

Before the
UNITED STATES COPYRIGHT OFFICE
Library of Congress

Notice of Inquiry

Section 512 Study: Request for Additional
Comments

Docket No. 2015-7

ADDITIONAL COMMENTS OF UNIVERSAL MUSIC GROUP

Jeffrey Harleston
General Counsel and EVP, Business & Legal Affairs
Alasdair McMullan
Head of Litigation and SVP, Business and Legal Affairs
Universal Music Group
2220 Colorado Avenue
Santa Monica, California 90404

David Kokakis
Executive Vice President, Head of Business & Legal
Affairs, Business Development and Digital
Universal Music Publishing Group
2100 Colorado Avenue
Santa Monica, California 90404

Universal Music Group (“UMG”) respectfully submits these comments in response to the Copyright Office’s Request for Additional Comments, in connection with the Copyright Office’s Notice of Inquiry respecting the safe harbors contained in Section 512 of the Copyright Act, 17 U.S.C. § 512. *See* Section 512 Study: Request for Additional Comments, 81 Fed. Reg. 78636 (Nov. 8, 2016).

UMG appreciates the continued efforts of the Copyright Office to study the impact and effectiveness of Section 512. UMG – like virtually all of its counterparts in the creative community – believes that the DMCA is broken. Errant court decisions, ambiguous statutory language, and the extraordinary growth, speed, and diversity of the online environment have led to a system that is fundamentally out of balance. Through its initial comments and these additional comments, UMG has endeavored to provide specific solutions, including in the form of both practical suggestions and legislative language, to respond to the questions raised by the Copyright Office and to address the flaws that have undermined the efficacy of the DMCA safe harbor regime.

UMG views this as a significant public policy priority. Music not only entertains, inspires, and thrills – it also fuels jobs, the economy, and digital innovation. The United States exports some \$6 billion in music annually, and music is a key part of a broader copyright workforce in the United States – some 5.5 million persons strong – that contributes to a \$1 trillion copyright economy.

UMG views music as an ecosystem. Like any dynamic ecosystem, music thrives when the system is in balance and when resources are recycled and reinvested. But it also withers when resources are consumed by large inhabitants for their own profit without adequate return. UMG is proud of the role that it and other music companies play as the largest investors in music

– recorded music companies invest some \$4.5 billion annually in A&R (the identification and development of talent) and marketing, contributing a greater share of revenue to “R&D” than most any other industry. However, the unbalanced application of the DMCA has undermined and compromised both those investments and the value of the creative works they were designed to foster. UMG therefore views updating the DMCA as key to the future health of the music ecosystem.

1. [T]here 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?

As UMG noted in its initial comments, “[m]odifications and recalibrations of Section 512 must...work equally for all copyrights owners, from the smallest to the largest.” Comments of UMG at 18. The same principle applies to online service providers that offer more than de minimis amounts of copyrighted content; the DMCA should not make distinctions between such online service providers based upon size, volume of material hosted, or other similar factors. Rather, as discussed further in UMG’s initial comments and these additional comments, modifications to the DMCA safe harbor system should be adopted and implemented in a manner that is fair to all participants – copyright owners, online service providers, and users alike – and that does not unreasonably discriminate on any basis. Today’s one-person start-up could be tomorrow’s Google, and it is both prudent and appropriate to require robust respect for, and support of, intellectual property rights from inception, rather than attempting to instill it only after an online service provider has achieved success on the backs of copyright owners. Consistent with those principles, measures such as filtering or stay-down should not be limited only to the largest online service providers; copyright owners are harmed by infringements on

“small” and “large” websites alike, and the rapid advances in technology that led to the explosion of the Internet can just as easily support accessible and cost-effective solutions to help address and prevent online infringement.¹

With respect to notices and counter notices, as discussed further below, UMG supports automated systems that facilitate the preparation and transmission of accurate and effective takedown notices, and that will be useful to individual senders and larger copyright owners using automated systems alike. Similarly, UMG proposes adjustments to the notice and counter notice provisions of the DMCA to clarify the process and streamline the resolution of disputes; these modifications, too, are intended to make the system more efficacious for all users.

2. Several commenters noted the importance of taking into account the perspectives and interests of individual Internet users when considering any changes to the operation of the DMCA safe harbors. 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?

A critical consideration respecting individual Internet users is the need for education and clarity respecting their rights and obligations. As reflected in UMG’s initial comments, users who dispute UMG’s infringement claims (both through the YouTube Content ID system and in connection with DMCA takedown notices) often may be unaware of copyright law, and thus assert “defenses” to infringement that are nothing of the sort (and often merely confirm infringement). *See* Comments of UMG at 33. UMG’s initial comments include a list of typical responses that UMG’s recorded music business receives in response to its infringement claims, including “I bought it online” or “I gave credit to the song owners.” *Id.* UMG’s music

¹ In its initial comments, UMG identified several such technological solutions, *see, e.g.*, Comments of UMG at 22-23, some of which are readily available to online service providers at relatively modest cost that can be proportional to the size of the site or the extent of use of copyrighted content on the site. *See, e.g.*, Comments of Audible Magic at No. 8 (stating that Audible Magic’s filtering solutions are “quick, simple and inexpensive to install, and once installed will require very little in the way of maintenance,” and that prices can scale relative to the size and type of the service).

publishing business, Universal Music Publishing Group (“UMPG”), routinely receives similarly erroneous “non-infringement” responses to its claims that online content incorporates UMPG compositions, including “This is purely our band’s live performance,” “It’s a video of a jam night, no recorded content is used,” and “This video is not copyright because I just cover this song!”

As discussed further below (*see* No. 9), UMG believes that education of individual Internet users – both within the DMCA process and outside of it – is a vital aspect of addressing the problem of online infringement. Such education could assist users in better understanding the scope of copyright (*e.g.*, the existence of distinct copyrights in musical compositions and sound recordings), and in making more fully-informed assessments as to the limitations on their legal use of copyrighted content (*e.g.*, what is, and is not, fair use). Education of this sort would pay multiple dividends. Among other things, it could promote and facilitate the lawful use of content by individual users; reduce the unlawful use of content; ease the burden on both copyright owners and online service providers by reducing the amount of infringement online; and, in so doing, help to avoid litigation that copyright owners might otherwise be forced to bring against individuals who (perhaps naively) persist in infringement.

