



December 1, 2020

The Honorable Thom Tillis
United States Senate
113 Dirksen Senate Office Building
Washington, DC 20510

VIA EMAIL

Re: Engine Responses to DMCA Reform Bill Questions from Senator Tillis for Stakeholders

Dear Chairman Tillis,

Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government and a community of thousands of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship through economic research, policy analysis, and advocacy on local and national issues.

Engine appreciates the opportunity to submit these responses to the stakeholder questions regarding the Digital Millennium Copyright Act (“DMCA”), dated November 10, 2020. The DMCA’s carefully-crafted balance remains valuable today, especially for the nation’s startups and smaller online service providers. And any changes to 17 U.S.C. § 512, even those that may seem minor, could have an outsized impact on startups. Engine appreciates your attention to these concerns and hopes that startups and smaller technology companies will continue to have a seat at the table during your review of the DMCA.

1. The record established in my DMCA reform hearings indicated that an overarching principle of any reform should be making digital copyright less one-size-fits-all. The law needs to account for the fact that small copyright owners and small online services providers (OSPs) may have more in common with each other than they do with big copyright owners and big OSPs, respectively. Accordingly, I think we should consider whether copyright law should be revised to account for such differences among stakeholders. In particular, could copyright law borrow from employment law, or other relevant fields, to establish different thresholds for copyright owners and OSPs of different size, market share, or other relevant metric? If so, what is the best way to accomplish this? Is there a particular area of law, or existing section of the U.S. Code, that provides crucial guidance? As with all questions where it is relevant, please include in your response specific recommended legislative text.

Section 512 currently treats OSPs the same, regardless of size, which contributes to the certainty and clarity of the statutory framework. Certainty in the law is important to all businesses, especially high-tech,

high-growth startups. The best way to preserve the certainty and protections today’s startups need is to preserve the current framework. And there are problems using size as a proxy for ease of compliance with the law. There are also problems using small/large thresholds to regulate startups—because emerging technology companies are designed to scale, ideally rapidly, and often defy simple definitions.

That said, as in all policy areas, Engine strives to seek solutions and work with lawmakers whenever possible to find approaches to ensure clarity for startups. Without more detail about how size differentials might operate in copyright law, it is difficult to respond to this question in more concrete terms, but the following response lays out general concerns with an approach that would treat different-sized companies differently. We are aware of two proposals to distinguish small and large OSPs: (1) impose size-based thresholds (e.g., bifurcate the law for small and large OSPs) or (2) incorporate a reasonableness standard. Each of those proposals raise substantial concerns that need to be fully vetted, and this response outlines some of them.

Likewise, while Engine agrees it is essential to recognize startup needs, and appreciates your attention to that, OSP size is often not a good proxy for the volume of alleged or potential infringement on a platform. An OSP may be large by some standard (e.g., reach a large audience or host a large volume of user-generated content), but that platform may experience very little, if any, infringement.¹ As such, imposing new cost and risk on that OSPs may not catch much, if any, additional infringement, which makes it difficult to justify the additional costs and risks.

A. Thresholds. Establishing thresholds for OSPs of different sizes risks merely delaying, rather than resolving, the consequences of possible changes to § 512. Changes which shift the existing balance in the law—whether decreasing certainty, imposing new costs, or creating new risks—would have an outsized negative impact on startups and smaller tech companies, making it harder for them to succeed, attract investment, and compete. But tying those changes in the law to company size would still have a negative impact. Some of the problems may just kick-in as companies approach those thresholds. Moreover, the incorporation of thresholds could generate new uncertainties (or create traps for the unwary), incentivize unproductive behavior, and be difficult to implement in the context of high-growth startups.

First, even with thresholds, many of the concerns that motivate treating smaller OSPs differently would immediately re-emerge when those smaller OSPs near the threshold. Larger OSPs would still be able to cover costs and risks of changes to § 512. But their smaller (albeit maybe not their smallest) potential competitors—those who are just large enough to exceed a threshold—would have a harder time competing.² Indeed, such thresholds could harm competition, as emerging companies nearing the

¹ See, e.g., *Is the DMCA's Notice-and-Takedown System Working in the 21st Century?: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 116th Congress 8-9 (2020) (testimony of Abigail A. Rives), available at <https://www.judiciary.senate.gov/imo/media/doc/Rives%20Testimony.pdf> (listing OSPs that receive relatively small numbers of takedown notices relative to the amount of content they host).

² See, e.g., Thomas Spoerri, *On Upload-Filters and Other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market*, 10 J. Intel. Prop. Info. Tech. E-Commerce L. 173, 179 (2019), available at <https://www.jipitec.eu/issues/jipitec-10-2-2019/4914> (referring to Europe’s Article 17, explaining how “[a] small or young company offering services related to content uploaded by users and thereby trying to compete with established [OSPs] . . . will - at the latest after three years of its existence . . . - fall under the direct liability regime of article 17 DSM and have to apply filtering technologies”).

threshold would have an incentive to be acquired by a more-established competitor that already has the technological and financial resources to weather a changed § 512 framework.³

Relatedly, thresholds in the law can operate like traps for startups.⁴ Unsuspecting companies, either unaware of various thresholds or growing unpredictably, could quickly find themselves out of compliance and suddenly liable for alleged user-generated infringement they had no knowledge of or involvement in.

Second, and similarly, establishing thresholds within the § 512 safe harbors could create problematic incentives. For example, establishing discrete thresholds would give some small companies a reason to stay below that number, and create a sort of “reward for staying small.”⁵ Indeed, other legal regimes that “penalize growing businesses by requiring [them] to satisfy costly and complex legal requirements as they increase in size” discourage entrepreneurial growth.⁶ In addition, setting legal requirements based on thresholds of, e.g., employee headcount, could encourage OSPs to restructure or recategorize employees solely to maintain safe harbor eligibility.⁷

Third, as this question makes a nod to employment law’s tiered structures, there is reason to approach such analogies with caution. For one, we are aware that certain employment laws contain exceptions so that small businesses do not face the same requirements as larger employers in, e.g., pay, leave, taxes, and/or anti-discrimination.⁸ However, small businesses are not the same as startups. There are all types of small businesses that can, and are designed to, operate as small businesses. By contrast, the high-tech, high-growth startups Engine works with are designed to expand—hopefully rapidly. They likely cannot

³ Lenard Koschwitz, *Startups Told to Pack Their Bags After Three Years*, EU Observer (Feb. 8, 2019), <https://euobserver.com/stakeholders/144126> (discussing Europe’s carve-out from Article 17, noting that “European startups will become more likely to be acquired at an early stage instead of scaling-up”); *see also, e.g.*, Michael Mandel & Melissa Blaustein, Opinion, *Entrepreneurs Need Policy to Escape the ‘Startup Trap,’* Gainesville Sun (Feb. 26, 2019), <https://www.gainesville.com/opinion/20190226/point-of-view-entrepreneurs-need-policy-to-escape-startup-trap> (explaining while “‘carve-outs’ are beneficial for companies who stay below the relevant thresholds, the threat of losing these exemptions can make entrepreneurs think twice before expanding”).

⁴ Mandel & Blaustein, *supra* note 3.

⁵ Koschwitz, *supra* note 3.

⁶ Kelly Hamren, Note, *Closing the Entrepreneurial Gap: Liberalizing Employment Law to Restore French Competitiveness*, 34 Nw. J. Int’l L. & Bus. 519, 546-47 (2014) (discussing French labor laws which start to apply once a company reaches fifty employees, and how this has been found to influence companies not to grow).

⁷ Cf. *Engelhardt v. SP Richards Co.*, 472 F.3d 1, 5-6 (1st Cir. 2006) (discussing 50-employee exception within FMLA, and describing legal test to “ensure that defendant has not structured itself to avoid labor laws”).

⁸ *See, e.g., id.*, Ruth Mayhew, *Small Business Labor Law*, Chron, <https://smallbusiness.chron.com/small-business-labor-law-60748.html> (last visited Nov. 20, 2020) (discussing small business employee thresholds in certain labor laws); *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999) (“purpose is to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail”); Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Discrimination Law*, 80 St. John’s L. Rev. 1197 (2006) (“Laws prohibiting discrimination in employment often make an exception for the smaller firm.”); *Compliance Overview: Federal Employment Laws by Employer Size*, Sullivan Benefits (2017), available at <https://www.sullivan-benefits.com/wp-content/uploads/Federal-Employment-Laws-by-Employer-Size-03.17.171.pdf> (“An employer’s size, or number of employees, is a key factor in determining which federal labor laws the employer must comply with.”).

survive or succeed as small businesses forever, but instead “succeed at scale.”⁹ As such, legal carve-outs designed for traditional, perpetual small businesses make sense for many sectors of the economy, but do not translate to regulating the tech startup ecosystem. Because those startups will (hopefully) rapidly outgrow protections, while they will not outgrow the need for those protections as quickly.

