

**April 1, 2016**

U.S. Copyright Office  
Attn: Maria A. Pallante  
Register of Copyrights  
101 Independence Ave. S.E.  
Washington, D.C. 20559-6000

*Electronically submitted via [www.regulations.gov](http://www.regulations.gov)*

**Re: Section 512 Study: Notice and Request for Public Comment Issued on December 31, 2015 by the U.S. Copyright Office [Docket No. 2015-7]<sup>1</sup>**

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Dear Register Pallante:

The Independent Film & Television Alliance (IFTA) respectfully submits these comments in response to the Notice of Inquiry published in the Federal Register requesting written submissions on the impact and effectiveness of the safe harbor provisions set forth in section 512 of the Digital Millennium Copyright Act (DMCA).<sup>2</sup> IFTA welcomes this opportunity to provide input as the Copyright Office evaluates the extent to which section 512 effectively addresses online infringement.

### **About IFTA and its Member Companies**

Based in Los Angeles, California, IFTA is the trade association for the independent motion picture and television industry worldwide and is dedicated to protecting and strengthening its Members' ability to finance, produce, market and distribute independent films and television programs in an ever-changing and challenging global marketplace. IFTA represents more than 135 companies in 23 countries, the majority of which are small to medium-sized U.S.-based businesses<sup>3</sup> which have financed, produced and distributed many of the world's most prominent films, 21 of which have won the Academy Award® for "Best Picture" since 1980.

Independent films and television programs are made at every budget level and may be mainstream, commercial or art house. IFTA defines 'independent' producers and distributors as those companies (apart from the six major U.S. studios) that assume the majority of the financial risk for the production and control the licensing of its distribution throughout the world. While operating in a global arena, these companies rely heavily on the United States as a major marketplace to conduct business and engage in licensing of their copyrighted works.

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<sup>1</sup> See [80 Fed. Reg. 81862 \(December 31, 2015\)](#).

<sup>2</sup> 17 U.S.C. § 512.

<sup>3</sup> A complete list of IFTA Members is available online at: <http://www.ifta-online.org>.

The economic impact of the independent film and television industry evidences that copyright drives innovation, creation and prosperity. Our sector accounts for over 75% of all films produced in the U.S. In 2014, independent production companies shot 365 films in the U.S. This independent production activity resulted in the creation of 23,175 direct full-time jobs and another 69,836 full-time jobs for the various vendors that service the industry. Combined, both classes of employees earned over \$9.3 billion. Total business revenue that resulted from this independent production activity totaled over \$14.4 billion in economic output. It also generated nearly \$1.95 billion in income and sales taxes for both the federal and individual state governments. The federal government's share of income tax received was over \$1.22 billion.<sup>4</sup> Content theft seriously undermines the independent sector's ability to sustain business operations and to employ American workers.

Today, IFTA Members face unprecedented theft of their copyrighted content with no way to prevent or stop the introduction and rapid proliferation of infringing copies across the Internet. For example, the most pirated movie of 2015 — *Interstellar* — was illegally downloaded over 46 million times and those illegal downloads were 55 percent *more* than the most pirated movie of 2014, *The Wolf of Wall Street*.<sup>5</sup> Once illegally uploaded, an infringing digital file is easily “shared”, downloaded, streamed or further distributed creating a situation which simply cannot be effectively stopped under the current system of notifying online service providers of each and every instance of infringement. This is especially harmful in the case of pre-release theft where the appearance of even a single copy online alone is proof of criminal activity.

Below, IFTA responds to those specific questions posed by the Copyright Office in the Notice of Inquiry where the experience of IFTA Members may be of greatest assistance in the evaluation of section 512.

### **Question 1:**

#### **Are the section 512 safe harbors working as Congress intended?**

In enacting section 512 back in 1998, Congress created a system for copyright owners and online service providers to address online infringement, including limitations on liability for compliant service providers to help foster the growth of Internet-based services.<sup>6</sup> The safe harbor provisions of section 512 limit an online service provider's liability for copyright infringement on condition that the service provider complies with the notice-and-takedown framework by timely removing the sufficiently identified infringing material from their systems upon notice. This system reflected Congress' recognition that the same innovative advances in technology that would expand opportunities to reproduce and disseminate content could also facilitate exponential growth in copyright infringement.<sup>7</sup>

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<sup>4</sup> Information provided by the IFTA Research & Strategic Analysis Department.

