

April 1, 2016

Ms. Maria Pallante, Register of Copyrights
United States Copyright Office,
101 Independence Avenue S.E.,
Washington, D.C. 20559

RE: Section 512 Study, Notice and Request for Public Comment, FR Doc. 2015-32973

Dear Ms. Pallante,

Thank you for the opportunity to submit comments on the Copyright Office's section 512 study. Mozilla's mission as a non-profit organization is to promote openness, innovation, and opportunity online. As a core principle, we believe that the open Internet, as the most significant social and technological medium of our time, is an invaluable public resource that must be protected. As with [our recent submission to the section 1201 study](#), it is from this perspective that we offer our comments.

We believe that section 512 on many levels has been a success in promoting innovation and opportunity online. In freeing service providers to grow their services without having to become censors or monitors, it has helped support the emergence of the Internet economy, generating benefit both for the general public and for copyright holders who have been able to access new markets for their works.

However, 17 years of experience with this law have shown that it has some room for improvement. Significantly, it downplays the role of *context* when assessing the legality of posted *content*. A piece of content is neither "licensed" nor "infringing" *per se*; it is only so in a particular context - who uploaded it, what parts of it are used, what it has been combined with, what the artistic purpose of the use (or derivative work) is, and what jurisdiction it falls under. Casual language and interpretation focused on the phrase "infringing content" (including many of the questions in this notice) - without acknowledging the potential for fair use and other exceptions to exclusionary rights, or licensed use - fails to acknowledge this and so can lead to bad policy outcomes, creating a rift between the balance of interests created by the core of copyright law and that enabled in practice under section 512. Furthermore, machines and automated processes are often used to perform or assist the work of generating copyright enforcement notices under section 512. While they can detect the presence of specific content, they are not good at, and usually don't even attempt to, assess this context.

Blatant infringement of copyright online does occur, and we recognize and appreciate the substantial value of section 512 for copyright holders in responding to that behavior. However, section 512 also restricts legitimate rights of the general public, creators, and innovators, directly and indirectly, more than is necessary to achieve the purpose of copyright enforcement. Unfortunately, the safeguards placed in the law to prevent this "chilling" outcome are

inadequate. Therefore, while acknowledging the good in section 512, we will focus our comments on the problems as we see them, and on possible improvements which address them without making it harder for copyright holders to take action against true infringement.

[Section 512's limitations on liability facilitated the success of the Internet economy.](#)

[Section 512 is susceptible to abuse arising from a confusion between content and context.](#)

[Automated systems and informal processes amplify the harm of abuse.](#)

[Section 512's safeguards are insufficient to protect against abuse, and should be strengthened.](#)

1. Section 512's limitations on liability facilitated the success of the Internet economy.

Section 512's liability limitations have enabled the massive growth both of online services and, thereby, of the market for licensing copyrighted works. Both of these outcomes have been of great benefit to Internet users.

3. How have section 512's limitations on liability for online service providers impacted the growth and development of online services?

Section 512's liability limitations are a cornerstone of the success of the interactive and social aspects of the web in the United States. While we believe they could be improved, as we outline below, online services would not have been able to grow and develop to the size, capability and complexity they have, with concomitant massive benefit for users, without limitations protecting service providers from liability for the actions of those users.

The very existence of social networks like Facebook or Twitter; chat applications like WhatsApp or Viber; file backup, storage, and exchange sites like Dropbox or SpiderOak; and video sharing sites like YouTube or Vimeo would all be in serious question without the protections afforded by section 512. If the providers of those services were immediately liable for statutory damages for any copyright infringement in the content posted or exchanged by their users, they would need to react by preventing or deeply restricting the exchange or storage of any images, audio and video. Users would not get the products and services they need to interact and transact online, and creativity and innovation would suffer.

4. How have section 512's limitations on liability for online service providers impacted the protection and value of copyrighted works, including licensing markets for such works?

Section 512's liability limitations have, indirectly, massively expanded the value of and the market for copyrighted works. They have permitted the growth of online services which, in turn,

have become conduits for the marketing and licensing of copyrighted works to far more people than might have had access to them if such services had not existed. They have brought into existence a market for smaller and amateur content creators who are able to easily generate revenue from their content for the first time. With effective limitations on liability, copyright owners, online services, and the public can enjoy a mutually beneficial relationship.