Fourth, as we have previously explained:¹⁰

[I]nherent in the question is the challenge of defining large and small OSPs. Would a small OSP be measured by employee headcount, volume of user-generated content, average daily users, revenue, or something else? The goal of a high-growth startup is to increase, ideally rapidly, in all of these metrics. . . .

[I]t can be difficult (if not impossible) for companies to predict their growth, which would make it difficult (or impossible) to know when the new liabilities and monitoring costs would kick in. And much of this growth is outside of a company’s immediate control. For example, if an OSP has a piece of content go viral, it might see its average daily user numbers skyrocket for a limited period of time. Without advance notice that it needs to have litigation reserve funding or filtering tools ready, it could suddenly find itself out of compliance with copyright law with no accessible, affordable way to resolve the problem. Likewise, if the average daily user count falls the following month, it could become “small” again, having incurred risk and cost in the interim that are shortly-thereafter moot. . . .

Defining and distinguishing between larger and smaller OSPs would introduce other uncertainties in practical application that could easily eviscerate the benefit for companies below the threshold. Currently, OSPs accused of infringement have to prove that they qualify for immunity under § 512. If the law contained size thresholds, OSPs accused of infringement would have to prove not only that they qualify for immunity but also that they fall below the threshold.¹¹ Size would be a fact-bound inquiry, and a small company that fell below the statute’s thresholds would still have to go through fact discovery and wait until summary judgment to prove size.¹² The cost of litigating just to summary judgment is more than many startups can afford,¹³ so if a startup cannot afford to prove it is below the law’s threshold, the

⁹ Koschwitz, *supra* note 3 (“Unlike the traditional concept of SMEs, startups shoot for the moon. With a scalable and repeatable business model at core and nearly unlimited computing power, startups can only succeed at scale.”).

¹⁰ *Is the DMCA's Notice-and-Takedown System Working in the 21st Century?: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 116th Congress 21-22 (2020) (response to Questions for the Record (QFR) No. 4 from Senator Patrick Leahy to Abigail Rives), available at <https://www.judiciary.senate.gov/imo/media/doc/Rives%20Responses%20to%20QFRs.pdf>.

¹¹ *E.g., Adler v. Her Campus Media, LLC*, 411 F. Supp. 3d 121, 123-4, 125 (D. Mass. 2019) (denying motion to dismiss asserting safe harbor affirmative defense, deferring resolution until after development of factual record).

¹² *Cf. Engelhardt*, 472 F.3d at 3 (affirming summary judgment that defendant-employer did not employ requisite number of people and was therefore not in violation of FMLA); *Cardinale v. Southern Homes of Polk County, Inc.*, No. 8:06-CV-1295-JDW-MSS, 2008 WL 788460, at *1, 3-6 (M.D. Fla. Mar. 19, 2008) (granting summary judgment that defendant-employer was not subject to FMLA, in part conducting fact-bound inquiry of whether student workers met statutory definition of “employee”); *Johnson v. Wabash National Trailer Centers, Inc.*, No. 06-1688-KI, 2007 WL 539496, at *3 (D. Or. Feb. 15, 2007) (denying motion to dismiss FMLA complaint, and deferring resolution pending more complete evidentiary record, where defendant-employer contended it did not employ enough people and sought to invoke “small employer” exception).

¹³ *Infra*.

protections intended by the threshold lose practical value. Making it more expensive to prove safe harbor eligibility would also make it more expensive to get even bad faith lawsuits dismissed. Increasing costs on startup OSPs who are below the threshold, in turn, makes the threat of litigation a bigger problem and increases incentives to threaten lawsuits in hopes that small companies will settle (or capitulate to wealthy rightsholder demands to take additional measures beyond what is required for safe harbors).

Likewise, in other areas of the law where thresholds come up, complex legal tests have been developed to determine where a given company falls relative to the threshold. For example, the affiliation rule and the “integrated employer” tests complicate the inquiry of a company’s size.¹⁴ It is hard for many companies to know their “size” under different regulations and legal tests. These are also fact-intensive tests, and if similar thresholds were implemented in § 512, companies seeking to prove they were below the threshold would also have to develop the facts and litigate their size according to the regulatory or court-developed tests that will have to be developed to evaluate company size.

Europe’s experience with Article 17, and the current effort of member states to implement it, sheds further light on these challenges. Article 17 includes a carve-out for smaller, younger companies that, under certain circumstances, do not have to adopt the filtering technologies and licensing efforts required under the EU’s Directive on Copyright in the Digital Single Market.¹⁵ Specifically, OSPs that are less than three years old and have less than 10 million Euro revenue (cumulative) may be exempt from the Directive’s requirements, but once they surpass five million unique monthly visitors the Directive’s requirements kick-in.¹⁶ Companies that qualify for the carve-out would have to be very small, are not likely to compete with large (or “big tech”) OSPs, and are “presumably not . . . even an established [OSP].”¹⁷ As such, in practice the carve-out in Article 17 will “rarely apply and generally not be helpful to start-up companies or to help increase competition amongst [OSPs] in the EU market.”¹⁸ And while there are numerous other flaws with Article 17, the needs of Europe’s startups and the problems with the thresholds-based carve-out are likely part of the reason “countries are struggling to implement [the] new, imbalanced legal regime that disregards technological realities.”¹⁹

¹⁴ E.g., 13 CFR 121.301(f) (affiliation rule); Kathryn L. Hickey & Erin M. Estevez, *Affiliation in the Context of SBA Loans – Guidance for Venture Capital Investors*, NVCA (Mar. 27, 2020), available at <https://nvca.org/wp-content/uploads/2020/03/VC-SBA-Lending-and-Affiliation-Guidance-for-SBA-Loan-Programs.pdf> (four page document explaining affiliation rule for startups, specifically as it pertains to investors and access to COVID relief programs); *Grace v. USCAR*, 521 F.3d 655, 662-3 (6th Cir. 2008) (explaining Department of Labor regulations for evaluating employment relationships to assess whether an employer has to provide FMLA leave).

¹⁵ Directive (EU) 2019/790, Article 17(6).

¹⁶ *Id.*; Spoerri, *supra* note 2, at 179.

¹⁷ Spoerri, *supra* note 2, at 179.

¹⁸ *Id.*

¹⁹ Evan Engstrom, Opinion, *Lawmakers Should Use Extreme Caution When Considering Any Changes to Resilient DMCA*, InsideSources (Mar. 12, 2020), <https://www.insidesources.com/lawmakers-should-use-extreme-caution-when-considering-any-changes-to-resilient-dmca/>.

Finally, regarding investment (dis)incentives, as we have previously explained:²⁰

In a survey of investors, a majority of respondents said they would be deterred from investing in online platforms that hosted user-generated music or video posts if new laws increased the risks that their investments would be exposed to secondary liability in IP infringement cases.²¹ Indeed, even just the uncertainty over whether (and when) an OSP would qualify for the safe harbor could curtail investment.²²

* * *

[E]ven with [thresholds,] [i]nvestors would still be reluctant to invest if they knew their money could go to cover the cost of platform liability for user infringement.²³ As UMG has shown us, rightsholders are willing to sue investors themselves, even if the target company is in compliance with all the § 512 safe harbor provisions.²⁴ Bifurcating the law would not resolve these concerns.

B. Reasonableness. The Copyright Office’s § 512 report also acknowledged differences among DMCA stakeholders. However, instead of thresholds the Copyright Office recommended a “reasonableness standard” to “right-size” § 512.²⁵ In the context of this question, it is worth noting the additional and distinct concerns such an approach could trigger. As we have previously noted:²⁶

If Congress were to re-write any portion of the DMCA, it would take decades of litigation for courts to interpret what the statute means. That would require courts to apply new law to enough factual scenarios “before OSPs could have any confidence in their protection under the [new] safe harbor.”²⁷

A “reasonableness” standard is particularly fraught from a startup perspective. Determining what level of monitoring (or what filtering technology) is reasonable would be a fact-specific inquiry. In many cases, those are questions that have to go to a jury.²⁸

²⁰ Rives, *supra* note 1, at 21; QFR Responses, *supra* note 10, at 22 (response to QFR No. 4 from Senator Patrick Leahy to Abigail Rives).

