarious software, which threatens the existence of a safe digital ecosystem. In December 2015, the Digital Citizens Alliance released its study *Digital Bait*, which highlighted the link between content theft and malware. The study found that accessing pirate sites left consumers' computers "28 times more likely to be infected with malware" which in turn makes them vulnerable to "identity theft, financial loss, and computers being taken over by hackers"<sup>5</sup> It is important that ISPs work cooperatively with copyright owners to help combat infringement online, not only to ensure that the internet is a safe space for copyright holders to disseminate their work, but also to guard against bad actors that threaten the safety of the internet, individual users, and the general public.

## II. Operation of the Current DMCA Safe Harbor System

### 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?

The NOI asks how policy makers should consider the divergence of views regarding the effectiveness of the DMCA safe harbor system. In evaluating these divergent views, the primary focus for policy makers should be whether the safe harbor provisions effectively balance the interests of ISPs and copyright owners as Congress intended. Balance would be reflected by the fact that both sides are in agreement about how well the DMCA is working (or not). But where—as the public comments and roundtables has revealed—one side, the ISP community, is pleased with the DMCA but the other side, the copyright community, is not, it is clear that this balance has not been achieved.

When Congress enacted the safe harbor provisions of the DMCA, the intent was to "appropriately balance[] the interests of content owners, on-line and other service providers, and information users"<sup>6</sup> by incentivizing "service providers and copyright owners to cooperate to detect and deal with copyright infringement" online.<sup>7</sup> That balance has not been achieved. While ISPs are routinely shielded from liability under the DMCA, the problem of online copyright infringement has grown enormously since 1998, leaving copyright owners to bear the brunt of

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<sup>5</sup> DIGITAL CITIZENS ALLIANCE, *DIGITAL BAIT* 1, 6 (2015), <https://media.gractions.com/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/0f03d298-aedf-49a5-84dc-9bf6a27d91ff.pdf>.

<sup>6</sup> H.R. REP. NO. 105-551, at 21 (1998).

<sup>7</sup> H.R. REP. NO. 105-551, at 49 (1998).

the burden—*with little to show for it*. The fact that copyright owners shoulder most of the burden of enforcing against infringement is not, standing alone, the primary problem. The primary issue is that, when they do take on that burden and send takedown notices, the notices have little if any effect, as the infringing material is often immediately reposted. This results in the burden being almost exclusively placed on the creative community, and that is far from the balance and cooperation that Congress intended.

4. *What are the most significant practical barriers to use of the notice-and-takedown and counter-notice processes, and how can those barriers best be addressed?*

In asking about barriers to the effective use of the notice-and-takedown process, the NOI contemplates some of the most significant issues that copyright owners face, such as the lack of uniformity and consistency from one ISP's web form to the next, and the practice by some ISPs of imposing requirements beyond those prescribed under the law. In addition, copyright owners cite as barriers difficulty locating web forms and designated agents due to inconspicuous placement—since the DMCA only requires the information to be “in a location *accessible* to the public,” but not conspicuously placed—as well as backlash from notice recipients resulting in safety and privacy concerns. The comments submitted by the Arts and Entertainment Advocacy Clinic at George Mason (AEAC) discuss how one record label's concentrated effort in submitting takedown notices resulted in a computer being compromised and the hard drive destroyed. Those comments also explain how copyright holders are sometimes reluctant to send notices which require them “to reveal their personal information, including phone numbers and a home address” due to safety concerns and fear of retaliation.<sup>8</sup> We support these comments, and have reported similar concerns from our individual members. At least one member has even reported receiving death threats as a result of sending a takedown notice.

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<sup>8</sup> The Arts and Entertainment Advocacy Clinic at George Mason University School of Law, Comment on Section 512 Study (Apr. 7, 2016), at 10, <https://www.regulations.gov/document?D=COLC-2015-0013-90145>.