5. Do the section 512 safe harbors strike the correct balance between copyright owners and online service providers?

We discourage the Copyright Office from beginning its analysis of section 512 by considering the “balance” between copyright owners and online service providers, two business interests. The goal of the safe harbors, like that of all regulation and law, is first and foremost to promote the interests of the general public. Balancing interests between copyright owners and online service providers is part of serving the public, but the Copyright Office should examine that balance, and the impact of the law generally, on the interests of users, who benefit from:

- capable and featureful online services;
- a large number of innovative, experimental and derivative creative works entering the marketplace for them to enjoy;
- legal access to digital versions of copyrighted works; and
- the ability to take advantage of their fair use rights in their own creativity, and share the results with the world.

When it is working well, section 512 safe harbors are vital to providing all of these.

2. Section 512 is susceptible to abuse arising from a confusion between content and context.

The primary problem with section 512 is the mistaken confusion of content and context. Copyright infringement depends on context, but the systems which generate section 512 notices do not and cannot take account of this, and so instances of fair use get caught in enforcement.

1. Are the section 512 safe harbors working as Congress intended?

Yes and no. Section 512 has worked as intended in that it has enabled the growth of online services while generally addressing infringing activity, but it has also generated collateral damage to fair use rights and other interests via the misdirected burden imposed by automatically-generated takedown requests. Such automated systems can identify content but not analyze its context; by falsely equating the mere presence of particular content with the act of infringement, legal creative acts are discouraged. In many cases, section 512 has generated negative effects for free speech, empowering copyright holders effectively to censor content.

6. How effective is section 512's notice-and-takedown process for addressing online infringement?

Today, the notice-and-takedown process is often implemented in part through automated mechanisms. Service providers, unable to process manually the large volume of section 512 requests, provide copyright holders with an API (automated system) for submitting them. Once a request is submitted, the content is automatically taken down, and the posting user is notified by email or other means. The user's only option is to create and send a counter-notice, and wait 10 days - at the end of which, if no lawsuit is filed, the content is restored.

The "effective" nature of this depends on how one measures effectiveness. These processes are effective in that they result in the expeditious removal of targeted content (regardless of whether any acts of uploading the content are themselves infringing) without significant harm to the economic market for the copyrighted good, and without needing service providers to face possibly business-ending lawsuits for the actions of their users, even where such users ultimately may not be guilty of infringement. They are not so effective in that, in their current form, they do not properly protect from takedown uses of copyrighted material which are covered by fair use, explicit permission, or other exceptions. Furthermore, they place a significant and ongoing *a priori* compliance burden (in the form of counter-notices and process) on content creators who wish to take advantage of fair use rights.

10. Does the notice-and-takedown process sufficiently address the reappearance of infringing material previously removed by a service provider in response to a notice? If not, what should be done to address this concern?

The notion of "reappearance" is complex in practice. It could be narrow, focused on the reappearance of an entire specific work after takedown by the same person, or it could be broader, encompassing re-posting of pieces of the work by others. The latter interpretation would lead to particularly poor policy outcomes in the context of the question at hand, as a subsequent upload may be authorized by a license, or may constitute a fair use (e.g. reviewing the content or parodying it). Certainly, under some circumstances, identifying and attempting to preempt re-uploading of content removed by a host does offer practical efficiencies. However, if the concept of reappearance is defined in a way that includes scope beyond 1) the same person or entity 2) uploading the exact same content, then legitimate activities will be put at risk.

Even under the narrow scope of reappearance, the notice-and-takedown process remains suitable as a baseline, and any additional automated mechanisms or policies that are tied specifically to the content at issue run the risk of preventing licensed subsequent actions by the same user. And under a broader scope of reappearance, these concerns are many degrees greater, as such mechanisms or policies could also impinge on fair use and other permissible activity under copyright law. Any form of "notice-and-staydown" functions essentially as a permanent injunction, and will prevent some activity that copyright law permits, with significant risk of broad scale socioeconomic harm.