²¹ Matthew C. LeMerle et al., *The Impact of Internet Regulation on Early Stage Investment* 5 (Nov. 2014), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/572a35e0b6aa60fe011dec28/1462384101881/%20EngineFifthEraCopyrightReport.pdf>.

²² Evan Engstrom & Nick Feamster, *The Limits of Filtering: A Look at the Functionality & Shortcomings of Content Detection Tools* 24 (Mar. 2017), <https://www.engine.is/the-limits-of-filtering>.

²³ LeMerle *supra* note 21.

²⁴ *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1013 (9th Cir. 2003) (referring to UMG’s amended complaint to add Veoh’s investors as defendants).

²⁵ *Section 512 of Title 17: A Report of the Register of Copyrights*, United States Copyright Office 124 (May 2020), available at <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

²⁶ Rives, *supra* note 1, at 20.

²⁷ Engstrom & Feamster, *supra* note 22, at 24.

²⁸ *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007) (reasonableness of repeat infringer policy a question of fact); *see also Tran v. State Farm Mut. Auto. Ins. Co.*, 999 F. Supp. 1369, 1372 (D. Haw. 1998) (“An analysis of what is reasonable is almost always de facto a question for the jury.”).

Therefore, for an OSP to definitively know whether its current copyright moderation practices are reasonable, it would have to defend itself in a full jury trial. [T]he cost of defending even a frivolous copyright case can exceed a startup’s valuation. The cost of proceeding through discovery can exceed \$500,000,²⁹ and taking IP cases to trial is easily in the seven-figure range.³⁰ If it costs more money than a startup has to prove its practices are reasonable, that safe harbor would have little practical value.³¹

In addition, the reasonableness standard is intentionally flexible, meaning that what is reasonable one month might not be reasonable the next—as technology changes, as a company grows, or as the type of infringement it encounters shifts. All of those are unpredictable occurrences, but considering the fast pace at which new technology emerges and how quickly startups can (and do) grow, the problem of a shifting reasonableness standard makes it a very poor fit to this context, since a startup could never know in advance whether or not a court would find its practices to be reasonable.³² The baseline of what is “enough” will constantly be changing, and static copyright moderation practices will quickly become outdated and likely be deemed “unreasonable” for purposes of obtaining safe harbor protection.

Moreover:³³

much of the case law, to-date, that shapes our understanding of the DMCA was litigated by (now) larger OSPs. Today’s startups have the benefit of following in the footsteps of litigants who took the time and money to seek clarity in the law. If the law that applies to larger companies is no longer the same law that applies to all OSPs, startups and smaller tech companies would have to defend each individual case on their own. Larger OSPs would still be able to afford to adopt enhanced measures and litigate lengthy cases to prove they are doing “enough,” but startups and smaller OSPs would no longer be able to seek certainty and protection within those decisions.

2. OSPs eligible for the safe harbor under section 512 are divided into four categories (conduits, caching services, hosting services, and web location tools) that can be both under-inclusive and over-inclusive. First, what types of OSPs should be covered to account for technological advances and business practice changes that have occurred during the past twenty-two years? Second, how should the categories be revised to better cover the types of OSPs that need—rather than just appreciate—the safe harbor’s benefit? Among the possibilities would be to either increase the number of statutory categories to more explicitly cover specific types of service providers or to reduce the number of statutory categories, possibly to only one, and delegate authority to the Copyright Office to identify, by regulation, the covered types of service providers. If Congress were

²⁹ Evan Engstrom, *Primer: Value of Section 230*, Engine (Jan. 31, 2019), <https://www.engine.is/news/primer/section230costs> .

³⁰ Malathi Nayak, *Costs Soar for Trade Secrets, Pharma Patent Suits, Survey Finds*, Bloomberg Law (Sept. 10, 2019), <https://news.bloomberglaw.com/ip-law/costs-soar-for-trade-secrets-pharma-patent-suits-survey-finds> (median cost of patent suit with \$1-10M at stake is \$1.5M, and cost of patent case with over \$15M at risk is \$4M).

³¹ Engstrom & Feamster, *supra* note 22, at 25.

³² Engstrom & Feamster, *supra* note 22, at 24.

³³ QFR Responses, *supra* note 10, at 6 (response to QFR No. 6 from Senator Thom Tillis to Abigail Rives).

to take the latter approach, would this raise concerns about such authority being delegated to a non-presidentially-appointed Register?

In Engine’s view, the best course is to maintain current statutory language. As we have previously noted:³⁴

In defining which service providers would be eligible for safe harbors, Congress successfully wrote a law that is broad and flexible. Indeed, Congress wanted to create safe harbors that “ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.”³⁵ And it did.

Especially in a technology-oriented law with an eye toward innovation, rigid or narrow legal definitions would create a law that could not stand the test of time.³⁶ Congress should not now constrict the existing definitions, as that would curtail entrepreneurs with exciting new technical or business ideas.

That said, the issue of delegating to the Copyright Office raises additional questions that would need to be thoroughly considered before proceeding.

3. Section 512 places the burden on copyright owners to identify infringing materials and affirmatively ask the OSP to remove the material or disable access to it. This burden appears to strike the correct balance, but the burden that the notice-and-takedown system itself places on copyright owners is too heavy; the system is also woefully inefficient for both copyright owners and service providers. I believe U.S. copyright law should move towards some type of a notice-and-staydown system—in other words, once a copyright owner notifies a service provider that a use of a copyrighted work is infringing, the service provider must, without further prompting, remove subsequent infringing uses absent a statement from the user (whether the copyright owner or not) that they believe the use is licensed or otherwise authorized by law (e.g., fair use). What are your thoughts on such a system, and how could it best be implemented?

Notice-and-staydown amounts to a mandate that OSPs use upload filters to screen all user-generated content, which throws up a substantial barrier to entry.³⁷ “Implementing notice-and-staydown would require OSPs to review every single user-generated post, and—even for an early stage company—that

³⁴ Rives, *supra* note 1, at 17-18.

³⁵ S. REP. 105-190, 8.

³⁶ See, e.g., Susanna Monseau, *Fostering Web 2.0 Innovation: The Role of the Judicial Interpretation of the DMCA Safe Harbors, Secondary Liability and Fair Use*, 12 J. Marshall Rev. Intell. Prop. L. 70, 114 (2012) (arguing “courts should avoid as much as possible decisions which limit or prohibit technologies that make new uses of copyrighted works”); cf. Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 Va. L. Rev. 1575, 1638-40 (2003) (patent law has avoided technology- and industry- specific legislation, with Congress instead erring in favor of a standards-based statute that allows flexibility to accommodate different technologies).

³⁷ E.g. Chris Sprigman & Mark Lemley, Opinion, *Why Notice-and-Takedown is a Bit of Copyright Law Worth Saving*, L.A. Times (June 21, 2016), <https://www.latimes.com/opinion/op-ed/la-oe-sprigman-lemley-notice-and-takedown-dmca-20160621-snap-story.html> (it would be “impossible to enforce any ‘staydown’ without technologies that mark and identify copyrighted material”); Martin Husovec, *The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which is Superior? And Why?*, 42 Colum. J.L. & the Arts, 53, 59, 72 (2018) (describing “notice and staydown [] where unilateral filtering by intermediaries becomes compulsory”).

would quickly become impossible without technologies to mark and identify potentially infringing material.”³⁸ Requiring all OSPs to use upload filters obviously raises concerns about cost—especially when forcing smaller OSPs, startups seeking to compete with more established competitors, and OSPs that experience almost no infringement—but the inherent pitfalls of filtering technology also raises concerns about new risks. Because “when that technology failed (which it does, and would), OSPs would face massive liability.”³⁹

As we have previously explained:⁴⁰

notice-and-staydown would impose mandatory filtering costs on all companies, and significantly increase the costs of market entry.⁴¹ “If a law like takedown and staydown existed three years ago, [Patreon] never would have received the funding to start as a company because of the massive liabilities associated with user generated content”⁴² [T]he filtering tools (and their quality) will become a means of competition, where startups will be at a disadvantage.⁴³ But notice-and-staydown also creates a “multiplication of the compliance costs.” Under a staydown system, OSPs would have “to implement costly automated enforcement even if one right holder issues his or her first-notice.”⁴⁴ That is, for an OSP that currently receives a single notice, they can assess it and remove the accused content. Under notice-and-staydown, that same OSP which has so little infringement it only received one notice, would now be responsible for purchasing and implementing a filter for all content uploaded on the platform. For a startup, that would mean having the money to buy a sufficient filter the day it gets its first notice (which would be impossible to predict).

