

**Before the  
LIBRARY OF CONGRESS  
United States Copyright Office**

**In the Matter of  
Request for Comments  
on United States Copyright Office  
Section 512 Study**

**Docket No. 2015-7**

**Submitted April 1, 2016**

**Comments of the Motion Picture Association of America, Inc.  
Submitted by Jennifer L. Pariser, Vice President, Legal Affairs, MPAA**

**Introduction**

The Motion Picture Association of America, Inc. (“MPAA”) welcomes the opportunity to participate in the Copyright Office’s public study of section 512 of the Digital Millennium Copyright Act (“DMCA”).<sup>1</sup> Section 512 reflects Congress’s intent to foster a system of shared responsibility between copyright owners and service providers to deal with the problem of widespread infringement occurring over the Internet. In a number of important areas that delineate this shared responsibility, however, the federal courts have strayed from Congress’s language and the overall purposes underlying section 512. It is imperative for all members of the content-creation community, and broadly for all stakeholders interested in a vibrant Internet ecosystem, that the system Congress set forth in section 512 be interpreted and applied as Congress intended. The MPAA appreciates the Copyright Office’s attention to these important issues.

The Internet is an extraordinary resource for content creators and audiences to connect in innovative and increasingly flexible ways. The legitimate, licensed marketplace for video programming is burgeoning, with more viewers accessing more content through more dissemination channels than ever before. The MPAA’s members have embraced the Internet to offer their content through a wide and growing array of platforms and distributors. The MPAA’s members are committed to the continued growth of the online video marketplace.

Unfortunately, the Internet also has made it possible for piracy to flourish on a scale not previously imaginable. More than 15 years after the heyday of the infamous Napster service, copyright owners continue to be under siege from Internet piracy. The scope of infringing

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<sup>1</sup> Founded in 1922, the MPAA is the not-for-profit trade association that addresses issues of concern to the United States motion picture industry. The MPAA’s member companies are Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. These companies and their affiliates are the leading producers and distributors of audiovisual works in the theatrical, television and home entertainment markets, in all formats and all channels of distribution, including online distribution.



conduct occurring online is vast. Copyright owners spend millions of dollars annually combatting online piracy. This siphons resources away from investments in new content and new forms of distribution and delivery. In calendar year 2015, the MPAA's members sent notices with respect to more than 104.2 million infringing URLs to search operators and sites that host content and enable users to download or stream full-length movies without authorization. To use another barometer, the Google Transparency Report (GTR)—which reports on copyright owner takedown requests for links to infringing content returned through Google searches—shows that copyright owners sent Google more than 83 million takedown notices for infringing content accessible through more than 73,000 websites in March 2016.<sup>2</sup>

These numbers—and other extraordinarily large numbers discussed in these comments—underscore the immense problems that online piracy presents for content creators. To be sure, the numbers also demonstrate that some service providers have established efficient mechanisms for processing the large numbers of takedown notices that copyright owners send. The fact that the numbers continue to be massive year over year, however, shows that the notice-and-takedown process that exists today is entirely reactive and has been implemented in a way that is largely ineffective to address the underlying problem of infringement. The system delineated in the DMCA has been interpreted by courts essentially to require no affirmative action on the part of service providers unless and until a content owner advises them of the presence of an infringing work. The burden of identifying the granular location data for infringing content and formally notifying service providers falls almost entirely on copyright owners.

Moreover, because courts have determined that sites must only remove the specific file or link listed in a particular notice and not all instances of the same copyrighted work, the system fails to combat the larger piracy problem. Although a notice-and-takedown regime may work reasonably well for isolated acts of infringement by individuals who are not intentional infringers, that regime is ineffective at dealing with the problems created by willful infringers. Those who are determined to infringe copyright know very well how to manipulate a notice-and-takedown system—such as by stacking URLs to ensure that when one URL is removed, another automatically appears in its place—to ensure that the infringing content they post is always available.

This is not how Congress intended the system to work. When it enacted the DMCA, Congress realized the Internet's potential both to yield tremendous benefits and to facilitate widespread piracy. Through section 512, Congress intended to foster the former and provide incentives for all interested parties to combat the latter. The cornerstone of this effort was a system of shared responsibility between copyright owners and online service providers in addressing infringing content online and limiting its presence. Congress intended section 512 to protect innocent service providers from liability, without shielding those who intentionally benefit from or facilitate copyright infringement. The statute was never intended to be only a notice-and-takedown regime for online infringement. Congress certainly did not intend for

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<sup>2</sup> Google Transparency Report (accessed Apr. 1, 2016), *available at* <https://www.google.com/transparencyreport/>.



section 512 to create an endless game of “Whac-A-Mole,” having no real substantive impact on the overall availability of infringing content online.

In many areas, however, the courts have not followed the statute’s language or given effect to Congress’s purpose. Courts’ interpretation of the statutory “safe harbor” sections has shielded from liability even service providers who have built their entire business around copyright infringement—including by willfully blinding themselves to rampant infringement occurring on their sites—so long as the service provider responds to takedown notices. A notice-and-takedown regime on its own, however, cannot significantly reduce the vast amount of copyright infringement online. As soon as a content owner identifies one infringing copy of its work and the relevant service provider has taken it down, another copy—or, often, more than one other copy—is put online in its place. Far from the cooperative system that Congress envisioned, the prevailing interpretations of section 512 have created a system in which (a) content creators bear almost all of the burden of dealing with online infringement, and (b) non-innocent service providers claim protection from liability through ineffective notice-and-takedown policies while welcoming and even building businesses around infringing activity.

Congress did not intend to incentivize the creation of notice-and-takedown processes for their own sake. Congress intended to create *effective* measures—not merely efficient processes—to incentivize service providers as well as copyright owners to work together to prevent copyright infringement. That clearly has not happened. Courts have essentially transformed section 512 into a pure notice-and-takedown statute. The large number of takedown notices sent and responded to is not a sign that the system is working as intended; it is a sign that the system is failing. The law as construed provides the wrong incentives to service providers, places disproportionate burdens on copyright owners, serves to protect bad actors, and undermines congressional intent.<sup>3</sup>

## **General Effectiveness of Safe Harbors**

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

The section 512 limitations on liability are *not* working as Congress intended. Congress hoped to protect innocent service providers and “preserve[] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that

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<sup>3</sup> See, e.g., *The Copyright Infringement Liability of Online and Internet Service Providers: Hearing on S. 1146 Before the S. Comm. on the Judiciary*, 105th Cong. 1-2 (1997) (statement of Sen. Hatch) (stating that the Internet had the potential to “recklessly facilitate infringement” and that Congress aimed to “best combat the risk of copyright infringement facing content providers on the Internet”); 144 Cong. Rec. 9239 (1998) (statement of Sen. Ashcroft) (“Billions of dollars in pirated material is lost every year and [a]n impact is felt directly to our national bottom line.”); 144 Cong. Rec. 10615 (1998) (statement of Rep. Dreier) (“[A]s we look at the problems that we face as a Nation, and as we move rapidly towards this global economy, it is difficult to imagine an issue that is much more important than theft of intellectual property.”).



take place in the digital networked environment.”<sup>4</sup> Instead, section 512 as construed by courts incentivizes scrupulous inattention and inactivity by service providers to mass infringement they know to be occurring through their sites and services, and provides protection for bad actors who build businesses based on copyright infringement.

This has resulted in the availability of an extraordinarily large volume of infringing material on the Internet. As discussed in more detail in response to Questions 3 and 4, the widespread availability of infringing content makes it more difficult for copyright owners to maintain the value of their content,<sup>5</sup> and it requires the expenditure of millions of dollars and countless man hours annually on anti-piracy measures. For smaller content owners, the cost of combatting digital piracy and the difficulty of maintaining the value of their works in the face of that piracy may make it infeasible to create any content at all.

