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February 21, 2017

U.S. Copyright Office
Attn: Karyn Temple Claggett
Acting Register of Copyrights and Director of the U.S. Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000

Electronically submitted via www.regulations.gov

Re: Section 512 Study: Request for Additional Comments Issued on November 8, 2016 by the U.S. Copyright Office [Docket No. 2015-7][1]

Dear Acting Register Temple Claggett,

The Independent Film & Television Alliance (IFTA) respectfully submits these comments in response to the Notice of Inquiry published in the Federal Register requesting additional written submissions on the impact and effectiveness of the safe harbor provisions set forth in section 512 of the Digital Millennium Copyright Act (DMCA).[2]

Following IFTA's response to the Copyright Office's initial Notice of Inquiry in connection with its Section 512 Study,[3] IFTA's Senior Counsel, Eric Cady, participated in the roundtable discussion convened by the Office in San Francisco in May 2016. At the roundtable, IFTA highlighted online infringement, and the lack of effective mechanisms under the DMCA for rights holders to efficiently address piracy, as a main threat to the independent film and television industry. IFTA reiterated its call for a rebalanced approach to the section 512 safe harbors through updated legislation with a "notice, takedown and stay-down" framework to incentivize all stakeholders in the digital ecosystem to take effective and rapid action to mitigate online piracy, especially infringement resulting from pre-release theft.

IFTA continues to follow these discussions closely and responds below to those specific questions posed by the Copyright Office in its most recent Notice of Inquiry, where the experience of IFTA and its Member Companies may be of greatest assistance in the evaluation of section 512.

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[1] *See* 81 Fed. Reg. 78636 (November 8, 2016) as amended on January 27, 2017.
[2] 17 U.S.C. § 512.
[3] *See* IFTA's response to the Notice and Request for Public Comment Issued on December 31, 2015 by the U.S. Copyright Office [Docket No. 2015-7].

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?

Improvements in the DMCA, namely through the adoption of a fair and efficient notice, takedown and staydown framework to address online infringement, can be successfully accomplished while accounting for the diversity among the categories of content creators and internet services providers (ISPs) in the Internet ecosystem. While there may not be one statutory solution that is appropriate for all types of creative content or that is suitable to encompass all ISP-related functions (*i.e.*, mere conduit, hosting, caching, or indexing), when appropriately calibrated, the staydown framework becomes the only solution that will adequately rebalance the law.

For example, as discussed at the roundtable in San Francisco, there seemed to be an openness among at least some of the participants to explore the notion of a staydown requirement, narrowly focused on full-length film and television programming, and particularly with respect to content that has not been publicly released by the rights holder. Limiting the staydown framework to full-length content would eliminate the possibility of interfering with a fair use. Similarly, in the case of pre-release theft, the appearance of even a single copy online alone is proof of criminal activity and copyright infringement. These parameters could apply irrespective to the size of the ISP, volume of online material hosted by it, or regardless of the related ISP function.

From a rights holder perspective, such a narrowly focused staydown framework – addressing the most damaging incidents of infringement – would, in those critical instances, alleviate the expense and the time consuming practice of notifying service providers of each and every individual instance of infringement of the same infringing content. It would also solve the rampant problem of the automatic re-upload of infringing content that has already been noticed and removed. As we heard at the roundtable discussion, takedown requests can easily reach into the hundreds of millions, even for one service provider alone.[4] Independents often cannot afford to employ third party vendors to efficiently and quickly administrate notice and takedown.

Question #9:
Many participants supported increasing education about copyright law generally, and/or the DMCA safe harbor system specifically, as a non-legislative way to improve the functioning of section 512. 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?

Educational awareness about the copyright law in general, including the consequences of infringement, is important and must continue at all levels of our society. However, the real issue

[4] As of February 21, 2017, the Google Transparency Report states that **915 million** URLs have been requested to be removed from its search feature alone in the past year (February 21, 2016 to February 21, 2017).

must be addressed through legislation to update the current notice-and-takedown provisions of section 512 which are severely outdated and do not provide any meaningful way to enforce rights.