Because notice-and-staydown would be a filtering mandate, to understand why this proposal is untenable, it is helpful to understand the inherent limits of upload-filtering technology. Because the costs of adopting an upload filter are more than just developing the technology—it includes having the financial wherewithal to survive when the filters fail. For example:⁴⁵

Even complex, existing technologies are limited in their capacity to accurately identify the content they are designed to identify.⁴⁶ The inaccuracies often result in an unacceptably

³⁸ QFR Responses, *supra* note 10, at 12 (response to QFR No. 5 from Senator Christopher Coons to Abigail Rives).

³⁹ *Id.*

⁴⁰ Rives, *supra* note 1, at 22-23.

⁴¹ *E.g.*, Husovec, *supra* note 37, at 75.

⁴² Colin Sullivan, *Creators and Tech Companies Can Be Friends*, Medium (Jan. 19, 2017), <https://patreonhq.com/creators-and-tech-companies-can-be-friends-c18a8508c60d>.

⁴³ Husovec, *supra* note 37, at 72; Rives, *supra* note 1, part IV.D.

⁴⁴ Husovec, *supra* note 37, at 77

⁴⁵ Rives, *supra* note 1, at 21-22.

⁴⁶ *See, e.g.*, Sonia K. Katyal & Jason M. Schultz, *The Unending Search for the Optimal Infringement Filter*, 112 Colum. L. Rev. Sidebar 83, 102-03 (2012) (describing how “[f]iltering is notoriously prone to mistakes and shortcomings and constantly risks being both over- and under-inclusive”).

high number of “false positives.”⁴⁷ “[A]utomated systems, even if responsibly deployed, have limited capacity to avoid mistakes. Errors can be hard to catch, as resource constraints prevent any substantial human review of the vast majority of automated notices.”⁴⁸

These technologies are easy to circumvent. For a user intent on uploading infringing content, he or she would only need to make slight alterations to a file (changing the name or trimming 2 seconds from an audio file) to evade metadata or hash-based filters.⁴⁹

Filters are limited in the type of content they can operate on. For example, audio and video fingerprinting tools cannot identify potential infringement in any other file types. And there are no programs to filter, e.g., software programs or architectural designs. Likewise, as Engine and other smaller companies have noted, for “sites that allow users to sell physical goods, distribute remixed content, or publish blogs, no filtering tool will accurately identify alleged infringement.”⁵⁰ Moreover, as technology and creativity continue to evolve, there will be new types and formats of content we cannot even contemplate right now. It would be impossible to build technology to filter for that future content.

In addition, even the most sophisticated tools (which are still imperfect) are so expensive they would not be obtainable for startups. YouTube famously spent over \$100 million to develop its ContentID technology, a sum orders of magnitude greater than what the typical startup could afford.⁵¹ Off-the-shelf tools like Audible Magic are equally impractical for startups, as licenses can easily cost well upwards of \$10,000 per month and require companies to spend even more to implement and maintain the software.⁵² By contrast, early-stage companies raise an average of \$78,500 during their first year.⁵³ And of course, if OSPs were forced to pay high costs for imperfect filters, that would hamper innovation, as companies would be forced to divert money from R&D to implementing and maintaining filters.⁵⁴

4. Starting from the place of the provisions that support the current notice-and-takedown system, a notice-and-staydown system would need to give more teeth to the knowledge standards and

⁴⁷ Engstrom & Feamster, *supra* note 22, at 12, 15, 17 (reporting the false positive rate for one off-the-shelf audio fingerprinting tool as one to two percent).

⁴⁸ Jennifer M. Urban et al., *Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice*, 64 J. Copyright Soc’y U.S.A. 371, 386 (2017).

⁴⁹ See Engstrom & Feamster, *supra* note 22, at 12-13.

⁵⁰ Letter to John Kerry, United States Secretary of State, Penny Pritzker, United States Secretary of Commerce, and Michael Froman, United States Trade Representative (Dec. 16, 2016) (on file).

⁵¹ Paul Sawers, *YouTube: We’ve Invested \$100 Million in Content ID and Paid Over \$3 Billion to Rightsholders*, VentureBeat (Nov. 7, 2018), <https://venturebeat.com/2018/11/07/youtube-weve-invested-100-million-in-content-id-and-paid-over-3-billion-to-rightsholders/>.

⁵² Urban, *Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice*, *supra* note 48, at 400.

⁵³ *Startup Funding Infographic*, Fundable, <https://www.fundable.com/learn/resources/infographics/startup-funding-infographic> (last visited May 29, 2020).

⁵⁴ Katyal & Schultz, *supra* note 46, at 88.

requirements for implementing a repeat infringer policy; to clarify that section 512(m)'s lack of a duty to monitor does not mean lack of a duty to investigate once notified and also that representative list and identifiable location do not require as much detail as courts have required; and to provide better mechanisms for users to contest a takedown as authorized by a license or by law. How would you revise or add to the existing provisions in section 512 to accomplish this or, if this could better be achieved by starting from scratch, what new legislative text do you think would best accomplish this?

As above, staydown would impose significant cost and risk on startups and OSPs that receive very few (if any) claims of infringement. Engine urges against changes to § 512 that would impose staydown-type requirements.

6. It is clear from the record established across my hearings that one major shortcoming of section 512 is that users who have had their content removed may decide to not file a counter-notice because they fear subjecting themselves to federal litigation if the copyright owner objects to the putback. At the same time, the requirement that a copyright owner pursue federal litigation to keep a user from having content put back up following a counter-notice is a heavy burden. Congress might consider improving dispute resolution by directing disputes between notice and counter-notice filers to a small claims court rather than federal court. What is the best way to accomplish this? Would the copyright small claims court as envisioned by the CASE Act be the proper forum? If not, how should such a tribunal be designed? Related, what should be the time period for putbacks? There is broad agreement that the current 10-14 day window works poorly for both copyright owners and users. How would you amend this?

We appreciate this question, and agree that resolving problems with counter-notices deserves Congress's attention. As detailed below, one way to help the problem is to disincentivize the sending of improper notices, which would also obviate some (perhaps a lot) of the need for dispute resolution.⁵⁵ That said, Engine supports exploring options to avoid driving parties straight to federal court.⁵⁶ But giving notice senders, counter-notice senders, and OSPs alternatives to litigation must be done through an open and inclusive process that accounts for all the relevant perspectives. We and many others have significant concerns about the CASE Act as currently written—a bill with fundamental flaws which is making its way through Congress without scrutiny or the opportunity for stakeholder engagement.⁵⁷ A more fair,

⁵⁵ *Infra* resp. to question 8.

⁵⁶ Comments of Engine, GitHub, Kickstarter, Medium, and Redbubble, *In re* Section 512 Study, Docket No. 2015-7, at 13-14 (Apr. 2016), available at <https://www.regulations.gov/document?D=COLC-2015-0013-90694>.

⁵⁷ *E.g.*, *infra* note 60; Anthony Marcum, *Potential Pitfalls of the CASE Act*, R Street Institute (July 16, 2019), <https://www.rstreet.org/2019/07/16/potential-pitfalls-of-the-case-act/>; Daniel Takash, Opinion, *CASE Act Would Create a Drive-Through Window for Copyright Trolling*, Niskanen Center (Oct. 8, 2019), <https://www.niskanencenter.org/op-ed-case-act-would-create-a-drive-through-window-for-copyright-trolling/>; Letter to Sen. Lindsey Graham & Sen. Dianne Feinstein from Association of College Research Libraries et al. (July 17, 2019), <http://www.ala.org/advocacy/sites/ala.org/advocacy/files/content/Sign-ons/ReCreate-Coalition-Letter-to-Oppose-CASE-Act.pdf>; Kerry Maev Sheehan, *Copyright Law Has a Small Claims Problem. The CASE Act Won't Solve it*, Author's Alliance (June 4, 2019), <https://www.authorsalliance.org/2019/06/04/copyright-law-has-a-small-claims-problem-the-case-act-wont-solve-it%E2%82%AC%81/>; Letter to Members of House of Representatives from ACLU (Oct. 21, 2019), available at <https://www.aclu.org/letter/aclu-vote-recommendation-hr-2426-case-act>; Wayne T. Brough, Opinion, *If You Build It, They Will Troll*, Inside Sources (Sept. 4, 2019), <https://www.insidesources.com/if-you-build-it-they-will-troll/>; Press Release, Re:Create Coalition, Re:Create

balanced alternative to the CASE Act, though, could have value in resolving allegations of online infringement.