5. *Some commenters expressed the view that the process for restoring access to material that was the subject of a takedown notice takes too long, noting that the material for which a counter-notice is sent can ultimately be inaccessible for weeks or months before access is restored. Other commenters expressed the view that the timeframe for restoring access to content is too short, and that ten days is not enough time for a copyright holder to prepare and file litigation following receipt of a counter-notice. Are changes to the section 512 timeline needed?*

Another challenge that copyright holders report facing under Section 512 is that infringers sometimes abuse the notice-and-takedown process by sending illegitimate counter-notices, effectively stifling the enforcement efforts of copyright owners who cannot afford to file suit in federal court. As a potential solution to this problem, the NOI contemplates whether the ten-day window for suing should be extended. However, as discussed, copyright owners often lack the financial resources to afford to litigate in federal court, so extending the period of time in which they may file a lawsuit before the infringing material is restored, alone, fails to adequately address the issue. In addition to extending the ten-day window for filing,<sup>9</sup> a small claims tribunal such as the one outlined in [H.R. 5757](#) and [H.R. 6496](#) would provide a less expensive alternative forum in which copyright owners can enforce their rights. Additionally, that counter-notice senders express frustration with length delays in restoring access to content speaks to ISP non-compliance with the statute rather than a reason to amend the statute.

6. *Participants also noted disincentives to filing both notices and counter-notices, such as safety and privacy concerns, intimidating language, or potential legal costs. How do these concerns affect use of the notice and-takedown and counter-notice processes, and how can these disincentives best be addressed?*

We discussed the need for a small claims court to address the concern over legal costs in response to question 5, and safety and privacy concerns in response to question 4, but it is worth highlighting that these disincentives have the practical effect of impairing copyright owners' efforts to enforce their rights. Our own individual creator members have shared anecdotes about feeling "helpless" when left with no option but to sue in federal court. The comments submitted by AEAC discuss how concerns over safety and privacy caused Blake Morgan, a musician and owner of the record label ECR Music Group, to stop sending takedown notices altogether

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<sup>9</sup> The timing of "filing" under this provision should be considered to be the time the copyright owner-claimant sends the notice of small claims action to the respondent.



because “it simply was not worth it.”<sup>10</sup> Those comments also discussed photographer Yunghi Kim’s decision not to send a takedown notice to a website where her image had been used without permission because the group appeared to endorse violence and, in light of that, she was uncomfortable revealing her personal information to the group via a takedown notice.<sup>11</sup> We can only assume that there are other copyright holders who are even reluctant to share similar experiences. We hope that the Copyright Office acknowledges these concerns and disincentives in its final report.

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?

As we discussed in our previous comments, instances of alleged abuse of the notice-and-takedown process by rights holders, even if true, are vastly outnumbered by legitimate efforts to enforce copyright. To the extent that abusive and misleading notices occur, the DMCA adequately guards against this sort of abuse under section 512(f), which provides that “Any person who knowingly materially misrepresents ... that material or activity is infringing” can be held liable for such misrepresentation. As such, any effort to expand the scope of 512(f) liability or otherwise legislate new penalties is unwarranted, and would effectively create more barriers to enforcement for copyright holders. Further, a small claims tribunal as discussed in response to question 5 might be fashioned in a way to help those aggrieved by abusive notices and counter-notices to enforce claims under 512(f) without the need for legislating new penalties.

Additionally, with regard to a proper reading of section 512(f), the Copyright Office should confirm that the basis for liability under section 512(f) is separate from the requirements for a valid notice under section 512(c). Under the plain language of the statute, 512(f) only triggers liability when there is a “knowing material misrepresentation” that material or activity is infringing. In *Lenz v. Universal*, the Ninth Circuit improperly conflated 512(f) with the requirements of a valid notice under 512(c)(3) to essentially broaden 512(f) so that it triggers liability whenever a copyright owner sends a notice that does not meet the requirements under 512(c)(3). We ask the Copyright Office to confirm that, under the language of the statute, (1)

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<sup>10</sup> *Id.* at 12.

<sup>11</sup> *Id.* at 12.

512(f) only applies to representations that material or activity is infringing, not more broadly to the elements of a notice under 512(c)(3),<sup>12</sup> and (2) that, as every court to consider the issue has held (and no court has held to the contrary), the “knowing material misrepresentation” language clearly indicates that courts should apply a subjective standard.<sup>13</sup>

8. For ISPs acting as conduits under section 512(a), what notice or finding should be necessary to trigger a repeat infringer policy?