The incentives for service providers’ inaction, or, worse, intentional aiding of copyright infringement, are the direct result of manifestly erroneous interpretations of section 512.

First, the Second and Ninth Circuits have interpreted what is required for a service provider to have “red flag” knowledge—which removes the service provider’s eligibility for the safe harbor under sections 512(c) and (d)—to be effectively indistinguishable from “actual knowledge.”<sup>6</sup> Red flag knowledge differs from actual knowledge, however, and judicial decisions that effectively equate the two impose improper burdens on copyright owners—and disincentivize service providers from taking responsibility for their own websites and services—in ways that Congress did not intend.<sup>7</sup>

Second, courts have misinterpreted the “right and ability to control” standard, such that even service providers with significant control over the posting of infringing material are immune from liability.<sup>8</sup> That standard was intended to incorporate the common law standards on

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<sup>4</sup> House of Representatives Committee on Commerce, Report on the Digital Millennium Copyright Act of 1998, H.R. Rep. No. 105-551(II), at 49, 105th Cong., 2d Sess. (July 22, 1998); Senate Committee on the Judiciary, Report on the Digital Millennium Copyright Act of 1998, S. Rep. No. 105-190, at 20, 105th Cong., 2d Sess. (May 11, 1998).

<sup>5</sup> World Intellectual Property Organization, Advisory Committee on Enforcement, *Copyright Enforcement in the Digital Age: Empirical Economic Evidence and Conclusions* 2 (Aug. 2015), available at <http://www.mpaa.org/research-and-reports/>.

<sup>6</sup> See *UMG Recordings, Inc. v. Shelter Capital Partners LLC* (Shelter Capital Partners), 718 F.3d 1006, 1022-23 (9th Cir. 2013) (holding that a service provider does not have “red flag” knowledge even if they know that they are hosting a category of infringing content); *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012) (*Viacom*) (same).

<sup>7</sup> See Response to Question 19.

<sup>8</sup> See *Shelter Capital Partners*, 718 F.3d at 1027 (finding that a service provider may not have the “right and ability to control” infringing activity even if it has “the ability to locate infringing material” and “terminate users’ access” (internal quotation marks omitted)); *Viacom*, 676 F.3d at 36-38 (same).



vicarious liability, which themselves set a high bar for content owners seeking to hold service providers liable for copyright infringement. Courts, however, have required significantly more than that, making the standard almost impossible to meet.<sup>9</sup>

Third, the plain language of the statute provides that a “representative list” of infringing files is sufficient where the copyright owner provides notice of numerous infringements through the same Internet location.<sup>10</sup> Courts generally have imposed the much higher burden on copyright owners of identifying in takedown notices the specific web address (“URL”) for each item of infringing material rather than a “representative list” of such material.<sup>11</sup> Because infringing content is uploaded on a mass scale, requiring copyright owners to provide individualized URLs in order to trigger service providers’ obligation to act further ensures that the process will be repetitive, mechanical and ineffective.<sup>12</sup>

Fourth, at the same time that courts have construed service providers’ obligations under section 512 to combat infringement too narrowly, they have construed the types of activities that section 512 protects too broadly. For example, both the Second and Ninth Circuits<sup>13</sup> have interpreted section 512(c) to protect activities that go far beyond hosting of content.<sup>14</sup>

In some areas, cooperation between online service providers and content creators is occurring, including with respect to the voluntary initiatives described below. For example, the MPAA and other content owners have worked with services providing user-generated content to develop and follow guiding principles, including the adoption of technologies, designed to ensure that (a) infringing material is prevented from being uploaded in the first instance and (b) material that is taken down is not simply reposted. Such principles support the development of original user-generated content and help to combat copyright infringement. As part of another initiative, the Center for Copyright Information (“CCI”)—a collaboration between content owners and service providers intended to encourage consumers to access content online legally—launched the Copyright Alert System to make consumers aware that their accounts have been used for illegal copyright infringement and inform them about where to find the content they seek legally. Now in its fourth year, the Copyright Alert System has sent out millions of “alerts,” and the CCI continues to work to improve it.<sup>15</sup> Unfortunately, these cooperative activities, which are outside the section 512 system, remain the exception rather than the rule.

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<sup>9</sup> See Response to Question 20.

<sup>10</sup> 17 U.S.C. § 512(c)(3)(A)(ii)

<sup>11</sup> See, e.g., *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 643 (S.D.N.Y. 2011); see also *Perfect 10, Inc. v. Giganews, Inc.*, 993 F. Supp. 2d 1192, 1198-200 (C.D. Cal. 2014).

<sup>12</sup> See Response to Question 14.

<sup>13</sup> *Shelter Capital Partners*, 718 F.3d at 1015-19; *Viacom*, 676 F.3d at 38-40.

<sup>14</sup> See Response to Questions 2 and 21.

<sup>15</sup> See generally Response to Question 15 (discussing voluntary initiatives).



## 2. Have courts properly construed the entities and activities covered by the section 512 safe harbors?

In several important areas, courts have significantly erred in their construction of the entities and activities eligible for the section 512 limitations on liability. In particular, some courts have erroneously expanded the reach of section 512(c) to entities that have built their businesses around wide-ranging use of material stored on those entities' servers, and not just users' storing and accessing of material through those sites. Courts have similarly expanded the scope of activities protected by other section 512 provisions by interpreting sections 512(a) and (b) to apply to far more activities—and activities of a far different type—than the mere conduit and system caching activities that they were intended to reach.<sup>16</sup>

First, both the Second and Ninth Circuits have interpreted section 512(c) to protect activities that go far beyond the hosting of content.<sup>17</sup> Section 512(c) applies to limit liability that might otherwise result “by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.” In *UMG Recordings, Inc. v. Shelter Capital Partners*, for example, the Ninth Circuit held that “storage at the direction of the user” included not only storage, but also “access-facilitating processes that automatically occur when a user uploads” infringing material.<sup>18</sup> The Second Circuit adopted a similar interpretation in *Viacom v. YouTube*, holding that section 512(c) applies not only to storage, but also to “software functions performed for the purpose of *facilitating access* to user-stored material.”<sup>19</sup> That interpretation, however, reads the limitation “by reason of the *storage* at the direction of the user” out of the statute.

And even if section 512(c) was supposed to protect *some* activities designed to facilitate access, the “access-facilitating processes that automatically occur[ed]” in *Shelter Capital Partners* and *Viacom* went far beyond merely providing access to content stored by users to making substantive changes to that content that actually facilitated the infringement of its users. For example, in *Shelter Capital Partners*, the service provider not only converted the video to Flash 7 format, it also *extracted metadata to “help others locate the video for viewing”* and created a client software application through which a user could download and store videos.<sup>20</sup> In *Viacom*, the service provider created a “related videos” function that used a computer algorithm to “identif[y] and display[] ‘thumbnails’ of clips that are ‘related’ to the video” that the user was viewing.<sup>21</sup> In finding the section 512(c) limitation applicable to the entirety of both services, the

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<sup>16</sup> *Ellison v. Robertson*, 357 F.3d 1072, 1080-81 (9th Cir. 2004); *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1124 (D. Nev. 2006).

<sup>17</sup> *Shelter Capital Partners*, 718 F.3d at 1015-19; *Viacom*, 676 F.3d at 38-40.

<sup>18</sup> *Shelter Capital Partners*, 718 F.3d at 1016.

<sup>19</sup> *Viacom*, 676 F.3d at 38-40 (emphasis added).

<sup>20</sup> *Shelter Capital Partners*, 718 F.3d at 1012 (emphases added).