As we have explained elsewhere:⁵⁸

Dispute settlement and complaint and redress approaches should be balanced and incorporate core features of due process. There must be unbiased decisionmakers. Parties—especially individual users and smaller platforms—must have full access to the evidence they would need to prove their case, basic resources (sometimes including legal representation), and should have the right to appeal adverse decisions.

The system should also include protections against abuse. For example, there should be appropriate limitations on damages, such that minor, accidental, or unknowing instances of infringement are not subject to steep damages awards or onerous injunctive relief (such as lengthy takedowns or loss of access to a platform or service). Those sorts of high damages for infringement create a fertile foundation for abuse. Instead, damages for infringement should be tied to actual harm the rightsholder suffered, and the amount of damages should reflect the full circumstance (again, so that minor or accidental infringement does not cost too much). Likewise, where there is a strong case to be made that the alleged infringement was [authorized] or legitimate, that fact should also mitigate damages.

In addition, damages should be equitable, so that rightsholders are not able to seek a lot of money from accused infringers while wrongfully accused infringers are unable to seek similar damages. Users and service providers wrongfully targeted with infringement accusations should be able to seek sufficient damages, and the damages available against rightsholders who send improper notices should be calibrated to deter abuse of the system.

Turning specifically to the CASE Act (S. 1273), that bill:⁵⁹

does not offer a fair and viable solution to online infringement, and instead would incentivize bad faith copyright infringement claims and create potential traps for startups

Statement on the CASE Act (Oct. 22, 2019), https://www.recreatecoalition.org/press_release/recreate-statement-on-the-case-act/; Letter to Sen. Lindsey Graham & Sen. Dianne Feinstein from Consumer Tech. Assoc. (July 10, 2019), <https://www.recreatecoalition.org/wp-content/uploads/2019/09/CTA-Letter-CASE-Act.pdf>; Stan Adams, *The CASE Act: The Road to Copyright Trolling is Paved with Good Intentions*, Center for Democracy & Tech. (July 17, 2019), <https://cdt.org/insights/the-case-act-the-road-to-copyright-trolling-is-paved-with-good-intentions/>; Katharine Trendacosta, *Congress Continues to Ignore the Dangerous Flaws of the CASE Act*, Elec. Frontier Found. (Sept. 11, 2019), <https://www.eff.org/deeplinks/2019/09/congress-continues-ignore-dangerous-flaws-case-act>; Press Release, Public Knowledge, Public Knowledge Urges Congress to Re-examine CASE Act (July 18, 2019), <https://www.publicknowledge.org/press-release/public-knowledge-urges-congress-to-re-examine-case-act/>.

⁵⁸ Comments of Engine Advocacy re: Targeted Consultation Addressed to the Participants to the Stakeholder Dialogue on Article 17 of the Directive on Copyright in the Digital Single Market 12 (Sept. 10, 2020), available at <https://www.engine.is/news/engine-submits-comments-to-eu-on-implementing-copyright-policy-directive>.

⁵⁹ QFR Responses, *supra* note 10, at 10-11 (response to QFR No. 2 from Senator Christopher Coons to Abigail Rives).

and their users.⁶⁰ That bill was introduced for the first time in the Senate last spring and has never had a hearing in this chamber. [Congress and the IP Subcommittee should] take the time to formally collect stakeholder perspectives and weigh alternative approaches that could give copyright owners the benefits they seek without the harmful consequences startups and users would face under the current proposal.

As several smaller OSPs have further explained, the CASE Act as currently drafted “tips the scales of copyright law in favor of certain copyright owners and against small creators and rightful users of that content. . . . Because the CASE Act limits the rights of accused infringers, it will unduly constrict those fair uses, stifle the voices, and harm the creative businesses of the communities we serve.”⁶¹

While there are likely numerous alternatives to the CASE Act—other approaches to a small claims-like court or other approaches to alternative dispute resolution—there is also substantial room to improve the CASE Act (improvements which could also resolve constitutional infirmities in the current bill). Merely by way of example: ensure accused infringers access to counsel,⁶² afford accused infringers plenary right to appeal decisions of the Copyright Claims Board into a U.S. District Court for a jury trial,⁶³ require the Copyright Claims Board to evaluate fair use *sua sponte* (if not raised by the parties), lower the damages cap (e.g., to \$5,000-\$10,000, which is more aligned with state small claims courts),⁶⁴ and allow claimants to seek actual (not statutory) damages.⁶⁵

Finally, regarding the timeframe for restoring content that was subject to an improper notice, requiring an OSP (and their users) to wait 10-14 days to restore wrongfully-removed content is often too long—especially in the case of commercially valuable posts (e.g., Etsy sellers during busy holiday shopping seasons) or timely speech (e.g., news or commentary about current events).⁶⁶ Discouraging improper

⁶⁰ Abby Rives, *CASE Act Does Not Offer Viable Solution to Online Infringement*, Engine (July 11, 2019), <https://www.engine.is/news/case-act-does-not-offer-viable-solution-to-online-infringement>; Abby Rives, *Startups Need Certainty, Not Unaccountability and Confusion in Copyright Law*, Inside Sources (Sept. 10, 2019), <https://www.insidesources.com/startups-need-certainty-not-unaccountability-and-confusion-in-copyright-law/>; Letter to Speaker Pelosi, Sen. Feinstein, & Sen. Harris from Automattic, GitHub, Patreon, Pinterest, Reddit (Oct. 3, 2019), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5d9664cdd8a0454502015eae/1570137293411/2019.10.03+Letter+re+CASE+Act-2.pdf>; Letter to Sen. Wyden from Automattic, Etsy, GitHub, Patreon, Pinterest, Reddit (May 15, 2020), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5ebef732cb8c5651cdc49832/1589573426981/2020.05.15+Letter+to+Senator+Wyden+re+CASE+Act.pdf>.

⁶¹ Letter to Sen. Wyden from Automattic, Etsy, GitHub, Patreon, Pinterest, Reddit, *supra* note 60, at 1.

⁶² *Cf. id.* at 1-2 (identifying lack of counsel, especially when deciding whether to opt-out of CASE Act procedures or trying to prove fair use, as a procedural flaw).

⁶³ *E.g.*, Letter to Members of House of Representatives from ACLU, *supra* note 57, at 2-3; *see also, e.g.*, U.S. Const. amend. VII (providing right to jury trial where money damages exceed \$20); Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542 (1969) (appeal is an important feature, creating consistency and fairness in application of the law); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (prohibiting appellate review of punitive damages is unconstitutional).

⁶⁴ *See, e.g.*, *50-State Chart of Small Claims Court Dollar Limits*, NOLO (Jan. 24, 2020), <https://www.nolo.com/legal-encyclopedia/small-claims-suits-how-much-30031.html>.

⁶⁵ Letter to Members of House of Representatives from ACLU, *supra* note 57, at 3-4.

⁶⁶ *E.g.*, Letter from Etsy to United States Copyright Office 4-5 (Feb. 21, 2017), <https://www.regulations.gov/document?D=COLC-2015-0013-92464>; Natalia Krapiva et al., *Warning: Repressive*

takedowns will reduce the overall volume of such notices, which may free OSPs to be more involved in reviewing and challenging problematic notices on behalf of users.⁶⁷ However, shorter timeframes for putbacks could also be beneficial. For example, the law could allow OSPs to restore content in two to five days upon receipt of a notice.

8. At the same time that Congress should revise section 512 to ensure that infringing material stays down once identified, it should also discourage the over-sending of notices as a counter-balance to the more significant action that an OSP must take after receiving a notice. This could be done, for example, by heightening the requirements for accuracy in notice sending, possibly with stricter requirements and heavier penalties. As noted above, the standard may be more lenient for small entities and individuals. How might the requirements be heightened in a meaningful way while not unduly burdening copyright owners trying to protect their work against infringement?

We appreciate this question, and agree that the problem of improper notices imposes a substantial burden on OSPs and, importantly, the users and creators that rely on them. To resolve these problems, Congress could make minor modifications to § 512 to discourage the sending of such notices in the first place. Moreover, as we have noted elsewhere, § 512 exists against a backdrop of otherwise-imbalanced copyright law.⁶⁸ Changes that restore balance in copyright law more broadly could also pay dividends in the context of § 512.