3. Automated systems and informal processes amplify the harm of abuse.

Automated notice generation and informal enforcement are both well established in the section 512 and copyright enforcement landscape. Both independently, for different reasons, have the effect of unreasonably suppressing fair use.

9. Please address the role of both “human” and automated notice-and-takedown processes under section 512, including their respective feasibility, benefits, and limitations.

In many circumstances, automation of some processes reduces unnecessary time and burden. However, fully-automated notice-and-takedown processes - with no human review or role before content is taken down, either on the copyright owner side or on the service provider side - removes an important check from the system. As explained above, content is not infringing or non-infringing *per se*; the nature of the infringement depends on the context, in particular whether the user holds a licence to engage in the activity or can take advantage of an exception such as fair use. Automated systems, although stellar at the raw matching of bits in content, fall well short of human processes at assessing such context.

15. Please describe, and assess the effectiveness or ineffectiveness of, voluntary measures and best practices—including financial measures, content “filtering” and takedown procedures—that have been undertaken by interested parties to supplement or improve the efficacy of section 512’s notice-and-takedown process.

With regard to content filtering, it again depends on how you measure effectiveness. Accurate assessments of the effectiveness of a system must consider the amount of legal activity (mistakes, fair use, etc.) suppressed, and the cultural and economic harm which results.

Many voluntary measures for content filtering are triggered by automated technical systems, as described above, without a clear determination by any party (much less a judicial authority) of the infringing nature or otherwise of the context of the particular use to which the content has been put. Unlike due legal process under Section 512, informal processes and voluntary measures need make no attempt to consider fair use, provide due process, or a right of appeal or counter-notice. Formal measures such as section 512, where all interests can be considered, are therefore to be preferred to informal processes.

Informal financial measures are even more concerning. By their nature, they target an entire organization, an overly-broad scope for a copyright claim. If an organization is engaged in copyright infringement on such a broad scale that financial measures against it might be appropriate, surely legal process and a judicial determination are worth the undertaking.

25. Are there any existing or emerging “standard technical measures” that could or should apply to obtain the benefits of section 512's safe harbors?

“Standard technical measures” in the current text of section 512 refers to technologies used by copyright owners. This question seems to use the same term to refer to technologies which are or might be used by service providers; we take the meaning as we understand it in this question, despite the difference.

Requiring all service providers to implement specific legally-mandated technical measures against infringement would be harmful for many reasons. First, as laws move more slowly than technology, the technology may well outpace the law, rendering the required methods an ineffective millstone around the necks of providers. Adoption of newer, more effective technologies would be slowed with the financial and technical burden of implementing and maintaining the previous generation of mandated tools. Second, mandated technology is a barrier to market entry for newcomers, reducing innovation and competition with specific risks for small businesses. Third, consistent with our above comments, technical measures alone cannot accurately separate infringing from non-infringing uses of content. Fair use, licenses, and other exceptions are legal and social concepts, not technical.

Mandatory technical measures for service providers would impede both the effectiveness of policing infringement and efforts to make sure that non-infringing uses were not affected.

4. Section 512’s safeguards are insufficient to protect against abuse, and should be strengthened.

The penalties for misrepresentation in section 512 have turned out to be underpowered, and are not an effective curb on abusive notices. They should be reformed to reduce the use of notices to produce chilling effects that discourage free speech and other legitimate activity.

28. Are the remedies for misrepresentation set forth in section 512(f) sufficient to deter and address fraudulent or abusive notices and counter notifications?

In practice, the remedies set forth in section 512(f) are inadequate, as evidenced by their rarity of use as compared to the volume of notices sent. A significant collaboration of universities studies the latter phenomenon, with a significant focus on section 512 notices: [Lumen](#), formerly known as “Chilling Effects.” To many, notices are often sent to intimidate those seeking to exercise their fair use rights, particularly where the exercise of fair use would result in the public shaming or other reprobation aimed at the content holder. Meanwhile, although [section 512\(f\)'s remedies have occasionally been used successfully in court](#), relying on extensive litigation cost and risk in the pursuit of remedies is not something that many can afford to take on. Compared

to the volume of notices sent, the legal process required to challenge those that are fraudulent and never incorporated a proper review of the context is far too difficult.

