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

In re:

Section 512 Study:
Request for Additional Comments Docket No. USCO-2015- 7

COMMENTS OF
THE INTERNET ASSOCIATION

I. Characteristics of the Current Internet Ecosystem

(1) The current Section 512 safe harbor system properly accounts for the differences in stakeholders and changes are unnecessary. The DMCA is a future-proof legal system. It was not created for the online ecosystem of 1998: it was created to foster a system that encouraged diversity of creators and innovators to grow the online landscape for the public interest. When properly written, the legal landscape accounts for stakeholders of all sizes, including individual users, startups, and independent creators. Placing new requirements on specific categories of stakeholders may deter growth and diversity online, introduce legal uncertainties that fuel needless litigation, create market distortion, or discourage more innovative initiatives by companies through private sector work.

Internet companies serve diverse users, including rightsholders, creators, innovators, purchasers, readers, and reviewers. By ensuring legitimate content is accessible, internet companies provide a positive user experience that drives growth. Therefore, dynamic internet companies are heavily incentivized to provide positive user experiences, and that includes policing the marketplace against infringements.

U.S. internet platforms that have both cause and resources for voluntary measures above the floor of action of the DMCA are already creating these 'DMCA-plus' mechanisms.[1] The increasing interdependence of industries for growth in a digital world, and reality of blurring distinctions between industries that produce and distribute content, create an ecosystem that encourages internet companies to enhance programs beneficial to content creators. Artificial categories of legal obligations will not effectively create new, effective mechanisms to combat illicit activity. Empowering platforms as they scale and diversify to invest in 'DMCA-plus' actions is best done through the current system of clear limitation on legal liability and a floor of action for all internet companies.

(2) Copyright is first and foremost for the public interest and all issues related to copyright law must be grounded in consideration of advancing creativity for that purpose. Legislative history and subsequent judicial interpretation have reiterated the nature of the public interest in copyright law:

> "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."[2]

The interests of users and the public are in a system that fosters creativity, which includes a vibrant internet ecosystem, robust protections for exclusive rights and the public's right to access works, and in a fair and balanced administration of law that reflects that interconnectedness and interdependence of copyright stakeholders. The

[1] *See* Internet Association Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 29-30 (March 31, 2016).
[2] *Fogerty v. Fantasy, Inc* 510 U.S. 517 (1994)
[3] *See* Internet Association Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015

current statute recognizes and accomplishes this goal by creating shared responsibilities and protecting legal access to creative works.

II. Operation of the Current DMCA Safe Harbor System

(3) Despite divided viewpoints, DMCA is working: empirical data shows that both the internet and creative industries are flourishing.[3] The goal is not for the statute to be perfect for any single interest group: rather, the goal is that the statute establish the best possible system for all parties to carry out the constitutional purpose of serving the public interest.

A well-balanced statute will ensure that the internet and creative industries are flourishing, individual and user rights are protected, and that piracy is being effectively addressed. The online ecosystem is growing and diversifying more now than ever.[4] Creativity is also flourishing, both in economic growth and the volume of creative works being produced by a growing base of individuals.[5] Piracy in the United States is also being effectively addressed on responsible platforms, as shown in recent studies.[6]

(4) Internet companies are incentivized under current law to create takedown forms that are both accessible and readily usable by creators. Safe harbor protection is too foundational to businesses to risk. Because each internet business is unique, particularly new start-ups that might not have as many resources as larger and more established internet companies, one size fits all prescriptions for takedown forms will ultimately interfere with, rather than promote, positive innovation and growth for all actors in the

[3] *See* Internet Association Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 7-13 (March 31, 2016).
[4] Id. at 8-9.
[5] Id. at 10.
[6] Id. at 9.

ecosystem. In fact, regulating the form and format of takedown notices is the exact type of excessive regulation that should be reduced.

A single form for notices ignores crucial differences between platforms and has been explicitly studied previously. By allowing internet providers to create and tailor forms specific to their system and type of content distributed, they are able to ensure the most effective system for removing infringement from their sites.

While several stakeholders raised the issue of forms that were confusing, difficult to locate or complete, or otherwise unworkable, no specifics were provided on the exact platforms or the exact takedowns in reference. In stark contrast to those unspecific complaints, the forms of the member companies of the Internet Association are extremely easy to find.[7] Without specific case studies and empirical data that display a substantial and convincing existing deficiency, government action is unnecessary.

III. Potential Evolution of the DMCA Safe Harbor System

(9) Educational resources are critical and meaningful components of a viable safe harbor system. Legislation is unnecessary; the pace of technological development and marketplace evolution requires rapid adaption for resources. However, the Copyright Office may be better suited to organizing educational resources relevant to issues including the proper use of takedown forms and content subject to Section 512 removal in order to reduce abusive takedowns, as well as the various 'DMCA-plus' models available to rights holders.

[7] *See, e.g.*, Pinterest Copyright Infringement Notification, http://www.pinterest.com/about/copyright/dmca/; Dropbox Copyright Complaint https://www.dropbox.com/copyright_complaint; Twitter Copyright Infringement Notification https://support.twitter.com/forms/dmca.

(10) Voluntary initiatives are highly incentivized by the safe harbors and market dynamics.[8] Platforms that have both the resources and cause to develop affirmative 'DMCA-plus' mechanisms are empowered to do so by the statutory structure of the DMCA, which purposefully does not include monitoring requirements and acts as floor of action, rather than a ceiling. Continued growth of participation and capacity of these DMCA-plus models requires that the legal certainty provided by Section 512 remain intact. Undermining the legal clarity of the safe harbors, or attempting to create artificial parameters of action, would divert both resources and ingenuity away from the vast diversity of platforms that exist online today. Legislative reform or government driven mandates that replaced the supplemental nature of these efforts would disrupt the very system that has allowed platforms to experiment, participate in, and grow resources dedicated to additional measures beyond the requirements of the DMCA.