<sup>5</sup> <http://thehill.com/blogs/pundits-blog/technology/271587-industry-cooperation-takes-another-step-in-fighting-online>.

<sup>6</sup> See [80 Fed. Reg. 81862 \(December 31, 2015\)](#).

<sup>7</sup> See [80 Fed. Reg. 81862 \(December 31, 2015\)](#).

Section 512 requires that online service providers designate an agent to receive notices of infringement.<sup>8</sup> If the service provider complies with notices meeting the requirements of section 512(c)(3) and timely takes down infringing files, they are able to enjoy a safe harbor from a claim of infringement.<sup>9</sup> However, the burden is on copyright holders to discover each instance of infringement on a service provider's system and continue to notify the designated agent of each infringement. There is no proactive duty for the service provider to prevent the upload of the same, or other infringing files of that same copyrighted work, onto its system unless again notified and in today's "click and upload/stream" environment that is especially damaging to independent producers.

The current section 512 framework and incentive of the safe harbor contemplated a much "slower" digital environment in which the downloading of infringing files was the main problem to be addressed. A recent study concluded that online piracy is shifting significantly to video streaming from file-sharing and downloading.<sup>10</sup> Technology and Internet bandwidth have increased exponentially since then with the rise of decentralized file sharing systems becoming a common online activity, along with the ability for Internet users to immediately stream programming. The distribution of films and television programming has also evolved significantly since 1998 as consumers increasingly desire to receive or view content in digital formats online; these changes are creating additional opportunities for producers, but creators' ability to benefit from those opportunities is hampered by the lack of effective tools and deterrents to stop massive, continually repeated infringement.

This exponential increase in digital distribution and piracy has meant a growing flood of infringement notices, the volume of which is problematic for online service providers and copyright owners alike.<sup>11</sup> According to one report, "the antipiracy and security firm Irdeto, reported that in 2009 it detected 5.4 billion instances of pirated content online, from movies and television shows to videogames. [In 2010], that number jumped to more than 14 billion."<sup>12</sup>

The current statutory system is not capable of deterring piracy in such volume. It is especially troublesome for rights holders who cannot afford to engage in an endless notice-and-takedown system while service providers routinely complain of receiving and processing high volumes of notices. It was recently reported that Google received requests to scrub 213 million links from its search engine in the first 12 weeks of 2016 because of copyright infringement; a *Variety* analysis of the company's data shows — an increase of 125% compared with the same period last year.<sup>13</sup>

IFTA Members regularly confront online service providers that do not comply with the requirements of section 512 either by rejecting notices or not processing them in a timely manner. Average compliance rates as low as 39% have been reported on hosted sites based in the U.S. Compliance frequently also occurs well beyond the statutory deadline of 48 hours

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<sup>8</sup> 17 U.S.C. § 512(c)(2).

<sup>9</sup> 17 U.S.C. § 512(b)-(d).

<sup>10</sup> <http://variety.com/2015/biz/news/report-piracy-shifts-away-from-downloading-to-video-streaming-1201430189/>

<sup>11</sup> As of April 1, 2016, the [Google Transparency Report](http://www.google.com/transparencyreport/) states that **83,954,020** URLs have been requested to be removed from its search feature alone in the past month.

<sup>12</sup> <http://www.wsj.com/articles/SB10001424127887324906004578292232028509990>.

<sup>13</sup> <http://variety.com/2016/digital/news/google-dmca-copyright-removal-requests-piracy-1201740892/>.

necessary for the service providers to qualify for the safe harbors. IFTA Members also routinely encounter service providers that fail to designate an agent to receive notices of infringement as required by section 512, making it extremely difficult to enforce their rights online.

Updating the notice-and-takedown mechanism means requiring service providers, after having received clear notification of infringement and identification the infringing material from a rights holder, to use now-common technology to match infringing material identified in notices and take proactive steps to prevent the repeated upload and hosting of the same infringing material. This “notice, takedown and staydown” framework is better suited to address the tidal wave of infringement and will likely quell the volume of infringement notices by preventing the spread of the same pirated content on the same service provider’s system. This would alleviate the burden of sending and processing millions of notices for all stakeholders.