<sup>21</sup> *Viacom*, 676 F.3d at 39-40.



courts emphasized that the practices at issue involved automated technological processes. But the mere fact that technological processes were automatic cannot be sufficient; the service provider still had to create and implement the processes in the first instance. With section 512(c), Congress clearly did not intend to protect every aspect of a business that also includes hosting of online content stored by a user, but that is essentially what courts have done.

Second, courts have erroneously expanded the scope of what constitutes “intermediate and transient storage” for purposes of section 512(a), which sets forth eligibility for limitations on liability for certain defined “transitory digital network communications.” The protection conferred by section 512(a) is broader than that conferred by the other safe harbors: Unlike service providers claiming eligibility under sections 512(b)-(d), service providers seeking eligibility under section 512(a) have no takedown obligations. Section 512(a) was intended to protect only a limited category of conduct and service providers—i.e., those who act as passive conduits for infringing material. It requires that a service provider store infringing material only “while it is en route to its destination,” not “at the points where the transmission is initiated or received.”<sup>22</sup>

In *Ellison v. Robertson*,<sup>23</sup> however, the Ninth Circuit erroneously found that a *bulletin board hosting service* qualified for protection as a passive conduit. The service provider was not simply a passive conduit for information moving transitorily through its network. The service provider *stored* the infringing material for *14 days*, during which time a wide audience of users could access the infringing material at will.<sup>24</sup> The maintenance of material in a manner accessible to the public for so long goes far beyond acting as a passive conduit; it is hosting of that material, which, if to find protection under section 512 at all, must meet the requirements of section 512(c). Subsection (a) simply was not designed to permit a USENET hosting service to avoid any obligation to remove infringing posts simply by imposing a two week retention policy. In fact, such a reading flies in the face of the result in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*<sup>25</sup>—cited by Congress in crafting section 512—where the court found that such a service had a responsibility to respond to knowledge of such infringement by removing such material.

Third, courts have expanded the scope of activity protected under section 512(b) beyond what Congress intended. Section 512(b) deals with limitations on liability for “system caching” by service providers. Section 512(b) was intended to limit the liability of service providers for the act of “system caching,” whereby a service provider temporarily stores material from an originating site on its system to facilitate access by users who subsequently request access to the material from the originating site. The provision is subject to a number of statutory requirements. In *Field v. Google*,<sup>26</sup> however, a district court in Nevada ignored these critical

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<sup>22</sup> H.R. Rep. No. 105-551(II), at 50-51 (1998).

<sup>23</sup> *Ellison*, 357 F.3d 1072 (9th Cir. 2004).

<sup>24</sup> *Id.* at 1081.

<sup>25</sup> *Religious Tech. Ctr.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

<sup>26</sup> *Field*, 412 F. Supp. 2d at 1124.



limitations. For one thing, similar to service providers protected under section 512(a), those protected under section 512(b) can only make “intermediate and temporary” storage of the infringing material.<sup>27</sup> Relying on *Ellison*, the court in *Field* found that a service provider satisfied this requirement when copies of infringing material were present for up to 20 days.<sup>28</sup> There is nothing “intermediate” or “temporary” about storing material for nearly three weeks—Congress surely did not intend “caching” to cover this lengthy file storage.

Moreover, section 512(b)(1)(B) requires that the infringing material be transmitted from a person other than the service provider “to a person other than the [original] person . . . at the direction of that other person.” In *Field*, however, the court held that the “other person” could be the *service provider itself*.<sup>29</sup> That interpretation means that section 512(b) now protects service providers who *themselves* request infringing material. That cannot be what Congress intended.

In addition, section 512(b)(1)(C) requires that the storage be for the purpose of making the material available to users who request access to it *from the original person*. The court in *Field*, however, said that section 512(b) may still apply if a service provider “enables users to access content *when the original page is inaccessible*.”<sup>30</sup> The court’s finding that the service provider nevertheless qualified for the section 512(b) limitation on liability is therefore directly contrary to the text of that provision.

By stretching the scope of the activities protected by the section 512 limitations on liability, courts have greatly decreased the effectiveness of section 512. Section 512 was intended to protect only innocent service providers. Congress was therefore careful to ensure that the limitations on liability “preserve[d] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.”<sup>31</sup> Courts’ interpretations of the entities and activities covered by section 512, however, have decreased those incentives for service providers, requiring content owners to bear almost the full burden. Indeed, in some instances, courts’ interpretations give service providers permission to engage in activities that actively facilitate copyright infringement with almost no obligation to do anything to limit that activity. That was not Congress’s intention. The section 512 limitations on liability were meant to be an exception to common law principles of liability, and those exceptions were intended to be interpreted narrowly. Courts, however, have undermined Congress’s vision for how section 512 was supposed to operate.

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<sup>27</sup> 17 U.S.C. § 512(b)(1).

<sup>28</sup> *Field*, 412 F. Supp. 2d at 1124.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1118 (emphasis added).

<sup>31</sup> H.R. Rep. No. 105-551 (II), at 49, 105th Cong., 2d Sess. (July 22, 1998); S. Rep. No. 105-190, at 20, 105th Cong., 2d Sess. (May 11, 1998).



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

There is a burgeoning market for online services providing legitimate content. It has never been easier for consumers to access the television shows and movies that they demand online. There are more than one hundred legitimate online services offering television and film content online in the United States alone.<sup>32</sup> These legitimate services, however, must compete with numerous sites and services that make the same content available illegally for free. In some cases, consumers may not even know that they are accessing content through a service that is operating illegally. Courts' interpretations of the section 512 limitations have either insulated many of these sites and services from liability directly, or provided disincentives to other service providers, such as search engines, to make such illegal websites harder to find. Copyright owners have been working to educate consumers about legitimate websites and to make it as easy as possible for consumers to locate content legally. As long as the same content is easily available illegally, however, content owners will always be fighting a nearly impossible battle.

Judicial interpretations erroneously limiting the obligations of service providers to act with respect to infringing content means that legitimate, licensed services must compete head to head with free services. The ease with which users can access copyrighted material illegally online makes it more difficult for content owners to maintain the value of their works. Judicial decisions that capaciously interpret the entities and activities eligible for section 512 protection no doubt have helped many services that would otherwise not qualify for a safe harbor continue to thrive on the Internet. This legal landscape has likewise boosted the bottom lines and improved the valuation of the stock of many online services and sites that have built their entire business model on copyright infringement. As long as these services respond to takedown notices, they can turn a blind eye to the rampant copyright infringement that their sites and services not only facilitate, but depend on for their continued profitability. Thus, any growth in these service providers' bottom lines has occurred at the expense of content owners, who, as a result of rampant online piracy, have seen the value of their works diminished, their profits and headcounts slashed, and their ability to produce new creative content limited.

Those who deny or minimize the harms from copyright infringement often "blame the victim," claiming that online infringement thrives because copyright owners refuse to give consumers access to the content they want through online distribution mechanisms. The facts, however, show that content owners are listening to consumers' demands and embracing innovative and licensed distribution channels to meet those demands. In 2011, Americans had access to 65 online video services, which they used to watch 1.8 billion movies. Just three years later, in 2014, the number of video services had nearly doubled, to 112, and consumers used

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<sup>32</sup> Chris Dodd, *New Study Finds Vast Majority of Top Films and TV Shows Available Legally Online in the US* (Sept. 24, 2014), available at <http://www.mpaa.org/new-study-finds-vast-majority-of-top-films-and-tv-shows-available-legally-online-in-the-us/#.VtZ-2OY9fWK>.



those services to access movies 7.1 billion times.<sup>33</sup> And it is not only obscure films and television shows that are available: A study by SNL Kagan found that 98 percent of the most popular and critically acclaimed films and 94 percent of premium television series are available via online e-services.<sup>34</sup> Further, online content is available on a wide variety of devices—including PCs, Macs, smart TVs, tablets, gaming systems, smartphones, and others. This content is also available through a variety of service options, including rental, licensed-download, subscriptions, and ad-supported viewing. New services are being announced constantly. Since October 2014, Verizon and T-Mobile launched services allowing users to stream video without using their data plans; AT&T and DirecTV announced a plan for an Internet-based streaming television service; Time Warner launched a stand-alone HBO service called HBO NOW;<sup>35</sup> CBS launched a subscription video-on-demand and live-streaming service;<sup>36</sup> Sony launched a cloud-based TV service;<sup>37</sup> and DISH launched a live, over-the-top television service.<sup>38</sup> Not only are traditional content owners (including the members of the MPAA) making their content available online, but online distributors, such as Hulu, Netflix, and Amazon, are themselves expanding audiences' viewing choices by creating their own, original programming.