ISPs that qualify for safe harbor as conduits under 512(a) have the fewest conditions to meet for safe harbor protection under Section 512, which makes adherence to conditions all the more important. According to section 512(i), an ISP must adopt and reasonably implement “a policy that provides for the termination in appropriate circumstances of subscribers and account holders...who are repeat infringers.” What constitutes a reasonably implemented repeat infringer policy is highly fact specific and will vary from one context to another. However, any interpretation regarding a user’s status as a repeat infringer or whether a policy has been reasonably implemented should align with the purpose and intent of the statute. Congress intended Section 512 to encourage cooperation between ISPs and copyright owners in combating online infringement. As such, 512(i) incentivizes ISPs to cooperate by conditioning the benefit of safe harbor on implementation of a policy that would help to *deter* infringement.<sup>14</sup> A reading of the statute which requires an ISP to implement a policy only *after* the rightsholder expends resources litigating does nothing to support the goals of the legislation. Instead, such a reading places the burden on copyright owners while rewarding ISPs for a negligible effort on the backend.<sup>15</sup>

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<sup>12</sup> This is not to say the statute does not provide any recourse for users and service providers outside 512(f). See 17 USC § 512(c)(3)(B) and 17 USC § 512(g)(2).

<sup>13</sup> *Lenz v. Universal Music Corp.*, 801 F. 3d 1126 (9th Cir 2015); *Dudnikov v. MGA Entm't, Inc.*, 410 F. Supp. 2d 1010, 1012 (D. Colo. 2005); *Disney Enterprises, Inc. v. Hotfile Corp.*, 2013 WL 6336286 (S.D. Fla. Sept. 20, 2013); *Cabell v. Zimmerman*, 2010 WL 996007 (S.D.N.Y. Mar. 12, 2010); *Third Educ. Group, Inc. v. Phelps*, 675 F.Supp.2d 916 (E.D.Wis.2009); *Tuteur v. Crosley-Corcoran*, 961 F. Supp. 2d 333, 343 (D. Mass. 2013); *TD Bank, N.A. v. Hill*, 2014 WL 413525 (D.N.J. Feb. 3, 2014); *Smith v. Summit Entm't LLC*, 2011 WL 2200599 (N.D. Ohio June 6, 2011).

<sup>14</sup> “However, those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others *should know that there is a realistic threat* of losing that access.” S. REP. NO. 105-190, at 52 (emphasis added).

<sup>15</sup> For further discussion on 512(a) and repeat infringer policy under 512(i), we incorporate by reference the comments we filed in our [amicus brief](#) in *BMG Rights Management v. Cox*.

### III. Potential Future Evolution of the DMCA Safe Harbor System

9. *What types of educational resources would improve the functioning of section 512? What steps should the U.S. Copyright Office take in this area? Is there any role for legislation?*

To help educate the public and clear up some of the confusion regarding the rights and responsibilities of ISPs and copyright owners under Section 512, the Copyright Office could consider creating circulars for ISPs, notice-senders, and counter-notice senders. The Office may also wish to consider increasing awareness of copyright issues by partnering with schools at the K – 12 level to provide education on copyright and creative content in the digital landscape, and foster a greater respect for copyright.<sup>16</sup> We think all these activities (and more) can be accomplished without the need to make legislative changes.

10. *How can the adoption of additional voluntary measures be encouraged or incentivized? What role, if any, should government play in the development and implementation of future voluntary measures?*

We enthusiastically support the use of voluntary, collaborative efforts to address the problem of online infringement. Such initiatives reduce and equitably apportion the burden of reducing infringement, removing profit from infringement, and educating users about legal alternatives. Any initiative, whether voluntary or statutory, cannot be considered effective if the burden of action falls primarily on the creator; everyone in the online ecosystem has a role to play in creating a fair and sustainable marketplace. We also believe that these efforts should complement the DMCA rather than supplement where the legislation falls short. For example, while a growing number of ISPs are voluntarily implementing content filtering technology, if standard technical measures (STMs) had been adopted in a collaborative manner pursuant to section 512(i) (discussed further in response to question 11), there would be less of a need for independently-developed technology to balance the burden where the law has failed to.