**Question 3:**

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

Section 512’s limitations on liability for online service providers have allowed an online environment to develop where pirated content runs rampant with service providers doing no more than what is legally required under the statute to respond to notices of infringement. The lack of effective enforcement mechanisms for rights holders will ultimately hinder the development of online services because producers will no longer be able to support their production activities to supply those services with commercially viable content.

In today’s digital reality, legitimate online distribution platforms are forced to compete with pirated content offered on the Internet for free, which clearly stifles the development of those legitimate platforms. There is no doubt that someone who is presented an opportunity to view a pirated film or program online for free will be less motivated to pay to see it in a theater or through an authorized online platform. Piracy also becomes an ingrained behavior making it even more difficult for legitimate, compliant sites to become established.

Many service providers simply have no incentive to discourage users who have infringed from further uploading infringing files because they make money on revenue – especially ad revenue -- that comes with increased traffic to the site because of the availability of pirated content. Service providers can do more to rid their systems of infringing content, but it may be in their financial interest to do the bare minimum. A revised section 512 would include incentives that require service providers to do more.

**Question 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 limitations on liability for online service providers have reduced the ability of rights holders to adequately protect their copyrighted content and decreased the value of copyrighted works, including independent film and television programming, by fostering an online environment where pirated content is allowed to flourish and become “routine” behavior.

Copyright infringement damages independent producers and distributors beyond “lost revenues,” impacting their ability to secure basic financing and distribution for their productions. Independent producers depend on exclusive licensing arrangements with distributors who, *prior to physical production*, contractually commit to pay a minimum guaranteed license fee upfront in exchange for the exclusive right to distribute the completed production to the public in their particular territory. Those minimum guarantees from the license agreements are then collateralized by financial institutions which loan funds to support the production.

Online piracy competes with legitimate distributors and their ability to exclusively license and distribute independent content. In the case of pre-release piracy, it compromises the ability of legitimate distributors to recoup their upfront license fees and distribution costs. One study concluded that with respect to the theatrical window of exploitation, on average, pre-release movie piracy results in a 19% reduction in box office revenue relative to what would have occurred if piracy were only available after the movie’s release.<sup>14</sup> Websites with infringing copies may be “free” to consumers, but drain off legitimate business opportunities and the ability to repay those who invested in the production.

IFTA Members continue to report the destructive effect of online content theft on investment and financing of independent films and the negative impact on local distributors worldwide, including those based in the U.S. These distributors frequently cite “piracy,” even for content that is not yet released in a particular country, as a reason to pay reduced license fees or to refuse to distribute a film or television program at all. Reduced license fees and lost opportunities have devastating effects not just on the distribution of independent films and television programs made in the U.S., but also on the ability of independent producers to raise production finance for new projects, as many U.S. films rely on territorial pre-sales around the globe and/or co-production arrangements that are underpinned by financial commitments from national distributors prior to completing production.

A prime example of the devastating impact that online piracy has on independents is with the 2009 Academy Award® winning “Best Picture” *The Hurt Locker*. The \$15 million dollar budget for this Voltage Pictures’ film was 50% financed by pre-sales to distributors in France, Germany, Italy, Benelux, Brazil, Canada, and Eastern Europe.<sup>15</sup> While the film ultimately won six Oscars®, sadly this widely seen but heavily pirated film was one of the lowest box office earners of any Best Picture.<sup>16</sup> According to the film’s producer, box office performance was directly affected by infringing copies that appeared online during the theatrical release which led to millions of illegal downloads, peer-to-peer “sharing” and streams. If our Copyright Law is not updated to provide effective tools and deterrents to address online infringement, films with such diverse topics as found in *The Hurt Locker* or *Dallas Buyers’ Club* (another critically acclaimed and heavily pirated film from Voltage Pictures) may not be able to be made. That is the real and immeasurable cultural loss from piracy.

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<sup>14</sup> [https://techpolicyinstitute.org/2014/07/25/the\\_expendables\\_3\\_leak/](https://techpolicyinstitute.org/2014/07/25/the_expendables_3_leak/).

<sup>15</sup> <http://www.screendaily.com/comment/a-locker-full-of-gold/5009159.article>.

<sup>16</sup> <http://www.hollywoodreporter.com/thr-esq/hurt-locker-producer-nicolas-chartier-763982>.