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 divergence in views reflected in the initial responses to the Notice of Inquiry is compelling evidence that the DMCA safe harbor system is fundamentally out of balance. Notably, commenters who function exclusively or principally as online service providers generally assert that the Section 512 safe harbors are working as intended, while copyright owners generally assert that they are not. That dichotomy alone is a “neutral” testament to the

imbalance. *Compare, e.g.*, Comments of Google, Inc. at 1-2 (“The safe harbors established by the DMCA have achieved both of [the] objectives [intended by Congress].”); Comments of U.S. Telecom Assoc. at 1 (“The safe harbor provisions under Section 512 of the DMCA are generally working as intended and have helped to facilitate the unprecedented growth of the Internet.”); Comments of The Internet Assoc. at 2 (“The DMCA safe harbors have achieved the goal established by stakeholders and policy makers: the Internet has survived and thrived, benefitting Internet platforms, creators, users, and the general public interest); *with, e.g.*, Comments of the Music Community at 4 (“[T]oday, digital services enjoy an (expanding) safe harbor while content owners face an increasing onslaught of digital infringement, with no effective recourse. This couldn’t possibly be what Congress meant to achieve.”); Comments of the Motion Picture Assoc. of Am. at 3 (“The section 512 limitations on liability are *not* working as Congress intended.”) (emphasis in original); Comments of Getty Images (“[T]he balance has tipped further and further in favor of online service providers. While online platforms are thriving...this has come at the expense of copyright owners who have seen their content devalued by the ease with which it can be uploaded and shared, the massive scale of infringement, and the lack of meaningful remedies....”).

Moreover, empirical data supports the conclusion that the current regime fails to strike the balance intended by Congress, namely, to *both* (1) protect intellectual property rights in an increasingly digital environment; and (2) promote the continued growth and development of online technology and commerce. *See, e.g.*, H.R. Rep. No. 105-551, pt. 2, at 23 (1998). Section 512 has undoubtedly advanced the latter goal – a reality trumpeted in the comments provided by or on behalf of online service providers. *See, e.g.*, Comments of Google Inc. at 2 (“Following the passage of the DMCA in 1998, the Internet economy has grown to be a pillar of U.S.

economic strength, responsible for approximately \$966.2 billion of real GDP in 2014.... The protections the DMCA provided to OSPs played a significant role in spurring that growth.”); Comments of U.S. Telecom Assoc. at 1 (“The growth of the Internet since the DMCA was enacted has been a tremendous success story.”).

At the same time, the former goal – protection of intellectual property rights – has been far from realized. Such protection was intended to be a critical component of the DMCA. *See, e.g.,* S. Rep. No. 105-190, at 8 (1998) (“Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy.”). However, the ineffectiveness of the “notice and takedown” system of Section 512, particularly as exacerbated by erroneous court rulings, has allowed online infringement to proliferate, at the direct and massive expense of copyright owners. For example, notwithstanding the investment of extraordinary sums to police and attempt to redress online infringement, and notwithstanding that music is more popular and accessible than ever, worldwide music industry revenues declined approximately 40% between 2000 and 2015.

In short, both the stark (but telling) dichotomy between commenters and the relevant data objectively reflect that Section 512 has failed in critical part. As discussed further in UMG’s initial comments, in these additional comments, and in the comments of several other members of the creative and copyright owner community, multiple reforms are required to bring the system into balance, and to help achieve the goals underlying the DMCA when it was first enacted.

4. Several public comments and roundtable participants noted practical barriers to effective use of the notice-and-takedown and counter-notice processes, such as differences in the web forms used by ISPs to receive notices or adoption by ISPs of additional requirements not imposed under the DMCA (e.g., submission of a copyright registration or creation of

certain web accounts). 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 (e.g., incentives for ISPs to use a standardized notice/counter-notice form, etc.)?

In its initial comments, UMG identified numerous practical barriers to effective use of the notice-and-takedown and counter-notice processes, many of which (and UMG's proposed solutions) are also addressed in greater detail in these additional comments. These include the following:

- the notice-and-takedown system is simply not designed to handle, or capable of handling, the sheer volume of infringement that occurs online (*see* Comments of UMG at Nos. 1, 9, 10, 15, 16, and 22);

- the current system does not address the near-immediate recurrence of infringing material on a given site following a takedown (the so-called "whack-a-mole" problem) (*see* Comments of UMG at No. 10; *see also infra* No. 12);

- although the statute requires a service provider to act "expeditiously" to remove or disable access to infringing material, it does not define that term, often resulting in substantial delays before infringing material is removed – a particularly troubling issue with respect to pre-release, leaked, and newly-released material (*see* Comments of UMG at No. 6; *see also infra* No. 5(a));

- courts have effectively read the "representative list" language out of the "notice-and-takedown" portion of the statute, thereby depriving copyright owners of a useful tool in combating broad-based infringement (*see* Comments of UMG at No. 14; *see also infra* No. 13(b)); and

- to the extent a court were to find that manual, human review of potential infringements is required prior to sending a takedown notice (*e.g.*, to evaluate possible fair use), such a determination would effectively preclude meaningful operation of the notice-and-takedown

system, especially where a service contains a large amount of infringing material (*see* Comments of UMG at No. 9; *see also infra* No. 13(a)).

In addition, the lack of transparency by many online service providers as to their conduct under the DMCA – the number of notices received, the timing and treatment of those notices, the policies they apply respecting those notices – obscures or precludes meaningful analysis of the effectiveness, or ineffectiveness, of the DMCA. Recent litigation, however, has exposed some of the ploys that at least one online service provider used to thwart the efforts of copyright owners to notify it of infringement. According to the court’s recent opinion in *BMG Rights Mgmt. (US) LLC v. Cox Comm’ns, Inc.*, -- F. Supp. 2d --, 2016 WL 4224964 (E.D. Va. Aug. 8, 2016), Cox, a large online service provider, imposed numerous limitations on its processing of notifications of alleged infringement. These included limiting the number of notices it would process from any given copyright owner on any given day (all notices in excess of the limit were “closed” without action); refusing to process DMCA-compliant notices that also include a settlement proposal; and “blacklisting” a claimant, such that any and all notifications sent by that claimant were “silently delete[d]” from Cox’s e-mail server without any review. *Id.* at *4-*5.