In addition to the process weight, section 512(f) establishes a significant asymmetry in damages. Copyright infringement triggers substantial statutory damages, yet fraudulent misrepresentation of infringement triggers only those actual damages that can be proven. It is difficult to document the harm because that depends on a measurement of the popularity of the content, which is hard to determine precisely because the content has not been available.

Combined, this process burden and limited remedy render section 512(f) ineffective. Creators who make regular fair use of copyrighted material often find themselves receiving DMCA notices every couple of days from a wide range of parties. Suing all these parties for a reasonably small amount of money each is impractical, yet the cumulative negative effect on the person's creative enterprise is significant.

26. Is section 512(g)(2)(C), which requires a copyright owner to bring a federal lawsuit within ten business days to keep allegedly infringing content offline—and a counter-notifying party to defend any such lawsuit—a reasonable and effective provision? If not, how might it be improved?

Sections 512(g)(2) requires that content be kept down for at least 10 business days, even if a counter-notification is filed immediately. In doing this, it assumes the *prima facie* validity of the takedown request in all circumstances. This seems unbalanced. A more balanced system would allow the service provider freedom to restore the material immediately with cause to do so, such as for users who have been the frequent recipients of unfounded copyright claims. The material could then be re-removed if the copyright owner notified the service provider that they had filed an action.

Content on the Internet is often timely and has a relatively short life. If, for example, a movie review which makes fair use of content from the movie is published on the day a movie is released, then taken down due to an improper notice and only restored 10 days later, much of the value to the creator of the review is unreasonably lost.

Sites should be permitted to take account of a user's history when formulating their repeat infringer policies. If the user has successfully contested a number of section 512 notices, they should enjoy the presumption of innocence, which would in particular mean leaving the content up while its status was determined. As the law currently stands, the service provider has no discretion - the content must be taken down while its status is determined in order to qualify for safe harbor.

12. Does the notice-and-takedown process sufficiently protect against fraudulent, abusive or unfounded notices? If not, what should be done to address this concern?

As described above, the “good faith belief” standard of section 512(f) does not appear to be effective in practice. Copyright owners have the option to use low-cost automated systems to trigger substantial fixed damages; those accused must turn to extensive and expensive legal challenges to reap only the most uncertain of reward. The asymmetry in both process and punishment prevents a reasonable balance from emerging.

Changing either side of the imbalance would address this concern. Given relevant international treaties, it seems more feasible to impose statutory damages (such as \$1000 per abusive notice, a far smaller amount than infringement damages, plus costs and attorney fees) as penalty for abusive notices than to modify infringement to trigger only actual, measurable damages. Similarly, from a process point of view, allowing counter-notices to function without legal process could destabilize the system; therefore, imposing more process requirements on the filers of the initial notices, coupled with increasing the potential penalty for improper use, would seem the best path forward.

More specifically, we imagine a system where there are two possible paths for rightsholders in this context. By default, the existing safe harbor for intermediaries applies. To overcome that and force the intermediary to take action, one of the following should be done (at the discretion of the rightsholder):

1. The rightsholder seeks and receives a judicial decision that the act of posting is in fact infringing in context; or
2. The rightsholder submits a compliant DMCA notice, as now, but a) asserts under penalty of perjury that the information in the notice is accurate (as opposed to penalty of perjury applying solely to the authority of the complaining party to act), and b) faces statutory damages if the notice is later determined to be unfounded and an abuse of the process.

To a degree, the balance of interest can be improved in lieu of statutory damages with a reduction in the amount of maximum damages available. Canada has had good experience in reducing fraudulent, abusive and unfounded notices by limiting the maximum statutory damages available in non-commercial cases to CAN\$5000. This would not address the imbalance in full, but should help to ensure that the majority of notices are valid.

Incorrect takedown notices are in nobody’s interest - not that of the targeted creators, not that of the public who wish to enjoy the works, not that of the law which people should have respect for, and not even that of copyright owners, who are painted as suppressors of creativity. We hope that the Copyright Office will focus any substantive reforms of section 512 on eliminating them.

We are very grateful to the Copyright Office for the opportunity to comment on section 512. We hope that our comments prove helpful in reforming this section to further promote openness, innovation, creativity and opportunity online.

Respectfully submitted,

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