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

No. The rise of infringing content available on the Internet and the ability of rights holders and platforms to utilize technology to more quickly and affirmatively identify, remove and prevent a re-upload requires that the notice-and-takedown framework and safe harbor incentive be rebalanced in light of current realities.

For the film and television industry, the balance has shifted dramatically away from rights holders, leaving most without meaningful tools to combat online infringement. While online service providers continue to enjoy the safe harbor from legal liability by meeting bare minimum obligations that were appropriate for 1998 but not for the current digital environment, producers are forced to suffer real time consequences of mass online piracy. There is little to no incentive for online services providers to deploy current technology to affirmatively prevent the re-upload of files they have been previously informed should not be on their systems.

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

Section 512's never ending notice-and-takedown process is extremely inefficient and not an effective tool for independent producers in today's digital environment to address online infringement, especially for small companies that do not have the internal staff nor resources to monitor the Internet continuously and send notices on *each and every instance of infringement that occurs* as required by the statute. Even if resources exist to send endless numbers of infringement notifications to online service providers, the process is not workable for a variety of reasons. There is no means to prospectively notify service providers to prevent the upload of infringing files that have "escaped" secure environments, particularly during pre-release or theatrical release. Once a file is online, it proliferates rapidly and the current notice-and-takedown process cannot keep up with monitoring and notice sending for each instance of infringement. For example, the feature film *The Expendables 3* was stolen and uploaded to the Internet without the authorization from the rights holder and before the film was officially released. As a result of this criminal act, there were a reported 250,000 downloads of the film on the day of its leak.<sup>17</sup>

Websites also ignore notices and those sites that comply may take longer than 48 hours to do so. Most importantly, forty-eight hours is no longer timely – by the time a takedown occurs in response to the first notice, the infringing file has already gone global, been translated by purveyors or users into multiple languages, and reduced incentives for any legitimate distributor to fulfill its agreements to take the film to paying audiences.

IFTA Members report that even after engaging third party services which automate the monitoring and sending of notices to service providers, rights holders still cannot come close to making a dent in online piracy because they must repeatedly notify each service provider for

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<sup>17</sup> <http://deadline.com/2014/08/the-expendables-3-trailer-video-ronda-rouseysylvester-stallone-mel-gibson-813348/>.

each instance of infringement. IFTA Members collectively sent hundreds of thousands of notices, at great cost, but piracy continues to take its toll and the need for a more effective “notice, takedown and staydown” is clear.

**Question 7:**

**How efficient or burdensome is section 512’s notice-and-takedown process for addressing online infringement? Is it a workable solution over the long run?**

Section 512’s notice-and-takedown process for addressing online infringement is overly burdensome, expensive and resource intensive. Section 512 requires that a statement must be included “that the information in the notification is accurate” and “that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.” The second phrase in the statement must be made under penalty of perjury. Furthermore, section 512(f) establishes civil liability when there is a misrepresentation in a notice. This subsection is intended to deter knowingly false allegations to service providers in recognition that such misrepresentations are detrimental to rights holders, service providers, and Internet users.<sup>18</sup> These requirements, however, add to the burden of repeated notification and must be evaluating and streamlined as part of the necessary re-tooling of the section 512 framework.

Current tactics utilized by rights holders to address online infringement are increasingly expensive and involve comprehensive monitoring of the Internet, review of results and notifications to multiple intermediaries, including service providers, payment processors and advertisers. It is not a workable solution over the long run and today’s technology offers better and more expedient solutions for online service providers and hosted websites like YouTube to identify and protect content in cooperation with rights holders. Use of updated technology should not be optional for online service providers and they should not be allowed to continue to offer new solutions only to large or preferred rights holders.

The Copyright Law should require more stringent obligations for service providers to keep infringing copies off their systems after initial notice from the rights holders. Service providers should be legally required to do more to fulfill their duty of care under section 512 and to qualify for the statutory safe harbors. As technology evolves, service providers must be required to employ the best available means to meet their legal obligations and be required to provide those means to all rights holders.