The U.S. Copyright Office, prominent educational institutions, and third party groups such as CreativeFuture[5] are key sources of educational materials on copyright law. IFTA does not see a need for specific legislation in the area of providing educational information on the copyright law itself.

As the main advisor to Congress on matters related to Copyright Law, the U.S. Copyright Office should recommend legislative amendments to provide for an appropriately tailored notice, takedown and staydown framework which incentivizes all stakeholders in the digital ecosystem to take effective and rapid action to prevent or mitigate the damage of specific instances of online infringement.

Question #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?

Voluntary measures do not replace the need for Government action and legislation in the area of online enforcement, including updates to the 1998 DMCA. With respect to supplementing the current section 512 system, voluntary measures have not been widely embraced by Internet service providers, and more importantly, do not offer mechanisms to immediately prevent or mitigate the damage from a specific illegal act of online infringement. They also do not provide ISPs with the proper "safe harbor" needed for a notice, takedown, and staydown system.

The recent abandonment of the U.S. Copyright Alert System (which only addressed peer-to-peer infringement) is further justification that a legislative solution to address online infringement, most often by streaming, is needed now more than ever.[6] Notwithstanding the limited scope of the program, the parties still were not able to reach agreement to extend the U.S. Copyright Alert System in a manner that would offer tangible results with respect to recidivist (and professional) infringers.

IFTA is acutely aware that any such industry agreements are often "Cadillac Solutions" which disenfranchise those who are not involved in the relevant discussions on program framework or cannot afford the cost-sharing obligations to participate.

The United Kingdom's Intellectual Property Office recently brokered a deal between rights holder and UK search engines to develop a "Voluntary Code of Practice" dedicated to the removal of links to infringing content from the first page of search results.[7] It has been reported that the deal was motivated in part by the prospect of the UK Government imposing a legislative code of practice on search engines through the country's Digital Economy Bill, thus forcing those service providers to confront the issue of online infringement proactively.[8] The terms of

[5] http://www.creativefuture.org
[6] http://www.copyrightinformation.org/statement/statement-on-the-copyright-alert-system/
[7] https://www.gov.uk/government/news/search-engines-and-creative-industries-sign-anti-piracy-agreement
[8] https://torrentfreak.com/search-engines-copyright-holders-ready-voluntary-anti-piracy-code-170208/

the agreement have not been made public, although the Voluntary Code of Practice reportedly "will accelerate the demotion of illegal sites following notices from rights holders, and establishes ongoing technical consultation, increased co-operation and information sharing to develop and improve on the process. It will also enable new practices to be adopted where needed."[9] This agreement is promising but does not address the issues of concern with section 512, hence IFTA does not advocate any further delay in the U.S. changing the law.

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 as system have for future online innovation and content creation?

At this point in time, a notice-and-stay-down system is necessary and required to fix the antiquated provisions of the 1998 DMCA. Current law provides too great an umbrella to excuse service providers from responding to notice of pervasive illegal activity – encouraging them to rely on technical compliance with the onerous notice provisions of section 512 to evade doing anything meaningfully to address the infringement. In turn, rights holders are forced to deluge service providers with thousands of notices, rather than working in cooperation to deploy now-common technology that would accomplish takedown and staydown. Such technology is already well established, such as YouTube's Content ID, but is only offered to those rights holders with "large catalogs".

The specific details of any staydown requirement would be the subject of much consultation among industry. However, in broad terms, updating the DMCA means requiring service providers, after having received clear notification of infringement and identification of the infringing material from a rights holder, to use now-common technology to match infringing material identified in notices and take proactive steps to prevent the repeated upload and hosting of the same infringing material. <u>This "notice, takedown and staydown" framework is better suited to address the tidal wave of infringement</u> and will likely quell the volume of infringement notices by preventing the spread of the same pirated content on the same service provider's system. This would alleviate the burden for content owners and ISPs of sending and processing millions of notices for <u>all</u> stakeholders.