These choices allow consumers to watch content on whatever platform they want using whatever payment model they choose. Indeed, as of December 2015, 96 percent of popular, critically acclaimed and independent film titles were available through a permanent download model, 88 percent were available via online rental, and 96 percent were available through TV

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<sup>33</sup> See Comments of the Motion Pictures Association of America Regarding Development of the Joint Strategic Plan on Intellectual Property Enforcement 2 (Oct. 16, 2015), *available at* <http://www.regulations.gov/#!documentDetail;D=OMB-2015-0003-0058>.

<sup>34</sup> SNL Kagan, *U.S. Availability of Film and TV Titles in the Digital Age* 4 (Mar. 2016), *available at* <http://go.snl.com/rs/080-PQS-123/images/U.S.%20Availability%20of%20Film%20and%20TV%20Titles%20in%20the%20Digital%20Age.pdf>.

<sup>35</sup> HBO Chairman and CEO Richard Plepler Announces HBO to Offer a Stand-Alone HBO Streaming Service in 2015 (Oct. 15, 2014), *available at* <http://www.timewarner.com/newsroom/press-releases/2014/10/15/hbochairman-and-ceo-richard-plepler-announces-hbo-to-offer-a>.

<sup>36</sup> CBS Brings Programming Direct to Consumers with New Multi-Platform Digital Subscription Service (Oct. 16, 2014), *available at* <http://investors.cbcorporation.com/phoenix.zhtml?c=99462&p=irol-newsArticle&ID=1978514>.

<sup>37</sup> Sony Network Entertainment International And Sony Computer Entertainment Unveil PlayStation™Vue (Nov. 13, 2014), *available at* <http://www.prnewswire.com/news-releases/sony-network-entertainment-international-and-sony-computer-entertainment-unveil-playstationvue-a-new-cloud-based-tv-service-that-pioneers-the-future-of-television-282517811.html>.

<sup>38</sup> Sling TV to Launch Live, Over-the-Top Service (Jan. 5, 2015), *available at* <http://about.dish.com/press-release/products-and-services/sling-tv-launch-live-over-top-service-20-month-watch-tvs-tablets>.



Everywhere on-demand services.<sup>39</sup> To help viewers locate the content they seek, the MPAA created WhereToWatch ([www.WhereToWatch.com](http://www.WhereToWatch.com)), a free website that allows consumers to locate television shows and movies by title, actor, or director.

Legitimate services that properly license content from copyright owners, however, can only grow so much when they must compete with services offering the same content, unlicensed, for free. The growth in the availability of legitimate content online has occurred not because of section 512, but in spite of it.

**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?**

Erroneous interpretations of the section 512 limitations on liability have contributed to the continued and easy availability of infringing content online.<sup>40</sup> This availability makes it more difficult for copyright owners to maintain the value of their works.

The scale of infringement occurring online is not only massive but persistent. The last publicly available, comprehensive study of piracy occurring online was published in the fall of 2013. That study examined multiple sources of online piracy, including users accessing content through BitTorrent portals, peer-to-peer downloading sites, direct downloads, and Internet streaming. It found that 432 million unique users worldwide explicitly sought infringing content during one month alone; the same study also found that the amount of bandwidth consumed by infringing use totaled 9,567 petabytes in 2012 in North America, Europe, and the Asia-Pacific region.<sup>41</sup>

Although a comparably exhaustive study of online piracy has not been published in the intervening time, more recent studies of individual channels for online piracy confirm that the overall scope of infringing activity remains disturbingly high. In August 2015, for example, notorious cyberlockers Letitbit.net, Nowvideo.sx, and Rapidgator.net received 3,320,274; 6,660,581; and 7,405,192 unique visitors, respectively.<sup>42</sup> All three sites give rewards to users who upload popular copyrighted content. Streaming sites devoted to copyright infringement are also very popular, with Kinogo.co and Movie4k.to receiving 23,437,186 and 3,989,971 unique visitors, respectively, in August 2015.<sup>43</sup> Peer-to-peer services offering files for download remain

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<sup>39</sup> SNL Kagan, *U.S. Availability of Film and TV Titles in the Digital Age*, at 4.

<sup>40</sup> See Response to Questions 19-21.

<sup>41</sup> NetNames Report, *Sizing the Piracy Universe 3* (Sept. 2013), available at <https://copyrightalliance.org/sites/default/files/2013-netnames-piracy.pdf>.

<sup>42</sup> Motion Picture Association of America, *Comments to USTR in Response to Request for Public Comment on the 2015 Special 301 Out of Cycle Review of Notorious Markets*, Docket No. USTR-2015-0016, at 4-5 (Oct. 2015), available at <http://www.mpaa.org/policy-filings/>.

<sup>43</sup> *Id.* at 7.



very popular, particularly in the BitTorrent system. One of the largest sties, Kat.cr, was found to offer more than 6 million torrent files for download, nearly every one pirated.<sup>44</sup>

The problem of digital piracy is not likely to end anytime soon: According to one study, 40 percent of infringing websites investigated in 2013 had shut down or dropped below the threshold for tracking a year later. But overall, the same number of infringing websites could be found. In other words, when one site goes down, another pops up to take its place.<sup>45</sup> Further, online infringement is highly lucrative. A 2014 study by the Digital Citizens Alliance investigated 589 content theft websites. The report, *Good Money Still Going Bad: Digital Thieves and the Hijacking of the Online Ad Business*, estimated that the sites generated \$209 million in advertising revenue alone.<sup>46</sup> The study further estimated that the profit margin for advertising-supported websites was an astonishing 89.3 percent.<sup>47</sup>

The widespread availability of infringing content online for free undercuts the distribution of such content through legitimate channels, making it difficult for content owners to recover the substantial cost of creating creative content or generating money to invest in the creation of new content or content delivery systems. Pre-release movie piracy, for example, may decrease a film's theatrical revenue by 19 percent compared to piracy that occurs post-release.<sup>48</sup> Overall, researchers have found that if piracy could be eliminated from the theatrical windows entirely, the box office revenue would increase by 14-15 percent.<sup>49</sup> And piracy's effect is not limited to theatrical revenue; it also cuts into revenue from home video, video-on-demand, and pay per view, among other distribution channels.<sup>50</sup> Indeed, as a recent study by the World Intellectual Property Organization Advisory Committee on Enforcement found, "there is general consensus among economists who study piracy that it negatively impacts sales."<sup>51</sup> Thus,

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<sup>44</sup> *Id.* at 9-10.

<sup>45</sup> Digital Citizens Alliance, *Good Money Still Going Bad: Digital Thieves and the Hijacking of the Online Ad Business* 13 (May 2015), available at <http://www.digitalcitizensalliance.org/cac/alliance/content.aspx?page=GMGB2>.

<sup>46</sup> *Id.* at 2.

<sup>47</sup> *Id.* at 3.