**Question 8:**

**In what ways does the process work differently for individuals, small-scale entities, and/or large-scale entities that are sending and/or receiving takedown notices?**

For individual creators and small-scale entities like many IFTA Members, effectively and comprehensively navigating the notice-and-takedown process of section 512 is resource intensive and requires a level of legal expertise and fees that they simply do not have at their disposal. As a result, a cottage industry of middlemen has cropped up to handle infringement

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<sup>18</sup> [Sen. Rep. No. 105-109 at 49.](#)

notices on behalf of copyright owners.<sup>19</sup> IFTA has identified over 70 third-party vendors that offer various copyright protection or enforcement services, including the monitoring the Internet and the sending of infringement notifications to online service providers.

Some online service providers offer enhanced protections and programs to large-scale rights holders and third party vendor companies. For example, Google operates Trusted Copyright Removal Programs that streamline the process for submitting notifications of infringement and reportedly commit Google to responding to notices from certain rights holders within a 24 hour period, well ahead of the minimum statutory requirement of 48 hours. Smaller rights holders that do not qualify for these types of programs or that do not have the financial resources to engage vendor services are relegated to manual monitoring and enforcement and the inefficient framework of section 512.

Other *ad hoc* programs (discussed more fully below) are offered to certain content owners and normally exclude independent producers.

**Question 9:**

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

IFTA Members use both “human” and automated systems to monitor and enforce their rights online. Enforcement is expensive and often with compliance rates by online service providers reported to be as low as 40% and not timely (up to seven days from initial notice of infringement). IFTA Members have reported that enforcement is an absolute losing battle from the moment piracy is discovered online. One Member painted the bleak picture that, “[they] feel victorious on a large title when we achieve a 90% takedown efficiency” and went on to describe that a 90% takedown efficiency could mean that only a mere 10,000 infringing copies of their film have yet to be taken down.

IFTA Members may have a staff member actively monitoring the Internet for infringements, but this activity is sporadic and cannot cover all service providers, including hosted sites in a systematic way. Notices are often manually prepared and submitted to general contacts via email with no response or compliance follow-up. The websites must be rechecked to confirm the infringing material is removed. Further notices may also be generated. No human being or automated system can possibly keep up with this “whack-a-mole” process that may require hundreds of thousands notices to protect a single asset and still fail to “clear” the Internet of infringing material before irreparable damage is done.

Even with automation of the current section 512 framework the futility is certain. An IFTA Member reported that, “we can’t come close to removing every offending link – they just repopulate too fast”. While technology may be used by the rights holder to combat online piracy, it can only be done by employing automated services. The results often do not justify the costs because the damage of piracy is so pervasive and rapid and in the end unstoppable under the current statutory notice-and-takedown framework.

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<sup>19</sup> <http://www.bloomberg.com/gadfly/articles/2016-03-23/google-and-media-titans-clash-in-a-war-on-internet-piracy>.



**Question 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 notice-and-takedown process does not sufficiently address the reappearance of infringing material previously removed by a service provider in response to a notice of infringement and fails to address the problem of keeping all infringing copies of a copyrighted work once initially notified that there is no legal authorization for a single copy to be online. Also, since recidivist-users face no barriers to continual re-uploading or sharing copies, the assault on the system is not abated even if there is full compliance with section 512.

To ensure that Copyright Law keeps pace with technological advances, IFTA recommends amending the current statutory framework to provide for “notice, takedown and staydown” to incentivize all stakeholders to take effective and rapid action to mitigate the damage of specific instances of piracy that occur online.

**Question 11:**

**Are there technologies or processes that would improve the efficiency and/or effectiveness of the notice-and-takedown process?**

Yes. Service providers use metadata, fingerprinting, and image recognition to identify digital files and have the ability to establish “business rules” with respect to each work. These technologies are already in use and can be deployed to catch and prevent the upload of infringing files.<sup>20</sup> However, these technologies are currently only available to certain rights holders chosen by the service providers which use them.

Some websites which host content provide *ad hoc* protection programs to certain copyright owners. These programs include technologies that “fingerprint” a digital copy of the video and monitor for identical files. For example, YouTube’s Content ID Program provides some copyright owners with a dashboard to assist in fingerprinting their content and tracking unauthorized uses on the YouTube website. Similarly, eBay’s VeRO Program streamlines the process for rights holders to request eBay to remove certain listings that contain infringing material. Facebook is also testing a system to match and monitor videos uploaded to its system, which will be a key component in its new advertising revenue model. Other service providers have experimented successfully with programs that provide on-screen notices to users that a given file or program is unauthorized. All of these extra tools to protect copyright are welcomed and can be used to assist in containing piracy’s impact. Unfortunately, today, many of these technologies are employed by service providers only to “monetize” piracy -- by placing advertising around infringing material – or may only be available for content protection to a select few.