First, Congress should amend the statute to adopt an objective standard for determining whether a takedown notice was sent in good faith for purposes of § 512(f) claims. A § 512(f) plaintiff currently has to prove that the defendant notice-sender subjectively knew that it sent a false takedown notice. As we have previously noted:⁶⁹

that “good faith” is [currently] measured subjectively, mean[s] that a wrongly accused infringer would have to prove that the sender knew what it was doing was wrong.⁷⁰ Even if it were objectively improper for the (purported) rightsholder to send the notice, a wrongly accused infringer would not be able to push back. Because it is incredibly difficult (near

Regimes are Using DMCA Takedown Demands to Censor Activists, Access Now (Oct. 22, 2020), <https://www.accessnow.org/dmca-takedown-demands-censor-activists/> (“Even if your content is rightfully restored after a takedown, the harm has already been done. You can miss key, time-sensitive opportunities to spread an important message, and can lose followers and momentum.”); Nate Anderson, *DMCA Takedowns: Trampling on Free Speech Rights?*, Ars Technica (Apr. 6, 2010), <https://arstechnica.com/tech-policy/2010/04/dmca-takedowns-a-free-speech-killer/> (recounting experience of Senator John McCain’s campaign having YouTube clips removed pursuant to DMCA notices weeks before an election).

⁶⁷ Cf. Comments of Automattic Inc., *In re Section 512 Study*, Docket No. 2015-7, at 2-4 (Mar. 22, 2017), available at <https://www.regulations.gov/document?D=COLC-2015-0013-92493> (discussing Automattic’s experience pushing back against improper notices that harm the platform and its users); Paul Sieminski, Opinion, *Corporations Abusing Copyright Laws Are Ruining the Web for Everyone*, Wired (Jan. 17, 2014), <https://www.wired.com/2014/01/internet-companies-fair-use/> (similar).

⁶⁸ QFR Responses, *supra* note 10, at 2-3 (response to QFR No. 2 from Senator Thom Tillis to Abigail Rives).

⁶⁹ Rives, *supra* note 1, at 15.

⁷⁰ *Rossi v. Motion Picture Ass’n of Am., Inc.*, 391 F.3d 1000, 1004-05 (9th Cir. 2004).

impossible) to prove subjective bad faith in court, abusers of the DMCA’s notice system can send faulty notices virtually risk free.⁷¹

Were Congress to adopt an objective standard for § 512(f), instead, it would make the cause of action against improper notices more viable.

Second, statutory damages should be eliminated, or at very least eliminated for alleged online infringement, modified, and/or reduced. As we have previously explained:⁷²

statutory damages reform could “alleviate the consequences of OSP’s conservative behavior, which is driven by fear of very high potential liability for their users’ infringements.”⁷³ To be eligible for the safe harbors, OSPs must remove content in response to a notice, even an improper one. This creates a very strong incentive for takedown, because the OSP could otherwise be liable for \$150,000 in statutory damages for each work allegedly infringed—regardless of the actual damages, if any, caused by the infringement. Risk-averse companies, especially startups, will understandably be inclined to remove content. Some OSPs have, at times, refused to remove content when they receive improper notices, but they do that at great personal risk. If OSPs had flexibility to evaluate problematic notices, and could push back without exposing themselves to absurd statutory damages risks, they could play a more significant role in combating improper notices. Congress could either reduce statutory damages or make damages sensible in relation to the harm caused. Particularly for secondary infringement claims, actual damages make far more sense.

Congress could restore some balance to copyright law, overall, and discourage the over-sending of (especially improper) takedown notices by eliminating statutory damages altogether. Shy of that, there are numerous alternative statutory damages reforms that Congress could consider. For example:

- Reassess, and lower, the minimum and maximum amounts for statutory damages.⁷⁴
- Eliminate enhanced statutory damages.⁷⁵
- Prohibit statutory damages in cases of secondary liability, e.g., in cases against OSPs.⁷⁶

⁷¹ See, e.g., Eric Goldman, *DMCA’s Unhelpful 512(f) Preempts Helpful State Law Claims—Stevens v. Vodka and Milk*, Technology & Marketing Law Blog (Mar. 28, 2018), <https://blog.ericgoldman.org/archives/2018/03/dmcas-unhelpful-512f-preempts-helpful-state-law-claims-stevens-v-vodka-and-milk.htm> (summarizing cases); Steve Vondran, *DMCA “Bad Faith” Takedowns and Counternotifications May Require a Plaintiff to Prove Subjective Bad Faith*, Attorney Steve Blog (Jan. 28, 2019) <https://www.vondranlegal.com/ninth-circuit-512f-dmca-bad-faith-claims-require-evidence-of-subjective-state-of-mind> (similar).

⁷² QFR Responses, *supra* note 10, at 5 (response to QFR No. 5 from Senator Thom Tillis to Abigail Rives).

⁷³ Urban, *Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice*, *supra* note 48, at 407.

⁷⁴ E.g., *Copyright Reform for a Digital Economy*, Comp. & Commc’ns Industry Assoc. 20-21 (2015), available at <https://www.cciacnet.org/wp-content/uploads/2015/08/Copyright-Reform-for-a-Digital-Economy.pdf>.

⁷⁵ E.g., Ben Depoorter, *Copyright Enforcement in the Digital Age: When the Remedy Is the Wrong*, 66 UCLA L. Rev. 400, 444 (2019); see also, e.g., 17 U.S.C. § 504(c)(2) (providing for enhanced damages in cases of willful infringement).

⁷⁶ E.g., Comments of Engine et al., *supra* note 56, at 6-7.

- Instead of allowing statutory damages to operate as a default, restrict requests for statutory damages only to cases where they are a necessary alternative to actual damages. This would include restricting statutory damages to cases where it is impossible to approximate actual harm. If, for example, the allegedly infringed work can, and/or has, been licensed at an approximate price, statutory damages should not be available.⁷⁷ Similarly, statutory damages could still have to be tethered to some approximation of harm, instead of a blanket amount set in statute.
- Remove, or give courts discretion to depart from, the “per infringed work” calculation.⁷⁸
- Increase opportunities to reduce statutory damages awards in cases of non-willful online infringement and in cases against OSPs.⁷⁹
- Amend 17 U.S.C. § 505 to address problems of damages/remedy over-claiming. Even if ultimately (and likely) unsuccessful on the merits, a plaintiff can use overly-aggressive damages claims early in a case to create more imbalance and impose undue risk on defendants. Section 505 allows attorney fee shifting in copyright cases, but the statutory language merely authorizes courts to award attorneys fees to the prevailing party. Congress could amend the statute to allow, and signal that courts should, consider whether a party overstated its case with regard to remedy. For example, the statute could allow the prevailing defendant in litigation to seek fees based on a copyright plaintiff making unreasonable damages claims. The statute could also take away the benefit of fee-shifting for a “prevailing [plaintiff] that overstates the case with regard to the applicable remedy.”⁸⁰

Relatedly, damages for alleged infringement should also be aligned with damages for sending improper notices. As we have noted:⁸¹

the remedy for victims of improper notices is wholly out of balance to be an effective deterrent in the context of copyright law. Wrongfully accused infringers may only recover for actual damages and attorneys fees, even though their permissible speech was targeted for takedown, whereas rightsholders can use the threat of \$150,000 statutory damages to stifle even legitimate speech.⁸² Experience with § 512(f) litigation confirms its flaws. . . .⁸³

How to resolve this imbalance, though, depends on whether there are changes to statutory damages. At one end of the spectrum, statutory damages should be eradicated and parties should be limited to actual

⁷⁷ *Cf. id.* (“Copyright Office should support reforms that disallow statutory damages awards in secondary infringement actions in favor of an actual damages regime”); (“Oren Bracha & Talha Syed, *The Wrongs of Copyright’s Statutory Damages*, 98 *Tex. L. Rev.* 1219, 1249-50 (2020) (suggesting a similar reform through judicial practice).

⁷⁸ *Cf.* Jennifer M. Urban, Joe Karaganis, & Brianna L. Schofield, *Notice and Takedown in Everyday Practice* 130 (Mar. 2017), <https://americanassembly.org/publications-blog/notice-and-takedown-in-everyday-practice> (recommending “[g]iving courts discretion to depart from the “per infringed work” calculus, where appropriate”).

⁷⁹ *Id.* at 131 (“we recommend revising section 504(c)(2) to give courts discretion to reduce or remit statutory damages for any defendant who reasonably believed that the challenged use was not infringing”).

⁸⁰ Ben Depoorter, *Copyright Enforcement in the Digital Age: When the Remedy Is the Wrong*, 66 *UCLA L. Rev.* 400, 442 (2019).