<sup>48</sup> Liye Ma, et al., *An Empirical Analysis of the Impact of Pre-Release Movie Piracy on Box-Office Revenue* 26 (July 2014), available at [https://papers.ssrn.com/sol3/Data\\_Integrity\\_Notice.cfm?abid=1782924](https://papers.ssrn.com/sol3/Data_Integrity_Notice.cfm?abid=1782924).

<sup>49</sup> See Liye Ma, Alan Montgomery, Michael D. Smith, *The Dual Impact of Movie Piracy on Box-Office Revenue: Cannibalization and Promotion*, 2-3 (Feb. 2016), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2736946](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736946).

<sup>50</sup> See Michael D. Smith & Rahul Telang, *Assessing The Academic Literature Regarding the Impact of Media Piracy on Sales* (Aug. 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2132153](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132153).

<sup>51</sup> World Intellectual Property Organization, Advisory Committee on Enforcement, *Copyright Enforcement in the Digital Age: Empirical Economic Evidence and Conclusions* 2 (Aug. 2015), available at <http://www.mpaa.org/research-and-reports/>.



whatever the precise metric used, there can be no real dispute that the ease with which consumers can access infringing content online poses challenges for the maintenance of the value of those works.

In addition, the expense of combatting online copyright infringement siphons off resources that otherwise could be used to invest in new content and new distribution platforms. The members of the MPAA alone send millions of takedown notices a year, requiring them to spend significant resources on personnel and technology merely to locate infringing content and have it removed. And, for all of their efforts, the MPAA's members' content continues to be available on infringing websites.

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

As discussed above (and throughout these comments), the section 512 limitations on liability as Congress intended them to operate strike the correct balance between copyright owners and service providers with respect to the problem of combatting online infringement. As implemented by service providers and as interpreted by the courts, however, section 512 is not striking the proper balance. It is placing the disproportionate share of the burden on copyright owners, while shielding from liability even those service providers who knowingly profit from digital piracy, so long as they respond to takedown notices.

**Notice-and-Takedown Process**

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

The notice-and-takedown process is not working effectively to address online infringement. Opponents of vigorous enforcement of copyright online often point to the raw numbers of takedown notices that copyright owners send each year as evidence that the system is imbalanced in favor of copyright owners. That view is manifestly erroneous. If notice-and-takedown were effective at addressing online infringement, the amount of infringing material or activity online would go down over time. After all, if notice-and-takedown were a panacea for online infringement, the removal of millions upon millions of links and pieces of infringing content every month should lead to a reduction in the amount of infringing material online—and a corresponding decrease in the numbers of notices that copyright owners send over time. The facts, however, paint a very different picture of what is happening.

As discussed in detail above, the scope of online copyright infringement remains disturbingly high. Because of the vast scope of digital piracy, content owners are forced to send an extraordinary number of takedown notices. In the calendar year of 2015, the member studios sent notices with respect to more than 46.5 million URLs to hosting sites and 57.7 million URLs



to sites devoted to search.<sup>52</sup> Google received requests to remove links to more than 83 million URLs in March 2016.<sup>53</sup>

Even worse, content owners must send thousands of takedown notices to the same sites, regarding the same works because courts have held that service providers have no obligation to remove all copies of an identified work—only the copy located at the specific, identified URL. As a result, as one copy of a work is removed from the Internet, another appears in its place. Indeed, in some cases, content is never actually removed. Once a content owner identifies an infringing URL, that URL is taken down, but another URL linking to the same infringing work, on the same site, simultaneously replaces the original link.

Consider some recent experiences of MPAA members trying to deal with illegal digital copies of their new releases. Fox sent more than 33,000 takedown notices directed to illegal copies of the movie “The Wolverine” just to one cyberlocker, Rapidgator.net, from July 2013 to February of 2014. This was an average of 173 notices per day—to just one service provider, for a single film—over a period of nearly eight months. Similarly, Disney sent 34,970 takedown notices directed to illegal copies of the movie “Avengers: Age of Ultron” to the cyberlocker Uploaded.net in the three-month period between August 20, 2015 and November 20, 2015. Likewise, NBC Universal sent 58,246 takedown notices directed to illegal copies of the movie “Furious 7” to a single cyberlocker, share-online.biz, in the three-month period between September 15, 2015 and December 15, 2015. These and many other examples belie the notion that takedown notices are proliferating indiscriminately. The reality is that illegal copies—of the same copyrighted content, available through the same service providers—proliferate online with ease.

The inability of notice-and-takedown to combat online infringement effectively is the direct result of erroneous judicial interpretations of section 512’s provisions and the response of service providers to those decisions.

First, as demonstrated above, the current system is not effective at ensuring that infringing content that is taken down remains down.<sup>54</sup> Because judicial interpretations of the statute countenance (indeed incentivize) service providers responding only to specific notices for specific infringing copies, the same infringing copies proliferate or links to the same simply

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<sup>52</sup> The numbers reported here include takedown notices sent to sites that purport to operate inside and outside the United States. The total numbers are relevant because, given the nature of current-day content delivery networks and mechanisms, copyright owners cannot know for certain whether infringing files are located inside or outside the United States; in some cases, files comprising portions of the same content may be located in two different places. In addition, infringing sites employ technology to obfuscate their location. Despite all that, if and when foreign pirate sites are sued in the United States, they invariably attempt to avail themselves of the section 512 limitations on liability.

<sup>53</sup> Google Transparency Report (accessed Apr. 1, 2016), *available at* <https://www.google.com/transparencyreport/removals/copyright/>.

<sup>54</sup> 17 U.S.C. § 512(g).



move up in stacked lists of search results. We discuss these issues in greater detail in response to Question 10, *infra*.

Second, section 512's notice-and-takedown provisions have gone from being one means by which service providers might respond to infringing material and activity on their sites (as Congress intended) to the nearly exclusive way that service providers will take any action with respect to widespread infringing conduct occurring through their sites. We discuss these issues further in response to Question 19, *infra*.

Third, a number of courts have required copyright owners to specify in self-contained notices individual pairings of copyrighted works and specific URL information for infringing material or activity—rather than the “representative list” the statute on its face allows copyright owners to send.<sup>55</sup> This adds complexity and delay to the process of compiling takedown notices. This delay allows further proliferation of infringing content. We discuss these issues further in response to Question 14, *infra*.

Fourth, service providers who receive takedown notices are not consistently living up to their obligation to remove infringing material or activity “expeditiously.”<sup>56</sup> Every minute that a copyrighted work remains on the Internet, hundreds of copies can be made and posted elsewhere. It is therefore critical that, once a content owner has identified an infringing work, the service provider remove that content immediately. Some service providers have established systems that take down infringing works (or links to infringing works), within the same day. While the MPAA's members believe that the response time—particularly with automated systems—must be shorter, even this level of cooperation remains the exception. Many service providers take far longer. This is because courts have not indicated any particular concern with service providers' delays. In one case, for example, the court found that a service provider had acted expeditiously when it removed infringing content “a few days” after receiving a takedown notice.<sup>57</sup> In another, the court found that a service provider acted expeditiously because it removed infringing content within three and half *weeks*.<sup>58</sup> Waiting days or weeks to take action in response to a takedown notice is not acting “expeditiously” to remove infringing content.

**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 is incredibly burdensome on copyright owners. Copyright owners must invest millions of dollars and countless man hours in internal anti-piracy teams, outside vendors, and anti-piracy software, simply to maintain the current

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<sup>55</sup> 17 U.S.C. § 512(c)(3)(A)(ii).

<sup>56</sup> *Id.* § 512(c)(1)(A)(iii).

<sup>57</sup> *Io Grp., Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1150 (N.D. Cal. 2008).

<sup>58</sup> *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500, 535-36 (S.D.N.Y. 2013) *amended on reconsideration in part*, 972 F. Supp. 2d 537 (S.D.N.Y. 2013) (*Vimeo*).