While YouTube offers a Content Verification Program which allows for “easier” DMCA notice sending to YouTube, YouTube routinely offers the program to “large rights holders” and rejects applications from independent rights holders, including some applications submitted by

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<sup>20</sup> [www.youtube.com/t/contentid](http://www.youtube.com/t/contentid).

IFTA Members. In one instance, an IFTA Member discovered pre-release piracy of its commercial film on YouTube and applied for the Content Verification Program to expedite the removal of the infringing content, verifying in its application that it owned at least 100 films and has sent multiple notices to YouTube for takedown. However, several days following its application, the applicant received an email from YouTube, informing it that, “we [YouTube] have decided that you are not an appropriate candidate for [the] tool” and that the program is designed for “large” copyright holders. To put this into perspective, YouTube denied access to its Content Verification Program to a leading international production and distribution company, which has successfully licensed the rights to over 150 motion pictures, including a “Best Picture” Oscar® winner. Not surprisingly, this IFTA Member continues to experience piracy of its copyrighted content on YouTube. It is clear from this rejection that not all rights holders receive the benefits of YouTube’s copyright protection programs.

**Question 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.**

Voluntary industry measures and best practices do not negate the need for Government intervention to address the need for strong updated legislation in the area of copyright enforcement nor the importance of Government involvement to ensure all stakeholders are represented in voluntary efforts.

Existing voluntary initiatives such as the Copyright Alert System to address peer-to-peer piracy,<sup>21</sup> the payment system operators’ “Best Practices to Address Copyright Infringement and the Sale of Counterfeit Products on the Internet”<sup>22</sup>, the “Best Practices Guidelines for Ad Networks to Address Piracy and Counterfeiting,”<sup>23</sup> and the Brand Integrity Program Against Piracy<sup>24</sup> operated by the Trustworthy Accountability Group are useful to *set the table* for an improved digital environment in which copyright is respected. However, in practice, such voluntary measures do not mitigate the damage from specific illegal acts or offer any immediate mechanism to stop the instant proliferation of infringing material online.

IFTA endorses the use of these initiatives, including to help prevent ad placement on websites that facilitate distribution of pirated content in an effort to cut off the revenue stream to those websites. The domain registry Donuts recently announced a commitment to ensure that websites using domains registered with Donuts are not engaged in large-scale piracy which IFTA views as a positive step and hopefully will be used a model for other domain registrars moving forward.

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<sup>21</sup> <http://www.copyrightinformation.org/the-copyright-alert-system/>.

<sup>22</sup> <http://www.inta.org/Advocacy/Documents/INTA%20Best%20Practices%20for%20Addressing%20the%20Sale%20of%20Counterfeits%20on%20the%20Internet.pdf>.

<sup>23</sup> <http://www.2013ippractices.com/bestpracticesguidelinesforadnetworkstoaddresspiracyandcounterfeiting.html>.

<sup>24</sup> <https://www.tagtoday.net/advertising-industry-launches-initiative-to-protect-brands-against-piracy-websites/>.

IFTA encourages such self-regulatory efforts<sup>25</sup>, but also is acutely aware that any such voluntary initiatives can create the potential for disenfranchising or disadvantaging those who are not involved in the relevant discussions or parties to the ultimate agreement, including the public, creators and providers of innovative new services. It is important that such efforts – however valuable to a limited number of affected parties – should not be relied upon to excuse official or formal inaction. Legal measures and criminal enforcement are and will remain necessary to give full protection to producers, distributors and consumers who depend upon a legitimate marketplace for full enjoyment of diverse content offerings.

**Question 22:**

**Describe and address the effectiveness of repeat infringer policies as referenced in section 512(i)(A).**

While section 512(i)(1)(A) specifies that the limitations on liability shall apply to a service provider only if the service provider, “has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s ... policy that provides for the termination in appropriate circumstances of subscribers and account holders ... who are repeat infringers”, IFTA Members have seen no tangible effects of any such repeat infringer policies and cannot attest that any such policies exist or are implemented.