The blurred lines between online platforms and content creators, and the increasing interdependence of industries for economic growth, are encouraging the development of initiatives at a rapid pace. Marketplace incentives, rather than government mandates, will best encourage continued development of voluntary measures. Without excessive government regulations to confine their initiatives, internet businesses and market participants are likely to move faster to find acceptable solutions, and those solutions will be market-based and avoid the unintended consequences of government regulations. Those initiatives can also be amended easier in order to address new threats or dissolved easier in situations where the threats no longer pose problems that need to be addressed.

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[8] *See* Internet Association Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015 Notice of Inquiry at 30 (March 31, 2016).

(12) A notice and staydown system would be technically and practically unworkable, stifle innovation, threaten fair use and other legal uses of works. No solution was offered in the initial round of comments or during the roundtables that provided detailed structure for such a system, or provided the technical and policy solutions to overcome the inevitable detrimental effects of a system that required internet providers to police the web. Internet businesses are not able to determine licensed use versus infringement, and are not the party suited to determine whether uses such as fair use apply. A 'notice and styadown' system disregards flexibilities in law like fair use that require case by case determination to protect the public interest in access to legitimate content, and instead imposes sweeping mandates that place the burden of identifying infringing works on internet intermediaries, who are the party least qualified to determine the legal nature of works. Additionally, the diversity of platforms, and how they intersect with content, makes a staydown monitoring obligation even more complex.

A particular issue raised by stakeholders in both initial comments and by roundtable participants was a notice and staydown system for only 'full length' works.[9] While billed as a solution that would narrow the scope of harms caused, such a proposal remains as infeasible as broader notice and staydown concepts. Limiting the scope of a notice and staydown system still offers no details on the technical details necessary for carrying out such a proposal. Additionally, there is no system to distinguish content that is licensed in one instance and unlicensed in another. Such a proposal would improperly require internet providers to monitor online content in direct contradiction to the anti-monitoring language of Section 512(m) and would require platforms to build cost-

[9] *See e.g.;* Transcript of the U.S. Copyright Office Section 512 Roundtable in New York, NY at 92 (NY Roundtable, pg. 92 (Kathy Garmezy, Directors Guild of America).

prohibitive systems to filter content, creating unreasonable market barriers and legal risk for startups. Notably, the right of fair use would remain threatened even under full-length only requirements. Several copyright cases have found that full-length content may be fair use cases.[10]

A notice and staydown system would be damaging to the future of online innovation as well as content creation. A diverse and vibrant online ecosystem benefits content creation. Growth in creative industries is driven by online consumption and consumer reach, and the internet has drastically lowered barriers to entry, providing more small and independent creators the ability to reach global audiences. Additionally, the legal distribution of creative works inspires further follow-on creative works. Notice and staydown would create unreasonable and unworkable barriers to entry for startups, deterring online innovation and discouraging a competitive online ecosystem that benefits our economy, the public interest, and creators alike.

IV. Other Developments

(14) It is unnecessary for the Copyright Office or Congress to consider action based on recent court decisions. The historical trend of judicial interpretations of Section 512 has been largely successful in implementing the safe harbors, and as current cases challenge both established and emerging trends in safe harbor law, the Office and Congress should avoid disrupting ongoing processes. In particular, notable 2016 decisions in *Capitol*

[10] *See* Sony Corporation of America et al. v. Universal City Studios, Inc., et al. 464 U.S. 449-450; Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 742 F.3d 17 (2d Cir. 2014); Authors Guild, Inc. v. Google Inc., No. 13-4829-cv (2d Cir. Oct. 16, 2015).

Records LLC v. Vimeo, LLC and *BMG v. Cox* have ongoing requests for higher court action and should be permitted to reach final outcomes.[11]

(15) The United States is the gold standard worldwide for balanced safe harbor provisions. It is not by accident that the world's most innovative companies are located in the U.S., and the U.S. is the global hub of creativity across mediums.

As noted in the Internet Association's October 2016 filing to the United States Trade Representative on the National Trade Estimate, threats to intermediary liability laws abroad threaten the continued success and growth of U.S. companies through creation of artificial market access barriers or discriminatory policies, such as online monitoring requirements.[12] Safe harbor regimes that create legal uncertainty and market risk will ultimately punish online innovators, creators, and users alike by deterring competitive online landscapes. The U.S. government should ensure that the robust and successful domestic laws that have enabled our digital economy remain in tact, and encourage our partners worldwide to allow competition and growth through similar safe harbor provisions.

[11] Capitol Records, LLC v. Vimeo, LLC, No. 14-1048 (2d Cir. 2016), *petition for cert. filed* (U.S. Dec. 14, 2016) (No. 16-771); BMG Rights Mgmt. (US) LLC v. Cox Commc'ns., Inc., No. 1:14–cv–1611, 2016 WL 4224964 (E.D. Va. Aug. 8, 2016), *appeal docketed*, No. 16–1972 (4th Cir. Aug. 24, 2016).

[12] *See* Internet Association Comments To Compile the National Trade Estimate Report on Foreign Trade Barriers Submitted in Response to U.S. Trade Representatives Notice of Inquiry (October 19, 2016).