Such hidden limitations are pernicious, not only because they are inconsistent with the provisions of the DMCA, but also because they are hidden. Cox rightly lost the benefit of the safe harbor (albeit for other reasons – the court did not have to reach the question of whether the limitations alone deprived Cox of the safe harbor), but the lessons from *Cox* should include a recognition that transparency is necessary to ensure compliance with the statute. Public disclosure of all of an online service provider’s policies respecting DMCA notices (including, but not limited to, a full description and accounting of its repeat infringer policy), as well as the

number of takedown notices and counter-notices it has received on a periodic basis (*e.g.*, monthly or quarterly), should be required for safe harbor eligibility.

Likewise, just as gamesmanship of the sort utilized by Cox should be prohibited, and should deprive an online service provider of the DMCA safe harbor, so too should the imposition of the sort of “additional requirements” that are referenced in the question. Quite apart from the unauthorized and unnecessary burden that requiring submission of a copyright registration would impose, the requirement is impossible to fill in many of the most pressing cases, due to the time currently required to obtain a copyright registration from the Copyright Office. *See infra* No. 5(c). Also unjustified is a requirement that the copyright owner or its agent be required to create an account with the online service provider in order to provide a DMCA notification. Any such requirement is not authorized by the DMCA itself, and would serve to dissuade many from enforcing their intellectual property rights, and to unduly burden those who do.

Finally, in addition to precluding the erection of barriers to utilizing the DMCA notice-and-takedown system, Congress should consider amending the DMCA to affirmatively require service providers to make available an industry-standard online interface for the automated submission of an infringement notification, which could then be processed automatically. *See infra* No. 5(a). Such an interface would benefit online service providers by streamlining and automating the process for the service provider, thereby reducing any burden associated with DMCA compliance, and would make utilization of the notice-and-takedown process easier and more accurate for those copyright owners that elect to use the interface.

5. A number of study participants identified the timelines under the DMCA as a potential area in need of reform. 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? If so, what timeframes for each stage of the process would best facilitate the dual goals of encouraging online speech while protecting copyright holders from widespread online piracy?

There are numerous respects in which the timelines under the DMCA are in need of reform, as described further below.

(a) “Expeditiously”

In its initial comments, UMG noted that a critical flaw in the DMCA is that it fails to impose clear or strict limits on how quickly a service provider must act in response to a takedown notice. See Comments of UMG at 14-16. Section 512(c)(1)(A)(iii) requires a service provider to “act[] *expeditiously* to remove, or disable access to, the material” upon obtaining knowledge or awareness of infringement. 17 U.S.C. § 512(c)(1)(A)(iii) (emphasis added). The absence of any clear direction as to the meaning of “expeditiously” has resulted in widely-ranging periods of time in which service providers respond to notices. However, delays in processing takedown notices – whether of days, hours, or even minutes – can translate into the unauthorized dissemination of works to millions of people. These delays are particularly prejudicial in the case of pre-releases, leaks, and newly-released albums, where the failure to act immediately in response to a takedown notice can contribute to the massive infringement of works when they are at their most valuable. Moreover, unlawful dissemination of leaked and pre-release material on the Internet can have numerous additional adverse consequences, including disruption of carefully-planned marketing and release schedules, further undermining the artist’s and copyright owner’s substantial investment in the content.

There is no reason that the time to take down infringing content should materially exceed the time it requires to upload infringing content (*i.e.*, nearly instantaneously). As noted in response to the immediately preceding question, online service providers should be required to

provide an online interface that permits a copyright owner to submit takedown notices in an automated fashion, and which then processes those notices in an automated fashion. As long as the notice is completed through the electronic interface, and as long as the copyright owner specifies the location of the infringing content on the service provider's site, the content should come down immediately. If a copyright owner elects not to take advantage of the electronic interface, and instead uses some other means to transmit a takedown notice (*e.g.*, e-mail to the online service provider's designated agent), then Section 512 should be amended to provide a maximum time (*e.g.*, an hour or less) within which content must be taken down for a service provider to get the benefit of a safe harbor. Similarly, if a copyright owner, in addition to specifying the location of particular infringing content (which is subject to immediate takedown), also requests that all other content that infringes the same copyrighted work be taken down from the site, or provides a representative list of its copyrighted works and requests that all content that infringes its works be taken down from the site (*see infra* No. 13(b)), then that broader request must be complied with within a maximum, and relatively short, time for a service provider to get the benefit of a safe harbor. The specific amount of time permitted should be the subject of further discussion and analysis, and is perhaps best handled through regulation; in all events, it should be subject to downward adjustment to account for continuing improvements and efficiencies in technology.

(b) Post-Counternotice Process and Timeline

UMG previously proposed the adjustments to the counternotice process and timeline (*see* Comments of UMG at 37-39). The current ten-day period between the time a copyright owner is advised of a counternotice and the reposting of the accused material is simply insufficient to permit copyright owners to evaluate the counternotice, attempt to resolve the dispute, and if

needed, file a lawsuit before the material is reposted. UMG believes, based on experience, that counternotices and disputes regarding them can often be resolved by dialog and discussion without the need for court intervention, but the current deadline does not allow for such a process in most cases. UMG therefore proposed numerous adjustments to the DMCA to address these and related issues: (1) extend the ten-day period to sixty days before the copyright owner is required to take action or the material is reposted; (2) the creation of a streamlined dispute resolution proceeding, to permit the rapid and inexpensive resolution of disputes (so that it can be utilized by users and copyright owners of all sizes and means), during which process the content remains down; (3) the automatic reposting of the content if the copyright owner does not initiate such a proceeding within the sixty-day period set forth above (with an option that the user may initiate the proceeding at any time starting ten days after serving the counternotice, in order to obtain a more expeditious resolution of the dispute and potential re-posting of the user's content); and (4) relief limited to reposting of the challenged content. *Id.* Other reasonable approaches doubtless exist, but change is clearly required to render the counternotice and post-counternotice timing and processes both meaningful and functional.