A recent case against the service provider Cox Communications revealed a gross misapplication of the company’s “Acceptable Use Policy”, where it not only sought to restrict the number of notices of infringement it received, but went to great efforts to avoid terminating accounts of associated Internet subscribers who were known to be serial copyright infringers.<sup>26</sup>

The Court ruled that “The record conclusively establishes that before the fall of 2012 Cox did not implement its repeat infringer policy. Instead, Cox publicly purported to comply with its policy, while privately disparaging and intentionally circumventing the DMCA’s requirements. Cox employees followed an unwritten policy put in place by senior members of Cox’s abuse group by which accounts used to repeatedly infringe copyrights would be nominally terminated, only to be reactivated upon request. Once these accounts were reactivated, customers were given clean slates, meaning the next notice of infringement Cox received linked to those accounts would be considered the first in Cox’s graduate response procedure.”<sup>27</sup>

The lack of real consequences for recidivists is another reason “notice, takedown and staydown” is necessary to address continual piracy.

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<sup>25</sup> See [IFTA Submission to IPEC Public Inquiry on Joint Strategic Plan \(October 16, 2015\)](#).

<sup>26</sup> *BMG Rights Management (US) LLC et al v. Cox Communications, Inc. et al* Federal District Court for the Eastern District of Virginia, 2015 WL 7756130.

<sup>27</sup> *Id.* at 13.

**Question 23:**

**Is there sufficient clarity in the law as to what constitutes a repeat infringer policy for purposes of section 512's safe harbors? If not, what should be done to address this concern?**

Section 512(i)(1)(A) is clear in stating that, “[t]he limitations on liability ... shall apply to a service provider only if the service provider has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers”. What constitutes a “repeat infringer” and the substance of such policy have been reviewed. For example, recently in *Cox*, the Court observed that termination is supposed to be the logical consequence of repeatedly using the Internet to infringe copyrights. “[T]he penalty imposed for repeat infringers (when appropriate circumstances exist) must be termination and not some lesser consequence.”<sup>28</sup> This shows that repeat infringers, i.e., defined as “those who repeatedly or flagrantly abuse their access to the Internet through disrespect for intellectual property rights of others should know that there is a realistic threat of losing that access”<sup>29</sup> must receive consequences so that the service provider complies with this essential obligation under section 512.

**Question 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?**

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—is not a reasonable and effective provision, especially for independents.

When infringing material is discovered online, time is of the essence for its removal as exact copies may populate all facets of the Internet very quickly. Private rights of action – civil suits – are cost prohibitive for independents and require rights holders to legally pursue millions of prospective customers (since in a file sharing environment all customers are also participants in ongoing proliferation) through the courtroom months, if not years, after the incident has occurred. Even those companies that attempt this inefficient enforcement method find that courts are inhospitable and monetary penalties are insufficient to deter future instances of piracy. Both the law and economics mean that private action alone is insufficient. Stronger criminal enforcement or mechanisms are required and must be available to all rights holders.

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<sup>28</sup> *Id.* at 12, citing *Capitol records, LLC v. Escape Media Group, Inc.* District Court for the Southern District of New York 2015 WL 1402049.

<sup>29</sup> *Id.*, citing *H.R. Rep. 105-551, pt. 2 at 61 (1998)*.

**Question 27:**

**Is the limited injunctive relief available under section 512(j) a sufficient and effective remedy to address the posting of infringing material?**

While section 512 does not confer absolute immunity from legal liability for copyright infringement, a court may grant limited injunctive relief against a service under section 512(j). Such limited injunctive relief may be too expensive for small companies to justify or pursue, especially in light of the flood of infringements that rights holders face in the online environment. Additionally, it is unclear as to whether a court would require a rights holder to establish a service provider's liability for copyright infringement before issuing injunctive relief under section 512(j).

**Conclusion**

Improvement to the existing section 512 framework is of great importance to IFTA Members because current law leaves our Members largely unprotected, without effective tools, and disproportionately harmed by online theft. Whatever the next step – whether new legislation, cross-industry voluntary agreements or a combination – the solutions must go beyond public education to attack actual infringement in today's digital environment and must reflect the needs of all stakeholders, including smaller rights holders, consumers, and online service providers.

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

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

*Respectfully submitted by,*



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