⁸¹ Rives, *supra* note 1, at 15-16 (cited examples omitted).

⁸² *Compare* § 512(f) with § 504.

⁸³ *See, e.g.*, Comments of Automatic Inc., *In re* Section 512 Study, at 3-4 (describing cases where Automatic sought redress for wrongful takedown notices but was unable to recover costs or fees).

damages (and possibly fees). At the other end of the spectrum, § 512(f) claimants could instead be able to seek statutory damages on par with the statutory damages against accused infringement.

Third:⁸⁴

§ 512(f) should include a repeat false sender standard, comparable to the § 512(i) obligation of service providers to develop a policy to terminate repeat infringers. . . . [A] service provider under this standard would be legally permitted to ignore notices sent from “repeat false senders” that regularly send false or unreasonably deficient notices without losing the protection of the § 512 safe harbor.⁸⁵

Fourth, turning to § 512(g), addressing concerns with counter-notices could include:⁸⁶

mak[ing] the use of § 512(g) counter-notices less intimidating, burdensome, and risky for senders, recognizing that those who are subject to wrongful takedowns are typically less sophisticated and less well-resourced than those sending the takedowns. For example, changes could be made to 512(g) to preserve the possibility of anonymity for a user who counter-notices and is ultimately vindicated, either through further review by the rightsholder or by a court. Other changes could expand the list of valid good-faith reasons for counter-noticing. Currently, the only reasons specified in 512(g)(3)(c) are that the removal was “a result of mistake or misidentification of the material,” a standard that is both overly narrow and opaque. The reasons notably do not explicitly include deliberate overreach by a rightsholder attempting to suppress speech, harass a critic or breach a critic’s anonymity.⁸⁷

Congress could specify that counter-notices can be filed if the removal was an attempt to suppress speech, unmask anonymous speakers, for anti-competitive purposes, etc. Addressing concerns about counter-notices will also depend on solving other problems with § 512(f) and statutory damages, as well as whether there is a fair, balanced, and reasonable alternative dispute mechanism. If users and smaller OSPs feel safe that a counter-notice will not expose them to exorbitant statutory damages, for example, that would remove a substantial barrier.

Fifth,⁸⁸

at the very least, Congress should avoid making the problem worse. The existing inclination to over-takedown would be exacerbated if OSPs faced more liability for user-generated posts (i.e., if Congress reduced the “red flag” knowledge standard or imposed an affirmative duty to monitor). And if OSPs were forced to deploy technology to conduct review and removal, it would likewise result in more problematic takedowns.

⁸⁴ Additional Comments of Engine Advocacy, *In re* Section 512 Study, Docket No. 2015-7, at 14 (Feb. 2017), available at <https://www.regulations.gov/document?D=COLC-2015-0013-92477>.

⁸⁵ Comments of Engine et al., *supra* note 56, at 12.

⁸⁶ Additional Comments of Engine, *supra* note 84, at 11.

⁸⁷ While such improper reasons may *implicitly* fall within 512(g)(3)(c), that fact is likely to be lost on many legally unsophisticated users who see only the much more limited language about “mistake or misidentification.”

⁸⁸ QFR Responses, *supra* note 10, at 5 (response to QFR No. 5 from Senator Thom Tillis to Abigail Rives).

Finally, on a related note, another benefit of discouraging improper notices is that it will expand the market for developing sophisticated technology to attempt to flag instances of possible infringement. Larger OSPs that receive a larger number of claims of infringement develop tools to try and automate processes. These companies not only have to answer to rightsholders claiming infringement, but they also endeavor to protect their users and customers. As such, OSPs have numerous incentives to try and get the technology “right.” Rightsholder organizations also develop similar technology to try and flag instances of possible infringement. However, they do not have the same incentives to get the technology “right,” because they do not have to answer to or look out for the interests of users and other creators in the same way as OSPs.⁸⁹ Discouraging improper notices would also make the market for developing, e.g., sophisticated filtering technology, less-lopsided and could drive better technology.

9. Though section 512 says that OSPs must accommodate standard technical measures (STMs), no such measures exist after more than twenty-two years, and some stakeholders have complained that service providers have no incentive to establish STMs. The Copyright Office could help here, if Congress provided regulatory authority to adopt STMs and promulgate related regulations. How broadly or narrowly should the scope of this authority be defined?

In part, this inquiry should be based on a thorough investigation of the incentive structure at issue, and development of technology should not shift to be considered a one-sided obligation, as rightsholders have an essential role to play in the context of developing technology to address concerns of potential copyright infringement online.

When it comes to incentives, as we have previously explained:⁹⁰

First, the avoidance of legal liability provides an incentive for OSPs to develop tools to facilitate detection of potentially infringing material online. Even with § 512 safe harbors, rightsholders have long filed suit against OSPs.⁹¹ OSPs have to prove in court that they are entitled to the safe harbors, and even just surviving litigation long enough to establish qualification for the safe harbor can cost more than \$500,000 (and sometimes much more).⁹² As such, the threat of protracted, repeated litigation over even a few instances of

⁸⁹ Urban, *Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice* *supra* note 48, at 374, 387.

⁹⁰ QFR Responses, *supra* note 10, at 20-21 (response to QFR No. 3 from Senator Patrick Leahy to Abigail Rives).

⁹¹ See generally, e.g., *Capitol Records LLC v. Vimeo, LLC*, 826 F.3d 78 (2d Cir. 2016); *Ellison v. Robertson*, 357 F.3d 1072 (9th Cir. 2004) (naming AOL as a co-defendant); *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013) (original defendant was OSP Veoh, which had declared bankruptcy by the time the litigation concluded & UMG sought to name company’s investors as co-defendants); *Viacom Int’l Inc. v. YouTube Inc.*, 676 F.3d 19 (2d Cir. 2012); *Hendrickson v. Amazon.com, Inc.*, 298 F. Supp. 2d 914 (C.D. Cal. 2003); *Columbia Pictures Industries, Inc. v. Fung*, 710 F.3d 1020 (9th Cir. 2013); *Downs v. Oath Inc.*, 385 F. Supp. 3d 298 (S.D.N.Y. 2019) (defendant owns and operates Huffington Post).

⁹² It can cost \$500,000 to defend an intermediary liability case through discovery (i.e., to complete discovery, before being able to move for summary judgment that safe harbors apply). Engstrom, *Value of Section 230*, *supra* note 29 (identifying cost to take intermediary liability case through discovery). Many of the § 512 safe harbor cases are not

accused infringement (where damages are up to \$150,000 per work) is a significant incentive. Even an OSP confident in its compliance with all the provisions of § 512, facing threats of litigation, will consider going beyond the current safe harbor qualifications to placate rightsholders threatening suit.

Second, and importantly, OSPs are accountable to the users and creators who rely on them. Many OSPs provide platforms for creative communities and want to help their creators both (a) avoid detrimental improper accusations and (b) avoid infringement of their own works. Developing tools in-house—as it makes sense and if the platform has the resources—can help these OSPs serve their own users and creators.

Likewise, OSPs want to build the platforms and businesses they want to build. An entrepreneur who sets out to create a marketplace for original creations will place those original creations at the center of his or her work. If customers—users, creators, or fans—instead find a platform overrun with infringement and cheap knock-offs, those customers will go to a competitor. As such, some OSPs will use tools and improve access to the platform’s core content.

Third, OSPs face public pressure to improve their systems for identifying and removing potentially infringing content. Under notice-and-takedown, third parties can (and do) exercise control over what is removed from the Internet in the name of copyright enforcement.⁹³ But those third parties are not the face of content removal or the face of kicking off “repeat infringers.” Instead, the OSPs are accused of wrongdoing. Recent examples show how third party DMCA complaints against chef José Andrés and President Donald Trump’s campaign Twitter accounts resulted in Twitter being blamed.⁹⁴ Of course, all Twitter did was remove content in response to facially valid DMCA notices (even though those notices arguably targeted non-infringing, licensed, or fair uses).⁹⁵ OSPs have that additional incentive, to the extent improved technology can reduce instances of public backlash over suspect takedowns.

Indeed, numerous companies have developed technology to assist in the detection of potentially infringing material online. No one single tool has been adopted by all companies, and with good reason. Hopefully the Senate will take (or has already taken) the opportunity to learn more about existing technologies. But the fact is that as companies scale, and depending on several factors (including the type of content hosted and the volume of alleged infringement), many companies voluntarily adopt technology

resolved until summary judgment, or later—after more (sometimes much more) than half a million dollars of litigation costs are incurred.