(c) Application/Registration Requirement

Another timing issue that is indirectly related to Section 512, but which further contributes to its inefficacy, is the requirement of some courts that the Copyright Office issue a copyright registration (or affirmatively reject a registration application) before a copyright owner may file suit. Section 411(a) of the Copyright Act provides that “no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.” Several courts, including the Fifth, Seventh, and Ninth Circuits, have held that the requirements of Section 411(a) are satisfied

once a complete application is filed with the Copyright Office. *See, e.g., Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 386-87 (5th Cir. 1984); *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 631 (7th Cir. 2003); *Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612, 615-21 (9th Cir. 2010). The Tenth and Eleventh Circuits, however, have held that the Copyright Office must have processed the application (*i.e.*, either issued a registration certificate or refused registration) before a copyright owner may sue for infringement. *See, e.g., La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1201-07 (10th Cir. 2005), *abrogated on other grounds by Elsevier v. Muchnick*, 559 U.S. 154 (2010) (“*Muchnick*”); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1488-89 (11th Cir. 1990), *abrogated on other grounds by Muchnick*. And district courts within the remaining circuits are split on the issue. *See, e.g., Corbis Corp. v. UGO Networks, Inc.*, 322 F.Supp.2d 520, 521–22 (S.D.N.Y. 2004) (registration is required); *Well-Made Toy Mfg. Corp. v. Goffa Intern. Corp.*, 210 F. Supp. 2d 147, 157 (E.D.N.Y. 2002) (application is sufficient).

According to the Copyright Office website, the current processing time for copyright applications ranges from six to ten months for e-filed applications, and from ten to fifteen months for paper applications. *See* “I’ve Submitted My Application, Fee, and Copy of My Work to the Copyright Office. Now What?,” copyright.gov FAQ’s, <https://www.copyright.gov/help/faq/faq-what.html#certificate>. The practical consequence of this timing is that a copyright owner who has not yet obtained a registration *cannot* prevent the reposting of infringing material under Section 512(g)(2)(C) – *even when the material is clearly infringing* – if the copyright owner is required to file a lawsuit in a court that requires a registration (*e.g.*, for personal jurisdiction reasons). This is particularly an issue with respect to

pre-releases or new releases, where the absence of a copyright registration is no fault of the record company, but merely a result of processing times at the Copyright Office.

The solution to this problem is a change to Section 411(a), which should be amended to read:

Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no civil action for infringement of the copyright in any United States work shall be instituted until the deposit, application, and fee required for preregistration or registration of the copyright claim have been made delivered to the Copyright Office in proper form, or preregistration of the copyright claim has been made, in either case in accordance with this title. In any case, ~~however,~~ where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.

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?

UMG agrees that concerns respecting potential legal costs are valid, and further agrees that the notice-and-takedown and counternotice process should in no event be used – by either users or copyright owners – for intimidation or harassment. UMG's proposed adjustments to the counternotice process and timeline (*see supra* No. 5(b)), and in particular the substitution of a streamlined dispute resolution proceeding for federal court litigation, are intended to directly address (among other things) concerns respecting legal cost. Again, if adequate time is allowed during which the content owner is not being harmed, UMG believes that many of the disputes over notices and counternotices can be amicably resolved in that period without court intervention. Likewise, UMG's proposal that online interfaces and standardized forms be used –

both for takedown notices and for notifications to users (*see supra* No. 5(a), *infra* No. 9) – will aid in addressing concerns respecting “intimidating language” or the like.

However, one change that *cannot* be made is to allow accused infringers who wish to utilize the counternotice process to do so anonymously. A critical aspect of the (as-yet unrealized) DMCA “bargain” – *i.e.*, part of the tradeoff for insulating online service providers from liability – was to ensure that copyright owners could vindicate their rights against infringers. If online service providers are protected from liability, but copyright owners are also unable to readily identify and take appropriate legal action against users who infringe, then an already-broken system becomes even worse.²

While this would be a critical problem in all instances in which an alleged infringer remains anonymous, it would be particularly acute when pre-release content is leaked, and it is critical to identify and stem the source of the leak, and to prevent future leaks. Copyright owners are already hamstrung in their ability to effectively address infringement under those circumstances. *See supra* Nos. 5(a), 5(c). Allowing an infringer to erode the value of copyrighted content under the cloak of anonymity, while simultaneously insulating the service provider from liability, deprives the copyright owner of fundamental tools necessary to adequately enforce and protect its interests.

Response No. 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?

Increased or otherwise “strengthened” penalties are not the answer for multiple reasons. First, they are unlikely to curb willfully “false or abusive” behavior – there is no reason to

² While UMG believes that instances in which the notice-and-takedown system has given rise to legitimate safety or privacy concerns are exceedingly rare, other remedies are available to address those concerns, including federal and state cyber-stalking, anti-bullying and/or harassment laws.

believe that the actors involved in the “hall of shame” examples that various commenters have cited would have acted any differently if Section 512 contained additional and/or different penalties than it currently does. Second, while many commenters associated with online service providers bemoan the alleged underutilization of the counternotice process, strengthening penalties for false or fraudulent statements, if it has any impact, is likely to further discourage use of that process. And third, the most likely outcome is not that notice or counternotice behavior would be affected, but instead that the courts would be clogged with more litigation.

Instead, the better approach to addressing concerns respecting baseless notices or counternotices is to address the issue holistically, from multiple angles. This process would include ongoing education of the public respecting intellectual property rights; clarity and uniformity in the notice and counternotice process, and in the communications to users subject to a takedown notice; a cooperative effort on the part of all participants to identify and prevent infringement at the outset, rather than merely responding to infringement after it has occurred; and a streamlined process for addressing disputed counternotices.