It has been said that section 512(m), which relieves ISPs of any duty to monitor, in conjunction with section 512(c)(1)(A)(ii), which permits an ISP to be held liable for “red-flag” knowledge, discourages ISPs from adopting certain voluntary measures for fear that if they do, they may be liable under section 512(c). ISPs that reasonably implement effective filtering

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<sup>16</sup> Such a curriculum for K-12 has already been developed, with strong buy-in from both the tech companies and the copyright community. It can be found [here](#).

systems to monitor for and take affirmative action against piracy should be rewarded, not penalized. Consequently, we would be interested in exploring this dynamic further with the ISP community in the context of voluntary initiatives to determine the viability of eliminating the potential for liability through “red-flag” knowledge for those ISPs that effectively monitor for and take action against infringement.

11. *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?*

Section 512(i) specifically conditions eligibility for safe harbor protection on whether a service provider “accommodates and does not interfere with standard technical measures,” (STMs) which are to be developed based on “a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process.” However, as stated in the NOI, since the inception of the DMCA nearly 20 years ago, there have yet to be any standard technical measures adopted, effectively rendering the provision useless. *This is one of the most significant drawbacks to the effective application of the notice-and-takedown process*, as it nullifies a provision which is designed to facilitate cooperation between ISPs and copyright owners. To date, platforms like YouTube, Facebook, Scribd, and Dropbox have implemented technology capable of identifying and removing unauthorized copyrighted material posted by their users. Technologies like these should be shared with other ISPs in the context of 512(i), which specifies that STMs must be made “available to any person on reasonable and nondiscriminatory terms.”

12. *Several study participants have proposed some version of a notice-and-stay-down system. Is such a system advisable?*

While copyright owners collectively value the same end result—a digital environment that neither supports, nor cultivates piracy—different groups have different ideas about how best to achieve that end. One recommendation that is strongly supported by many of our members, but not all, is implementation of a “notice and staydown” system. Before the possibility of a “notice and staydown” provision can be fully considered we all need to have a better (and common) understanding of what that means and how that would be implemented. In concept, a “notice and staydown” system makes a tremendous amount of sense, but neither legislation nor

voluntary measures can be implemented based solely on a broad concept. We think the concept of a notice and takedown system is ripe for discussion between the copyright and ISP communities to better determine next steps.

#### IV. Other Developments

14. *What is the impact, if any, of these decisions on the effectiveness of section 512?*

At this time, we believe this question is premature, as litigation in the two cases mentioned, *BMG Rights Management v. Cox Communications* and *Capitol Records v. Vimeo*, is ongoing. We look forward to addressing this issue in the future, should the need and opportunity arise.

16. *Please identify any other pertinent issues that the Copyright Office may wish to consider in conducting this study.*

During the initial round of comments, some commenters suggested that “automated processes” for identifying content lack human review and are insufficient to support a takedown notice under the DMCA.<sup>17</sup> This position takes for granted the human component of artificial intelligence—the programs behind those automated processes are ultimately subject to human design, engineering, and review. Further, if a court can apply a finding of fair use—which must be proven by a preponderance of the evidence<sup>18</sup>—to a platform accused of infringing tens of millions of books without requiring human review of each digitized book,<sup>19</sup> automated review can certainly support a determination which requires only a “good faith belief.”

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<sup>17</sup> Electronic Frontier Foundation posited in its initial comments on the Copyright Office’s 512 Study that “[a]ccording to the DMCA, a takedown notice must be based on a “good faith belief” that the targeted content’s use of copyrighted material is not authorized by law. Automated processes, without any human review, cannot satisfy this standard.” Electronic Frontier Foundation, Comments on Section 512 Study (Apr. 7, 2016), at 8, <https://www.regulations.gov/document?D=COLC-2015-0013-90217>.

<sup>18</sup> Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685, 706 n.124 (2015).

<sup>19</sup> See *Authors Guild v. Google Inc.*, 804 F.3d 202, 208 (2d Cir. 2015).

**V. Conclusion**

We thank you for the opportunity to participate in the 512 Study and look forward to reviewing the Office's final report.

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