“Whac-A-Mole” process. From March 2013 to February 2014, the members of the MPAA sent more than 22 million notices to sites devoted to search. In the calendar year of 2015, that number had grown to more than 57.7 million. The large number of takedown notices reflects the sheer amount of copyrighted content available on websites that thrive on copyright infringement, and the ease with which users can access that content.<sup>59</sup> Under the section 512 system as currently interpreted, content owners devote millions of dollars in resources to sending takedown notices, and service providers devote millions of dollars in resources to responding to them. This system is “efficient” in terms of copyright owners generating, and some service providers responding to, large numbers of takedown notices, but the system is not effectively addressing the problem of mass online infringement.

**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?**

The members of the MPAA are among the largest content owners in the world. To protect their rights, they must send millions of takedown notices each year, requiring a huge investment of resources. The MPAA’s members are able to spend significant resources dealing with online infringement. Many smaller entities and individuals, of course, do not have the resources to engage in comparable anti-piracy efforts, even on the comparatively smaller scale of one or a small number of works. Such smaller entities may not be able to afford to use technology to enable discovery of infringing content or to otherwise supplement manual efforts, or to hire the number of staff necessary to even begin to protect their rights.

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

The sheer magnitude of infringing content that is available online requires the MPAA’s members to utilize a mix of human review and automated software to identify content and generate takedown notices. It simply is infeasible for individuals to monitor large numbers of Internet sites and compile lists of URLs that number in the millions annually.

The MPAA’s members therefore must rely on computer software to assist in the search for infringing content and the preparation of takedown notices. The MPAA’s members’ use of such software is centered on “long-form” content—copies of entire movies and television shows accessible through video hosting and streaming services. With respect to “user-generated” content—e.g., videos that make use of all or significant portions of copyrighted works and that then are posted to UGC sites such as YouTube—the MPAA’s members rely on a combination of software for identification, informed by human input, to determine if the content is infringing.<sup>60</sup> Copyright owners’ reliance on automated technology, informed and supplemented by human

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<sup>59</sup> See Response to Question 4.

<sup>60</sup> See the discussion of the *Principles for User Generated Content Services* and YouTube’s Content ID system in response to Question 10.



review, is a reasonable response to the magnitude of infringing content available online. It must be noted that service providers similarly rely on automated processes to process and catalog the large volume of material they maintain. Automation in turn has been a key basis for the protections that service providers have obtained in judicial interpretations of section 512.<sup>61</sup>

Third-party vendors have developed sophisticated software that “crawls” the Internet for long-form infringing content. The MPAA’s members utilize what the software industry calls “business rules” to establish the type of content that the software will identify. Such rules can include, for example, the duration of the identified material or other markers that indicate the material copies all or large portions of the copyrighted work. The use of business rules and regular reviews of the software’s efficacy strengthen the reliability of such automated processes for identifying infringing content.

While automated review mechanisms, such as content recognition technology, are indispensable tools for combatting mass online infringement, such technology cannot find all infringing content. Unfortunately, those who profit from online infringement have the incentive and the means to develop and utilize software and other techniques to disguise infringing content and frustrate anti-piracy operations. This necessitates constant upgrading and modification of third-party vendors’ anti-piracy software, all of which increases the cost and limits the effectiveness of automated review. Copyright owners’ use of automated processes should not relieve service providers of their own obligations to deal with infringing content available on or through their services.

**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 as currently interpreted by the courts does little to address the reappearance of infringing material previously removed by a service provider in response to a takedown notice. In order for anti-piracy efforts to be effective, infringing content that is taken down must stay down.

Infringing content can be propagated rapidly online. It therefore is imperative that service providers respond to takedown notices expeditiously, in accordance with the condition to maintain eligibility for the sections 512(c) and (d) limitations on liability.<sup>62</sup> Judicial interpretations of these provisions, however, have afforded service providers considerable leeway in responding to takedown notices. As a result, copyright owners generally find that as soon as one infringing copy is removed or blocked, numerous additional copies have taken its place, often on the same website. Thus, Fox sent more than 57,000 takedown notices to Uploaded.net regarding the film “Kingsman: The Secret Service” between April 22, 2015 and July 21, 2015 alone. And the number of takedown notices that it sent per day did not decrease over time. On April 30, 2015, Fox sent 697 takedown notices; on July 21, 2015, Fox sent 881

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<sup>61</sup> See Response to Question 19.

<sup>62</sup> 17 U.S.C. § 512(c)(1)(A)(iii), (d)(1)(C).



takedown notices regarding the same work. The experience of the MPAA's members in this regard is not unique. Textbook publisher Reed Elsevier, for example, had one of its textbooks uploaded to the same website 571 times.<sup>63</sup>

The reappearance of infringing material as soon as it is removed poses huge burdens on copyright owners. For smaller owners, the phenomenon may well make the notice-and-takedown exercise cost prohibitive. One independent film maker, for example, had to send 56,000 takedown notices regarding her film, and that volume of notices did not result in the film's permanent removal.<sup>64</sup> For some content owners, the expense of combatting digital piracy may be so great that it no longer makes sense to create *any* content at all.

This problem is not unsolvable. First, if courts interpreted section 512's knowledge, representative list, and expeditious removal requirements as Congress intended, the notice-and-takedown process would be more effective. As discussed below, courts have construed service providers' obligations to combat copyright infringement exceedingly narrowly, essentially immunizing them from liability so long as they remove or block access to infringing content found at specific URLs identified by copyright owners in some amount of time. Even if the service provider knows that large parts of a website are devoted almost entirely to infringing material, the courts' prevailing interpretation of section 512 relieves those service providers of the obligation to act on that knowledge. And even if service providers know about specific infringing material located at a specific URL, many providers still believe they can wait for a period of several days (or more) before taking the infringing material down. If service providers had to respond to infringing activity that was apparent to them, or to take action in response to representative lists of infringing material (both of which the statute on its face requires)—and if service providers had to act right away on such knowledge—that would limit the number of users who could download and repost the infringing material.

Second, voluntary cooperation between content owners and service providers could go a long way to solving this problem. Indeed, some service providers are already implementing some version of a system intended to prevent infringing works that have been removed from being reposted. For example, a number of copyright owners (including MPAA members) and UGC services have signed on to the *Principles for User Generated Content Services* (“*UGC Principles*”). The *UGC Principles* set forth standards intended to combat infringing content and to allow for uploads of original user-generated content. The *UGC Principles* call for UGC services to implement “effective content identification technology,” whereby content owners provide “reference data” for content that service providers then use to identify user-uploaded audio and video content matching that data; once a match is identified, the content owner specifies how matches should be treated, including in some cases the blocking of matched content.<sup>65</sup> YouTube, which did not sign on to the *UGC Principles*, uses a Content ID system that

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<sup>63</sup> Stephen Carlisle, *DMCA “Takedown” Notices: Why “Takedown” Should Become “Take Down and Stay Down” and Why It’s Good for Everyone* (July 23, 2014), available at <http://copyright.nova.edu/dmca-takedown-notices/>.

<sup>64</sup> *Id.*

<sup>65</sup> *UGC Principles*, available at <http://www.ugcprinciples.com/>.



is very similar to those described in the *UGC Principles*. YouTube’s system scans videos uploaded to YouTube against a database of files submitted to YouTube by rightsholders.<sup>66</sup> If there is a match, content owners are given several options, including muting the audio, blocking the entire video, monetizing the video by running advertisements, or tracking the video’s viewership statistics. YouTube has discretion over granting content owners access to the system.