8. For ISPs acting as conduits under section 512(a), what notice or finding should be necessary to trigger a repeat infringer policy? Are there policy or other reasons for adopting different requirements for repeat infringer policies when an ISP is acting as a conduit, rather than engaging in caching, hosting, or indexing functions?

There is no basis for distinctions between online service providers that act as conduits and those that engage in caching, hosting, or indexing functions with respect to the “repeat infringers” requirements of Section 512(i)(1)(A). Infringement is no more excusable when conducted over a network controlled by an online service provider than it is when conducted on a website hosted by the online service provider, or when cached or indexed by an online service provider. Indeed, courts have uniformly recognized that the adoption and implementation of a repeat infringer policy is a necessary condition of eligibility for *all* DMCA safe harbors, and a

critical element of the balance that Congress attempted to strike in fashioning those safe harbors. *See, e.g., Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 637 (S.D.N.Y. 2011) (noting that “repeat infringers” policy requirement is “a prerequisite for every DMCA safe harbor and is a fundamental safeguard for copyright owners”), *on reconsideration in part*, 2013 WL 1987225 (S.D.N.Y. May 14, 2013); *Perfect 10, Inc. v. Cybernet Ventures*, 213 F. Supp. 2d 1146, 1178 (C.D. Cal. 2002) (repeat infringer policy requirement is necessary to “maintain the ‘strong incentives’ for service providers to prevent their services from becoming safe havens or conduits for known repeat copyright infringers”).

Nor is there any basis, as some have argued, to limit repeat infringer policies such that they apply only to “adjudicated” repeat infringers (*i.e.*, persons who have been found liable for copyright infringement following fully-litigated court proceedings, on multiple occasions). No court has so held, and the language of the Copyright Act is to the contrary: the Act makes clear that “[a]nyone who violates any of the exclusive rights of the copyright owner...is an infringer of the copyright or right of the author,” 17 U.S.C. 501(a), regardless of whether that infringement has been adjudicated by a court. Indeed, the Second Circuit recently held as much: after considering the “text, structure, [and] legislative history of the DMCA” and reversing a district court’s repeat infringer definition as “too narrow,” the court held that “all it [takes] to be a ‘repeat infringer’ [is] to repeatedly [upload or download] copyrighted material for personal use.” *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 89 (2d Cir. 2016) (as amended).

Any contrary interpretation would be nonsensical, and would deprive copyright owners of the “fundamental safeguard” provided by the “repeat infringer” policy requirement. Limiting such policies to adjudicated infringers would essentially require aggrieved copyright owners to *twice* sue an infringer and proceed through years of litigation to a final judgment before a “repeat

infringer” policy was triggered as to that infringer. Such an outcome would either (or both) gut the DMCA’s repeat infringer policy requirement by rendering such policies almost uniformly inapplicable, and/or incentivize a massive flood of litigation to “adjudicate” infringers, so as to satisfy the (mis)interpretation of the “repeat infringer” standard. Neither of these alternatives can be what Congress had in mind.

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?

UMG wholeheartedly supports increased education both about copyright law generally and about the DMCA safe harbor system specifically. Such education could take multiple forms.

First, online service providers should be encouraged to prominently address copyright and other intellectual property issues on their websites. Many online service providers include “terms of use” that prohibit the uploading of infringing material, but few prominently display that prohibition or provide information that would aid their users in understanding what it means (and, of course, others who claim the benefit of the DMCA safe harbors actually encourage infringement, *see, e.g., EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 93-94 (2d Cir. 2016); *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1043 (9th Cir. 2013)). In any event, information and education regarding respect for and protection of intellectual property rights could effectively be provided to users on any number of occasions, including those when infringement is most likely to occur – when uploading content, visiting a known piracy site, and the like.

Second, copyright owners (both directly and through trade associations) should continue their efforts to educate the public respecting the critical importance and scope of intellectual property rights. UMG’s trade association, the Recording Industry Association of America, has

implemented numerous online resources to facilitate such education, including a dedicated portion of its website devoted to the topic, and the creation of a separate website, whymusicmatters.com, as a tool for finding legal music online.

Third, education should be integrated into the notice-and-takedown process itself. Whether through legislation, regulation, or a “best practices” recommendation from the Copyright Office or other authority, online service providers should be encouraged to use the communication of a takedown notice as an opportunity to educate their users. Among other things, the communication should include a standardized message that clearly and completely explains the reason for the takedown (*e.g.*, “Your video has been taken down because it contains [song], and we have received a notice that [song] is owned by [copyright holder] and is protected by copyright.”), in addition to the further detail provided in the notice. In addition, the communication should include links to the resources maintained by the Copyright Office and/or by copyright owners, to aid in the user’s understanding of the basis for the takedown notice and copyright law more generally.

Finally, relevant government agencies and departments, including the Copyright Office, the Patent and Trademark Office, the National Telecommunications and Information Administration, the Office of the U.S. Intellectual Property Enforcement Coordinator, and others, should play an active role in educating the public about the importance and protection of intellectual property, including through online resources, advertising, community outreach, and other suitable means.

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?

The best way to incentivize the adoption of important measures that are currently “voluntary” is to make them mandatory. It perhaps goes without saying that a substantial

limitation on the value of voluntary measures is just that – they are voluntary. For example, YouTube has taken the position that it is not required to make Content ID available, and can instead simply rely upon the provisions of Section 512. *See Viacom Int’l Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110, 120 (S.D.N.Y. 2013). Accordingly, these comments set forth a proposal for codifying and requiring at least one crucial “voluntary” measure, namely, the use of filtering. *See infra* No. 12.

The government also has a critical role to play in encouraging and incentivizing online service providers to adopt additional voluntary measures to discourage and curb copyright infringement, including robust user education and service provider transparency. For example, the Copyright Office and/or other suitable governmental body could – with input from the creative community – articulate recommended “best practices” for service providers that encompass multiple elements, including compliance with statutory provisions and additional voluntary measures (if not statutorily adopted) designed to prevent or redress infringement; complete transparency respecting the full range of the service provider’s DMCA policies and activities; both reactive and proactive efforts to educate users about and deter infringement; and the provision of, and redirection to, sites where copyrighted content may be obtained legally. Public identification and promotion of those who comply with the best practices may incentivize other service providers to likewise comply.