⁹³ See, e.g., 17 U.S.C. § 512(c)(1)(C); Rives, *supra* note 1, at 12-17 (discussing how notice senders can misuse the notice-and-takedown process in ways that remove legitimate content from platforms and improperly designate users as “repeat infringers”).

⁹⁴ Anna Spiegel, *José Andrés’s Hugely Popular Quarantine Cooking Videos Have Been Removed From Twitter*, Washingtonian (June 17, 2020), <https://www.washingtonian.com/2020/06/17/jose-andres-quarantine-cooking-videos-have-been-removed-from-twitter/>; Matt Schruers, *Claims Against Trump Campaign Video Call for Revisiting Intersection of Speech and Copyright*, DisCo (June 6, 2020), <http://www.project-disco.org/intellectual-property/060620-claims-against-trump-campaign-video-call-for-revisiting-intersection-of-speech-and-copyright/>.

⁹⁵ *Id.*

to flag for potential infringement—in what has been called “DMCA-plus.”⁹⁶ This is especially true for OSPs that have to manage and address a larger volume of alleged infringement.⁹⁷

Turning specifically to the matter of standards, it does not make sense to think of filters as a viable or reasonable standard. As we have previously noted:⁹⁸

[A] cursory review of existing tools . . . reveals inherent hurdles to adopting any as standard. The when, how, and what of developing these tools depends heavily on the OSP: what works for video streaming where users monetize creations through ad revenue cannot translate to a multimedia platform where users sell creative works directly to fans. Indeed, given how ubiquitous and diverse content is, one tool cannot be expected to identify the many types of potential infringement in and of the many types of content on the many types of platforms.

Moreover, some OSPs will be able to tolerate the inherent limitations of each tool, but others cannot. For example, tools that seek to detect infringement in music works are more accurate for certain types of music than others. Automated detection of infringement has shown substantial failures in classical music.⁹⁹ This is, at least in part, a function of differences in the underlying creative works, because for classical music “the bulk of the repertoire [is] in the public domain, [and] the differences between particular performances are much more subtle.”¹⁰⁰ Forcing platforms that serve the classical music community to adopt a standard screening technology that was built to suit all types of music would put those creators and fans at a distinct and unfair disadvantage.

In addition:¹⁰¹

[e]ndorsing a specific technology as the “standard” would also become quickly outdated. First, technology can and should be allowed to advance. Under the current [§ 512] framework, companies improve their “DMCA-plus” approaches. As of 2016, YouTube had invested \$60 million to develop ContentID,¹⁰² but in the subsequent two years it

⁹⁶ See, e.g., Urban, *Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice*, *supra* note 48, 382-83 (describing “DMCA-plus” and listing examples of measures adopted by OSPs within this category).

⁹⁷ *Id.*

⁹⁸ QFR Responses, *supra* note 10, at 8 (response to QFR No. 1 from Senator Christopher Coons to Abigail Rives).

⁹⁹ See, e.g., Michael Andor Brodeur, *Copyright Bots and Classical Musicians Are Fighting Online. The Bots are Winning.*, Wash. Post (May 21, 2020), https://www.washingtonpost.com/entertainment/music/copyright-bots-and-classical-musicians-are-fighting-online-the-bots-are-winning/2020/05/20/a11e349c-98ae-11ea-89fd-28fb313d1886_story.html (describing copyright identification algorithms removing live classical music performances performed remotely and online due to COVID-19 pandemic).

¹⁰⁰ Vance R. Koven, *Fair Use of Flickers*, The Boston Musical Intelligencer (May 30, 2020) <https://www.classical-scene.com/2020/05/30/fair-flickers/>.

¹⁰¹ QFR Responses, *supra* note 10, at 8-9 (response to QFR No. 1 from Senator Christopher Coons to Abigail Rives).

¹⁰² Katherine Oyama, *Continuing to Create Value While Fighting Piracy: An Update*, Google (Jul 13, 2016), <https://blog.google/outreach-initiatives/public-policy/continuing-to-create-value-while/>.

invested an additional \$40 million (totaling over \$100 million).¹⁰³ Second, types of creative content are subject to rapid innovation, and imposing outdated standards to monitor for infringement could hinder innovation in creative expression. Third, efforts to evade filtering technology will be (and are) a reality. Users intent on infringing will find workarounds to these tools.

Any consideration of incentives in this space must not be one-sided, but instead be holistic. Indeed:¹⁰⁴

scholars considering incentives in this space have explained why the notice-and-takedown system is preferable, because both OSPs and rightsholders have an incentive to contribute their unique technological know-how, resources, and information toward improving tools.¹⁰⁵ Changes which would shrink the current incentives for rightsholders would hurt the overall market for developing this technology. On the other hand, changes which increase the incentives for rightsholders to develop higher quality technology would allow the community to leverage another industry's strengths to improve technology.

Finally, there are additional reasons to seriously question providing the Copyright Office regulatory authority in this arena. The availability, development, adoption, and implementation of standard technical measures under § 512 implicate the type of “complex economic and technological questions that extend well beyond both [the Office’s] historical mission and its most credible claims of subject matter expertise.”¹⁰⁶ It has become apparent that the Copyright Office’s technical competence was lagging and its own internal IT projects have suffered from “significant strategic and operational issues.”¹⁰⁷ While the Library of Congress’s senior leadership has begun to correct those problems,¹⁰⁸ this reveals how questions about standard technical measures are beyond the Office’s expertise.¹⁰⁹

Indeed, the Copyright Office’s years-long modernization initiative is still underway,¹¹⁰ and the office is currently, and correctly, focused on improving its own IT systems. This effort is necessary for the

¹⁰³ Paul Sawers, *YouTube: We’ve Invested \$100 Million in Content ID and Paid Over \$3 Billion to Rightsholders*, VentureBeat (Nov. 7, 2018), <https://venturebeat.com/2018/11/07/youtube-weve-invested-100-million-in-content-id-and-paid-over-3-billion-to-rightsholders/>.

¹⁰⁴ QFR Responses, *supra* note 10, at 21 (response to QFR No. 3 from Senator Patrick Leahy to Abigail Rives).

¹⁰⁵ See Husovec *supra* note 37, at 84.

¹⁰⁶ Aaron K. Perzanowski, *The Limits of Copyright Office Expertise*, 33 Berkeley Tech. L.J. 733, 735 (2018); see also 17 U.S.C. § 512(i)(2) (defining standard technical measures).

¹⁰⁷ Library of Congress Office of the Inspector General, *Semiannual Report to the Congress 7-10* (Sept. 2015), available at <https://www.loc.gov/static/portals/about/office-of-the-inspector-general/annual-reports/documents/september-2015-semiannual-report.pdf>; see also, e.g., Ferras Vinh, *Putting Problems at the Copyright Office in Perspective*, Center for Democracy & Tech. (Apr. 10, 2017), <https://cdt.org/insights/putting-problems-at-the-copyright-office-in-perspective/> (referring to IG report finding Copyright Office “mismanaged efforts to modernize its systems and that the Office failed to notify both the [Library] and Congress regarding the scope of the subsequent problems”).

¹⁰⁸ Office of the Inspector General, *supra* note 107.

¹⁰⁹ See, e.g., Perzanowski, *supra* note 106, at 754 (“the Office is not particularly well-positioned to offer expert guidance—much less draft binding exemptions from liability—on questions at the frontier of copyright’s distention into the everyday lives of digital consumers”).

¹¹⁰ *Copyright Modernization*, Copyright.Gov, <https://www.copyright.gov/copyright-modernization/> (last visited Nov. 28, 2020).

Copyright Office to continue to perform its core functions of, e.g., registration and recordation, for today's copyright owners and the public.¹¹¹

We applaud the Copyright Office's efforts under the Librarian of Congress's leadership on IT modernization, and hope it continues to be a top priority for policymakers. But there are serious concerns the Office is not up to the task of adopting standard technical measures and promulgating related regulations. Not only that, but strapping the Office with these responsibilities would both distract it from its own modernization and core mission and could doom any effort on standard technical measures from the start.¹¹²

cc: Chief Counsel Brad Watts, Counsel-Detailee Brad Greenberg

¹¹¹ See, e.g., Perzanowski, *supra* note 106, at 771 (“the Office is struggling to hoist its registration and recordation systems into the twenty-first century”).

¹¹² See, e.g., Perzanowski, *supra* note 106, at 770 (noting even “[t]he current mismatch between the Office’s expertise and its duties risks distracting the Office from its core responsibilities”).