These content identification systems are not perfect—would-be infringers are continually coming up with new ways to circumvent filtering technologies. The *UGC Principles* seek to address this problem by obligating services providers to “enhance or update” their information technology as commercially reasonable; and by requiring content owners and service providers to cooperate to test new content identification technologies, “informed by advances in technology, the incorporation of new features, variations in patterns of infringing conduct, changes in users’ online activities and other appropriate circumstances.”<sup>67</sup> The members of the MPAA welcome the opportunity to continue to work with service providers to develop best practices to ensure that once infringing content is taken down, it stays down.

Third, as discussed below in response to Question 25, there are a number of fingerprinting and filtering technologies that could be considered standard technical measures and that could help ensure that infringing content that is taken down stays down.

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

As discussed above,<sup>68</sup> copyright owners are currently using various technologies focused on long-form infringing content to facilitate the notice-and-takedown process, and they continue to refine and improve those technologies.

Technologies that make it easier to send or respond to takedown notices, however, are only part of the solution. As discussed above, the DMCA’s goal is to encourage copyright owners and service providers to work together to combat copyright infringement, not to create a process for notices and takedowns for their own sake. Our benchmark for success is combatting piracy more systematically, reducing the number of notices we need to send—not making the notice-and-takedown regime better.

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

Section 512 includes detailed procedures for counter-notices and the “put-back” of material in response to such counter-notices. The statutory procedures properly balance the

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<sup>66</sup> YouTube, *How Content ID Works*, (accessed Apr. 1, 2016) available at <https://support.google.com/youtube/answer/2797370?hl=en>.

<sup>67</sup> *UGC Principles*, available at <http://www.ugcprinciples.com/>.

<sup>68</sup> See Response to Questions 9 and 10.



concerns of Internet posters who genuinely believe their material does not infringe with the overwhelming need of copyright owners to obtain expeditious relief in response to millions upon millions of pieces of indisputably infringing content available through service providers. These procedures, as well as the provision in section 512(f) providing a damages remedy for takedown notices that are sent in bad faith, are more than sufficient to protect against fraudulent, abusive, or unfounded notices.

If a party whose material is removed pursuant to a notice believes that it was a mistake for the service provider to remove the material, the statute provides a ready mechanism for the user to commence a process for reposting the material.<sup>69</sup> Under the statutory “put-back” procedure, the service provider must notify the copyright owner of the counter-notice, and must then replace the content and/or cease disabling access to the material not less than 10 and not more than 14 days after receiving the counter-notice—unless the copyright owner has informed the service provider that it has filed a lawsuit.<sup>70</sup>

The counter-notice and put-back procedures are not onerous. There is no evidence that these procedures are inadequate to deal with the concerns of people who post content who believe that their material does not infringe copyright. While the statutory procedures contemplate that material that is the subject of both a takedown notice and a counter-notice may be offline or inaccessible for as much as a few weeks, that temporary unavailability is part of a reasonable process that allows the copyright owner to review the counter-notice and decide whether to file an infringement action. In creating the notice-and-takedown procedures, Congress considered the balance of hardships on the content owners having unauthorized copies of their works online for millions of people to distribute versus individuals’ right to post works that are not infringing. Congress determined that content owners should be able to send notices relatively easily given the greater risk to their interests—and that allowing the user to repost the work after a short time out was a suitable solution to any improper notices.

To the extent that a takedown notice is sent in bad faith, section 512(f) provides an adequate remedy. Section 512(f) provides that a person who “knowingly materially misrepresents . . . that material or activity is infringing . . . shall be liable for any damages, including costs and attorneys’ fees, incurred by the alleged infringer . . . or by a service provider, who is injured by such misrepresentation.” Section 512(f) thus provides a remedy for those cases in which a takedown notice is the result of a knowing misrepresentation that material is infringing.<sup>71</sup>

There is no evidence of a widespread problem of fraudulent, abusive or unfounded takedown notices. In the FAQ of its transparency report, for example, Google lists *seven*

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<sup>69</sup> 17 U.S.C. § 512(g).

<sup>70</sup> *Id.*

<sup>71</sup> *Rossi v. Motion Picture Ass’n of Am.*, 391 F.3d 1000, 1004-05 (9th Cir. 2004).



examples of invalid requests.<sup>72</sup> The same document states that Google complied with 97 percent of takedown requests received between July and December 2011.<sup>73</sup> The Electronic Frontier Foundation (“EFF”) has a “takedown hall of shame” devoted to showcasing bogus takedown notices. But that list has only 33 entries.<sup>74</sup> These numbers are miniscule in absolute terms, and they pale in comparison to the number of takedown notices of indisputably infringing content. Over the six-month period from March to August 2013, MPAA members sent notices for almost 12 million links to search engines and more than 13 million links directly to site operators. During that time, members received only *eight* counter-notices, or .00003 percent of the takedown notices sent.<sup>75</sup> In calendar year 2015, MPAA members sent notices pertaining to more than 104.2 million links to websites devoted to search and content-hosting.<sup>76</sup> During the same time period, MPAA members received fewer than 210 counter-notices.<sup>77</sup> Although anecdotes about supposedly abusive takedown notices often receive significant press coverage, the problem of abusive or incorrect notices is tiny, particularly when compared to the scope of the problem of online copyright infringement.

We are aware that just a few days before the due date for filing these comments, Professor Jennifer Urban and others released a study purporting to find more than an insignificant number of takedown notices were of “questionable” validity.<sup>78</sup> We have not yet had the chance to fully review the report and the data set has not yet been released. Our experience and the paucity of counter-notices suggest this number is vastly inflated. At a minimum, the study appears to rely almost entirely on notices sent to Google—which funded the study—relating to Google’s Web and Image Search services. Notices to these two services are

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<sup>72</sup> Google Transparency Report (accessed Apr. 1, 2016), *available at* [https://www.google.com/transparencyreport/removals/copyright/faq/#abusive\\_copyright\\_requests](https://www.google.com/transparencyreport/removals/copyright/faq/#abusive_copyright_requests).

<sup>73</sup> *Id.*

<sup>74</sup> EFF, *Takedown Hall of Shame* (accessed Apr. 1, 2016), *available at* <https://www.eff.org/takedowns>.

<sup>75</sup> See Bruce Boyden, *The Failure of the DMCA Notice and Takedown System: A Twentieth Century Solution to a Twenty-First Century Problem* 3 (Dec. 2013), *available at* <http://cpip.gmu.edu/wp-content/uploads/2013/08/Bruce-Boyden-The-Failure-of-the-DMCA-Notice-and-Takedown-System1.pdf>.

<sup>76</sup> This number does not include MPAA members’ use of YouTube’s Content ID system, which allows for a variety of responses to “matched” content, including blocking matches to copyrighted content; it also does not include the members’ use of analogous matching technology. See Response to Question 10.

<sup>77</sup> The number in this sentence includes counter-notifications sent to YouTube as part of YouTube’s DMCA notice-and-takedown system, but does not include user challenges pursuant to YouTube’s Content ID agreements with individual content owners.

<sup>78</sup> Jennifer M. Urban, Joe Karaganis, Brianna L. Schofield, *Notice and Takedown in Everyday Practice* (Mar. 29, 2016).



not representative of the overall universe of takedown notices. We look forward to responding more fully to this study in the future, including in any Reply comments, if permitted.

**13. Has section 512(d), which addresses “information location tools,” been a useful mechanism to address infringement that occurs as a result of a service provider’s referring or linking to infringing content? If not, what should be done to address this concern?**

Search engines are a primary means by which users locate and gain access to sites with infringing content. Overall, search engines influenced 20 percent of the sessions in which consumers accessed infringing television or film content from 2010 to 2012; consumers who access infringing content online for the first time are more than twice as likely as repeat infringers to use a search engine to find infringing content.<sup>79</sup> According to one study, the majority of searches that lead to infringing content do not contain keywords “that indicate specific intent to view content illegally,” but instead contain “generic or title-specific keywords only.”<sup>80</sup> Accordingly, it is crucial that links to infringing websites be removed from search results.