Ultimately, however, the primary solution to the shortcomings of the DMCA, as it has been interpreted and applied, must come by way of statutory reform. Voluntary measures may modestly offset some small portion of the harm otherwise caused by online infringement, but they cannot remotely make up for the massive imbalance in the system as it presently exists.

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?

UMG refers to the Additional Comments of the Music Community respecting the issues raised in No. 11.

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?

A notice-and-stay-down system is not merely advisable; it is critical. In its initial comments, UMG related its experience with takedowns associated with a single artist and a single album: Taylor Swift's "1989" album. *See* Comments of UMG at 21-22. The data provided there illustrated the "whack-a-mole" problem that plagues the current system, requiring UMG or its agents to send literally thousands of notices to each of several sites over an eighteen-month period to take down *the identical content* posted to those sites. That problem has persisted; in the time since UMG filed its initial comments, UMG has sent dozens, or hundreds, or – in one case – thousands of *additional* notices to those same sites for that same content. Nor is UMG's experience in this regard unique to Taylor Swift or "1989". The following summarizes the number of notices sent to just two of those sites in connection with other albums, from the album's release date (noted in parentheses) to the present; UMG could provide similar data for any number of other artists and albums, as undoubtedly could any other major copyright owner:

| | Number of Takedown Notices Sent from Album Release to Present | | | | |
|----------------|---|--------------------------|---|------------------------------------|--|
| | Ariana Grande/ Dangerous Woman (5/20/16) | Drake/Views (4/29/16) | J. Cole/4 Your Eyez Only (12/9/16) | Lady Gaga/ Joanne (10/21/16) | The Weekend/ Starboy (11/25/16) |
| uploaded.net | 1607 | 692 | 133 | 115 | 413 |
| vibeclouds.net | 9343 | 5720 | 1174 | 2598 | 2855 |

A critical aspect of an effective “notice-and-stay-down” system is the mandatory use of content identification technologies, or “filters,” that can identify and block copyrighted content before it is even uploaded or posted online. UMG described some of those technologies in its initial responses. *See* Comments of UMG at 22-25, 30-36. While such technology is far from perfect, *see id.* at 25 n.5, adoption of filtering technology would substantially reduce infringement generally, and the “whack-a-mole” problem specifically. To that end, UMG proposes the following statutory amendments to Section 512(c)(1):

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; ~~and~~

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity; and

(D) implements filtering or other technology that is designed to identify, and that is reasonably effective in identifying,

(i) other material on the system or network that is the same as material identified in a notification of claimed infringement as described in paragraph (3), and as to which no counter notification as described in subsection (g)(3) was timely provided;

(ii) other material on the system or network that contains or otherwise reflects the same copyrighted work as is identified in a notification of claimed infringement as described in paragraph (3), and as to which no counter notification as described in subsection (g)(3) was timely provided; and

(iii) other material that a user seeks to upload to or store on the system or network that contains or otherwise reflects the same copyrighted work as is identified in a notification of claimed infringement as described in paragraph (3), and as to which no counter notification as described in subsection (g)(3) was timely provided;

and immediately removes, disables access to, or precludes uploading or storage of such material.

In addition, to avoid any arguable ambiguity or inconsistency with Section 512(m) (which some litigants and courts have (wrongly) relied upon to eviscerate these and other provisions of Section 512, including those addressed below, *see infra* Nos. 13(b) & 13(c)), that section should be amended as follows:

(m) Protection of Privacy.— Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on—

(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except:

(A) to the extent consistent with a standard technical measure complying with the provisions of subsection (i);

(B) to the extent the service provider is or should be aware of infringing activity on the system or network or at the online location, as described in subsection (c)(1)(A)(ii) and subsection (d)(1)(B), in which event the service provider shall affirmatively seek facts necessary to determine the nature and scope of the infringement on the system or network or at the online location;

(C) to the extent required by subsection (c)(1)(D); and

(D) to the extent the service provider is provided with a representative list pursuant to subsection (c)(3)(A)(ii) and/or a notification pursuant to subsection (c)(3)(A)(iii) that a copyrighted work is claimed to be infringed by multiple items of material and/or at multiple locations on a single online site, in which event the service provider shall affirmatively seek facts necessary to determine the nature and scope of the infringement being claimed;

or

(2) a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law.

UMG recognizes that certain commenters have raised issues respecting a filtering requirement, including both cost and the risk that allegedly noninfringing works – and particularly “fair uses” – will get “caught” in a filter. The concern respecting cost appears to be overblown – online service providers would not be required to create their own proprietary software, and cost-effective commercial alternatives are available. *See* Comments of UMG at 23; *see also supra* n.1. Regardless, if an online service provider wants the benefit of the safe harbor, then it must share (at least) the relatively modest burden of adopting an automated mechanism to take down and keep down known infringing works.

Likewise, UMG believes that the articulated concerns respecting fair use are overstated – based both on its own experience (*see* Comments of UMG at 32-34) and in light of the dubious nature of the data underlying many commenters’ claims (*see infra* n.4). In any event, UMG believes that consideration of fair use is better allocated to the counternotice procedure (*see infra* No. 13(a)), which provides ample redress (and an opportunity to provide the necessary context) for any claim that allegedly infringing material constitutes a fair use.

Finally, UMG believes that concerns that filtering will inhibit the growth of online service providers is baseless. YouTube implemented Content ID years ago, and although it is far from perfect, it also does not appear to have remotely constrained the expansion of YouTube.

In sum, incorporation of a filtering requirement into the DMCA would not fully address the imbalance experienced by copyright owners, or create a “perfect” notice-and-stay-down system, and other measures may also be required.³ However, UMG believes that requiring filtering is an essential step in that regard.