During the roundtable, some participants expressed concern regarding the ability of start-ups and smaller ISPs to comply with any statutory staydown requirement, in part due to the associated financial or technical burdens. With respect to the concern that a staydown framework would stifle innovation, section 512(i)(2)(c) already provides that "standard technical measures" must not "impose substantial costs on service providers or substantial burdens on their systems or networks.[10] This existing language of the statute may be used as a guidepost as the staydown framework is developed, however since the technology is well established <u>all</u> ISPs should be required to employ it and no blanket exemption should be given lest infringing activity migrate to certain ISPs. Furthermore, under a notice, takedown, and staydown framework, rights

[9] http://allianceforip.co.uk/CodeofPracticepressrelease.pdf
[10] 17 U.S.C. § 512(i)(2)(c).

holders would maintain the responsibility to employ suitable technological measures to watermark, fingerprint or otherwise identify digital files and online infringements.

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.

In addition to the amending the statutory framework of section 512 to provide for "notice, takedown and staydown" which incentivizes all stakeholders in the digital ecosystem to take effective and rapid action to prevent or mitigate the damage of specific instances of infringement, IFTA offers the following recommendations that would assist in the functioning of the DMCA safe harbor regime by creating stronger deterrents to infringement and identifying circumstances that require heighted attention by service providers.

- **Include obligations on ISPs and others to address security breaches that result from cyberattacks.** ISPs, search engines and other third party intermediaries should be statutorily required to assist rights holders to control and mitigate the damage in extenuating circumstances following notification of a specific criminal act, such as when a pre-release film or television program has been stolen and leaked online. Upon notification, the notified parties should immediately remove the infringing material from its systems and employ technology to seek individual digital files to prevent the further upload of the particular leaked content. Search engines should immediately de-list results offering such material. Others in the chain of distribution should act with similar dispatch and under legal mandate.

  In the absence of such special provisions, rights holders who have been victimized by hacking and other forms of theft must rely on existing inadequate DMCA provisions, which are incapable of stopping the worldwide spread of the stolen film or television program.

- **Include stronger deterrents - classify large-scale unauthorized streaming as a felony.** A recent study concluded that online piracy of film and television content has shifted significantly from file-sharing and downloading to illegal video streaming.[11] It is imperative that the criminal penalties for online infringement reflect the massive damage that may be inflicted on rights holders and emergent businesses offering legally acquired audiovisual content to consumers. Specifically, the federal criminal law should be modernized to include felony criminal penalties for those who engage in commercial streaming of illegal, infringing content in the same way the law already provides for the reproduction and distribution of infringing content.

  Under current federal law, a legal distinction exists between the penalties for illegal streaming and downloading – two methods of distributing the same stolen digital content. IFTA recommends that Congress clarify that large-scale copyright infringement by streaming or other technology with similar impacts is a felony in appropriate circumstances. This would require amending the federal criminal code to provide for imprisonment for up to five years, a fine, or both, for criminal infringement of a

[11] http://variety.com/2015/biz/news/report-piracy-shifts-away-from-downloading-to-video-streaming-1201430189/

copyright where the offense consists of 10 or more public performances by electronic means, during any 180-day period, of one or more copyrighted works and where: (1) the total retail value of the performances, or the total economic value of such performances to the infringer or to the copyright owner, would exceed $2,500; or (2) the total fair market value of licenses to offer performances of those works would exceed $5,000.

Such a clarification would reconcile a disparity that exists in current law between illegal streaming and downloading, the latter of which is already considered a felony, and serve as a strong deterrent for large-scale willful reproduction, distribution and streaming of illegal, infringing content for profit.

Conclusion

IFTA appreciates this opportunity to provide further input regarding the impact and effectiveness of the DMCA safe harbor provisions. As the Copyright Office continues its review of section 512, IFTA once again urges action to amend the statutory framework of section 512 to provide for "notice, takedown and staydown" which incentivizes all stakeholders in the digital ecosystem to take effective and rapid action to prevent or mitigate the damage of specific instances of infringement.

We continue to encourage you and your colleagues in the U.S. Government to call on IFTA for information regarding the paralyzing costs and burdens as well as inefficiencies of the notice-and-takedown process on the independents. Thank you again for this opportunity and your support of the intellectual property industry.

Respectfully submitted by,

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Independent Film & Television Alliance