³ As UMG previously noted, *see* Comments of UMG at 23 n.4, various complementary types of filtering, including audio fingerprinting, hash-based filtering, and key word searching, can and should be used in conjunction to maximize effectiveness. As UMG’s experience with Content ID reflects, use of only one type of filtering (in the

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 proposed statutory revisions addressed elsewhere in these additional comments, UMG believes that several other aspects of Section 512 warrant reconsideration and modification, as discussed below.

(a) Proper Treatment of Fair Use

In its initial comments, UMG addressed the recent Ninth Circuit decision in *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016) (“*Lenz*”), in which the court held that a copyright owner must consider fair use *before* sending a takedown notice. *Id.* at 1153. UMG recognizes the important role that the fair use defense plays in promoting the dissemination of ideas and advancing the purposes of copyright. However, for the reasons described in UMG’s initial comments, to the extent the *Lenz* holding is intended to require individualized, human evaluation of every potential takedown, it would be simply impossible to discharge. Instead, the fair use determination should be handled as it is in litigation – as an affirmative defense – and its consideration should be relegated to where it belongs – in connection with a counternotice, in the event a user contends that a given use is “fair” and provides sufficient information to permit an informed evaluation of that contention.⁴

case of Content ID, audio fingerprinting) fails to capture a large volume of infringing material, including in particular live recordings, cover recordings, and new releases. *See id.*; *see also* Comments of UMG at 25 n.5.

⁴ A recent paper commissioned by Google, Jennifer Urban, Joe Karaganis and Brianna L. Schofield, “Notice and Takedown in Everyday Practice,” available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628 (the “Urban Study”), suggests that approximately 7.3% of takedown notices in one of the sample sets that the authors reviewed “presented a fair use question.” The Urban Study has been criticized on numerous grounds, *see, e.g.*, Kevin Madigan & Devlin Hartline, “Separating Fact from Fiction in the Notice and Takedown Debate,” Center For The Protection Of Intellectual Property (April 25, 2016), available at <http://cpip.gmu.edu/2016/04/25/separating-fact-from-fiction-in-the-notice-and-takedown-debate/>, and its fair use “analysis” is no exception. Although the authors conceded that they “could not do a full fair use analysis,” the basis for their calculation suggests that the limited analysis they *did* do was fundamentally flawed. The authors stated that requests they flagged as “potential” fair uses “predominantly” related to “mashups, remixes, or covers,” and that another “notable group of requests targeted ringtones.” *Id.* at 95-96. The authors do not state the basis for their suggestion that ringtones, covers,

The *Lenz* court also held that the “good faith belief” referred to in Section 512(c)(3)(v) is a *subjective*, rather than *objective*, belief. *Lenz*, 815 F.3d at 1153-54. UMG believes that this holding is correct (and is evident from, among other things, the phrase “*good faith belief*”). However, *Lenz* has sought certiorari respecting this issue. Regardless of whether the Supreme Court elects to grant *Lenz*’s petition, to avoid any further dispute, UMG also believes that a modification to Section 512(c)(3)(v) to codify the Ninth Circuit’s holding in this regard is appropriate.

Accordingly, UMG proposes the following amendments to Section 512(c)(3)(v):

(v) A statement that the complaining party has a subjective 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; provided, however, that notwithstanding any other provision of this title, the complaining party is not required to consider whether use of the material complained of constitutes a “fair use” within the meaning section 107 of this title unless and until a claim of fair use is made with respect to such material in a counter notification provided pursuant to subsection (g)(3), including information in the possession of the person providing the counter notification respecting the purpose and character of the use.

Similarly, UMG proposes the following amendment to Section 512(f)(1), to conform that provision to the above change:

(1) ~~that material or activity is infringing~~ the facts referenced in subsection (c)(3)(v), or

UMG submits that the changes will add clarity and coherence to the DMCA takedown process, while still ensuring that the important doctrine of fair use is fully and appropriately considered within the notice and takedown system.

remixes, or mashups are likely to constitute fair use, nor is the basis for that suggestion readily apparent. On the contrary, these examples of copying copyrighted works – whether the sound recording, the composition, or both – are classic cases of infringement that are unlikely to present a meaningful fair use question.

(b) “Representative List”/“Identification of the Material”

UMG’s initial comments also indicated the need to clarify the meaning of “representative list,” as that phrase is used in Section 512(c)(3)(ii). *See* Comments of UMG at 27-29. As noted in those comments, courts have simply read that phrase out of the statute entirely. This outcome is directly at odds with the expressed intention of Congress. The House Report respecting Section 512 provided the following illustration of when a “representative list” could be used:

[F]or example, where a party is operating an unauthorized Internet jukebox from a particular site, it is not necessary that the notification list every musical composition or sound recording that has been, may have been, or could be infringed at that site. Instead, it is sufficient for the copyright owner to provide the service provider with a representative list of those compositions or recordings in order that the service provider can understand the nature and scope of the infringement being claimed.

H.R. Rep. No. 551 (Part 2), 105th Cong., 2d Sess. 55 (Jul. 22, 1998). This example could readily apply to any number of online services that have effectively functioned as “Internet jukeboxes” – *i.e.*, where music is available to stream or otherwise access on demand – or other comparable platforms for the broad and unauthorized dissemination of music. However, as described in UMG’s initial comments, courts have refused to embrace the meaning Congress intended, instead requiring particularized identification of each allegedly infringed work. Similarly, courts have interpreted the language in Section 512(c)(3)(A)(iii) – which calls for “[i]dentification of the material that is claimed to be infringing” – to require the copyright owner to provide URL-specific identification of each and every individual case of infringement on a site, thereby imposing extraordinary and unwarranted burdens on copyright owners. *See* Comments of UMG at 27-28. Amendments are needed to better allocate the burden of addressing online infringement between the relevant stakeholders, which will aid in restoring the balance that was intended to underlie the DMCA.

UMG therefore proposes the following amendments to the above-referenced sections:

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a non-exhaustive but representative list of such works at that site; when such a representative list is provided, the notification is sufficient to encompass all works owned by the complaining party of which the list is representative.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material; when the same copyrighted work is claimed to be infringed by multiple items of material and/or at multiple locations on a single online site, the notification is sufficient to encompass all such items and/or locations if it identifies at least one such item of material and at least one location of such material on the site.

(c) Red-Flag Knowledge/Willful Blindness

As discussed in the initial comments of the Music Community and several other commenters (*see, e.g.*, Comments of the Music Community at 35-37; Comments of MPAA at 31-36), and referenced by UMG (*see* Comments of UMG at 40), numerous court interpretations have effectively read “red flag” knowledge out of the DMCA, and have likewise all but eliminated the “willful blindness” doctrine as applied to the statute. This trend continued, following the submission of initial comments, in *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78 (2d Cir. 2016), in which the Second Circuit concluded that an online service provider did not meet either the “red flag” knowledge or the “willful blindness” standard – notwithstanding that the service provider’s executives and employees were aware of widespread infringement on the service – in the absence of evidence that the service provider was aware of “specific instances of infringement” of the videos-in-suit. *Id.* at 96-99. Just months later, however, a different panel of the Second Circuit reached a conclusion that appeared to take a somewhat broader view of those doctrines. In *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79 (2d Cir. 2016) (as amended), the court concluded that a service provider can have “red flag knowledge” of, or be

willfully blind to, infringement of *categories* of works (*e.g.*, all songs uploaded prior to a particular date, or all songs by a particular artist) within the meaning of the DMCA, thereby giving rise to a “time-limited, targeted duty” to remove those infringements, without regard to whether the service provider was previously aware of each specific instance of infringement. *Id.* at 92-93.

UMG affiliates are plaintiffs in both of the above-referenced cases, and UMG’s views respecting the merits of those cases are fully reflected in the publicly-available briefs that it has filed, which it incorporates here. For purposes of these comments, however, these cases also illustrate that the courts are not best-suited to effectively address the problems underlying the DMCA safe harbor regime. Ironically, one commenter associated with the online service provider community asserts that “the statute replaced the murky, judge-made standards that characterize copyright’s secondary liability doctrines with detailed, relatively predictable rules.” Comments of Electronic Frontier Foundation at 3. These cases reflect that nothing could be further from the truth. Instead, DMCA cases appear to be (at least partially) outcome-oriented, based on the perceived value and worthiness of the online service provider (*i.e.*, a conclusion that YouTube and Vimeo “deserve” DMCA protection, while MP3tunes and its founder, Michael Robertson – a prior adjudicated infringer – do not). They are also inherently untimely: by the time the cases reach the appellate courts, the technology at issue is necessarily long out of date (*Vimeo* was filed in 2009; *Lenz* was filed in 2007; *MP3tunes* was filed in 2006), and the defendants have often long since gone out of business (MP3tunes filed for bankruptcy in 2012; Veoh filed for bankruptcy in 2010). And inconsistencies and errant rulings abound, resulting in a lack of clarity and lack of finality. Statutory modifications that can provide clarity in light of current market realities are far preferable to a hopeless amalgam of court decisions that provide

no meaningful or consistent guidance, and that are effectively out of date as soon as they are issued.

To that end, and with respect to the “red flag” knowledge/willful blindness issue, UMG proposes the following revisions to Section 512:

Section 512(c)(1)(A) (respecting information residing on systems or networks at the direction of users):

- (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
- (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent, including without limitation circumstances in which the service provider is or should be aware of infringing activity on the system or network, even in the absence of knowledge or awareness of specific and identifiable instances of infringement on the system or network; or
- (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

Section 512(d)(1) (respecting information location tools):

- (A) does not have actual knowledge that the material or activity is infringing;
- (B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent, including without limitation circumstances in which the service provider is or should be aware of infringing activity at the online location, even in the absence of knowledge or awareness of specific and identifiable instances of infringement at the online location; or
- (C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

UMG believes that these changes would clarify the proper application of the relevant provisions and help to ensure that service providers bear their portion of the shared burden to reduce or prevent infringement on their systems.

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.

UMG has addressed throughout its initial comments and these additional comments its concerns respecting various court decisions, including those recently issued, and has provided recommendations for addressing those concerns.

In addition to the issues raised above with respect to the Second Circuit's recent decision in *Vimeo*, that decision presents another concern respecting application of the DMCA. In the first portion of its opinion, the Second Circuit concluded that the DMCA safe harbors apply to sound recordings first fixed prior to February 15, 1972 (i.e., "pre-72" sound recordings). It reached this conclusion notwithstanding the fact that the Copyright Act does not otherwise protect such sound recordings or include them within its scope, and notwithstanding the fact that the Copyright Office had reached the opposite conclusion in a report issued in 2011. See United States Copyright Office, "Federal Copyright Protection for Pre-1972 Sound Recordings," at 130-132 (Dec. 2011), available at <https://www.copyright.gov/docs/sound/pre-72-report.pdf>. There is simply no justification for the dichotomy imposed by the Second Circuit, in which the rights and remedies of owners of pre-1972 recordings are restricted under the DMCA, but without the corresponding benefits that federal law provides to owners of federal copyrights.

UMG has filed a petition for certiorari with the United States Supreme Court in *Vimeo*. Regardless of whether that petition is granted, the Copyright Act should be amended to make even more clear that the DMCA safe harbors do not apply to pre-72 sound recordings. Obviously, another alternative would be to bring pre-72 sound recordings within the scope of the

Act – a matter which seems beyond the scope of the current Notice of Inquiry and which would raise numerous issues that would require careful consideration.

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?

UMG refers to the additional comments provided by the Music Community, which address approaches taken in jurisdictions outside of the United States.

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Respectfully submitted,

Jeffrey Harleston

General Counsel and EVP, Business & Legal Affairs

Alasdair McMullan

Head of Litigation and SVP, Business and Legal Affairs

Universal Music Group

2220 Colorado Avenue

Santa Monica, California 90404

David Kokakis

Executive Vice President, Head of Business & Legal
Affairs, Business Development and Digital

Universal Music Publishing Group

2100 Colorado Avenue

Santa Monica, California 90404