As currently interpreted,<sup>81</sup> however, section 512(d) has been of limited use in addressing the role of search engines in helping consumers locate infringing material. Giving notice to a search engine on a URL-by-URL basis is always burdensome, and often futile for much the same reason that this process is ineffective against unauthorized sites—new instances of infringement simply replace the old ones. For example, a search on Google for “watch *Frozen* online free” yielded 11 infringing results on the first page, as well as a message from Google that it had already removed 26 results in response to DMCA complaints.<sup>82</sup> When a search engine removes one infringing URL, another is simply rotated into its place. Thus, the current notice-and-takedown regime results in a repetitious cycle: Content owners send a takedown notice to a search engine. The search engine removes the specified URL. Another link is immediately substituted for the removed link. The search engine then indexes the same site to create a new set of links, including the new link to the content owner’s copyrighted work, prompting the copyright owner to send yet another takedown notice. In the end, despite the fact that copyright owners send millions of takedown notices—and search engines respond to those notices—*infringing copies continue to be easily located through Internet searches.*

Section 512(d) could be quite useful, however, if properly construed to allow copyright owners to give notice about an infringing *website*, rather than a specific URL. Section 512(d)

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<sup>79</sup> See MilwardBrown Digital, *Understanding the Role of Search in Online Piracy 2* (accessed Apr. 1, 2016), available at [https://copyrightalliance.org/content/understanding\\_role\\_search\\_online\\_piracy](https://copyrightalliance.org/content/understanding_role_search_online_piracy).

<sup>80</sup> *Id.*

<sup>81</sup> For a discussion of courts’ current interpretation, see Response to Question 14.

<sup>82</sup> See <https://www.google.com/search?q=watch+frozen+online+free&ie=utf-8&oe=utf-8> (accessed Mar. 30, 2016).



provides that the “material that is claimed to be infringing or to be the subject of infringing activity” means “the *reference or link*, to *material or activity* claimed to be infringing . . . and information reasonably sufficient to permit the service provider to locate that reference or link.”<sup>83</sup> The statute on its face does not require the copyright owner to reference a specific file; the statute discussed “activity” claimed to be infringing. There is therefore no reason to conclude that Congress intended its reach to be limited to specific URLs.

The legislative history similarly refers to the “wrongful activity that is occurring *at the location* to which the link or reference refers, without regard to whether copyright infringement is technically deemed to occur at that location or at the location where the material is received.”<sup>84</sup> Thus, the notice need not, as courts have largely required, identify the specific link containing an infringing file, but merely an online *location* where infringing activity is occurring. If interpreted as written, section 512(d) could be a valuable tool for combatting online piracy.

**14. Have courts properly interpreted the meaning of “representative list” under section 512(c)(3)(A)(ii)? If not, what should be done to address this concern?**

The judicial trend in the interpretation of “representative list” under section 512(c)(3)(A)(ii) is moving in a direction counter to congressional intent. One court, writing relatively close in time to Congress’s enactment of the DMCA, correctly construed “representative list” in accordance with Congress’s intent.<sup>85</sup> More recent decisions, however, have moved away from the congressional understanding.

Section 512(c)(3)(A)(ii) provides that a notification of claimed infringement is effective if it includes “[i]dentification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, *a representative list of such works at that site.*”<sup>86</sup> The legislative history makes clear that this provision was intended to clarify that “it is not necessary for a compliant notification to list every musical composition or sound recording that has been or could be infringed at that site, so long as a *representative list* of those compositions or recordings is provided so that the service provider can understand the nature and scope of the infringement being claimed.”<sup>87</sup>

Section 512(c)(3)(A)(ii)’s requirement that copyright owners submit a “representative list” of infringing works to service providers is one of the key ways that Congress envisioned a system of shared responsibility between copyright holders and service providers: copyright holders must provide service providers with a representative list of infringing works that includes information reasonably sufficient to allow the service provider to locate the infringing material, and the service provider must locate and remove the infringing content. The text acknowledges a

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<sup>83</sup> 17 U.S.C. § 512(d)(3) (emphasis added).

<sup>84</sup> S. Rep. No. 105-190, at 47 (1998).

<sup>85</sup> See *ALS Scan, Inc. v. RemarQ Cmtys., Inc.*, 239 F.3d 619, 622-25 (4th Cir. 2001).

<sup>86</sup> 17 U.S.C. § 512(c)(3)(A)(ii) (emphasis added).

<sup>87</sup> S. Rep. No. 105-190, at 46 (1998).



critical distinction. Where an online site has a single work claimed to be infringed, the copyright owner can send a notice identifying that single work. Where, however, an online site has multiple copyrighted works claimed to be infringed, a copyright owner need only send a “representative list of such works at that site,” and the burden is on the service provider to remove all instances of the infringing works.

One federal appellate court decision has understood and meaningfully applied the balance of competing considerations struck in section 512(c)(3)(A)(ii). In *ALS Scan, Inc. v. RemarQ Communities, Inc.*,<sup>88</sup> a company that creates and markets photographs sued an internet service provider for copyright infringement. The service provider argued that it “did not ‘have knowledge of the infringing activity as a matter of law’” because the content owner “failed to identify the infringing works” in compliance with the DMCA.<sup>89</sup> The content owner responded by noting that the two websites in question were created solely for the purpose of publishing and exchanging the owner’s photographs, and that by directing the service provider to those websites, it had presented it with a “representative list.”<sup>90</sup> The Fourth Circuit agreed, finding that the “subsection specifying the requirements of a notification does not seek to burden copyright holders with the responsibility of identifying every infringing work—or even most of them—when multiple copyrights are involved.”<sup>91</sup>

Thus, the court found that it was sufficient to provide the service provider with information that identified two websites created for the sole purpose of publishing infringing works, where virtually all of the images at the two sites were infringing, and refer the service provider to a website where it could find pictures of the copyright material and obtain the copyright information.<sup>92</sup> That approach is the correct one—where a website is overwhelmingly dominated by infringement, a copyright owner should not have to identify each individual infringing URL on that website to protect itself.

Nonetheless, some courts have interpreted 512(c) to require exactly the *comprehensive* list that the “*representative*” list provision was intended to avoid by requiring copyright holders to list the name of every work claimed to be infringed and *the specific URL* where the work resides. In *Capitol Records, Inc. v. MP3tunes, LLC*,<sup>93</sup> for example, EMI submitted takedown notices listing infringing song titles and web addresses to MP3tunes, LLC. MP3tunes removed links to the specific web addresses listed, but otherwise refused to remove identical copies of the recordings found at different file addresses within the MP3tunes service. Although the court properly recognized that under section 512(c)(3)(ii)(A), a DMCA notice must only provide “a

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<sup>88</sup> 239 F.3d at 622-25.

<sup>89</sup> *Id.* at 622.

<sup>90</sup> *Id.* at 625.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> 821 F. Supp. 2d 627, 643 (S.D.N.Y. 2011).



representative list, if multiple works on a single site are subject to the same notice,”<sup>94</sup> it then continued to hold that even if the content owner’s representative list “properly identified” the copyrighted works at issue, it still had to provide “web addresses” to require MP3tunes to locate and remove the infringing material under section 512(c)(3).<sup>95</sup> Similarly, in *Perfect 10, Inc. v. Giganews, Inc.*,<sup>96</sup> the court concluded that a takedown notice pointing to the results of a search on a specific date and including thumbnail images of infringing material was insufficient to identify the infringing material; instead, the content owner was required to list the infringing material’s “Message-ID,” which was akin to a URL.<sup>97</sup>

Such decisions have relied in part upon the fact that although section 512(c)(3)(A)(ii) states that copyright owners may provide “a representative list” of the works “claimed to have been infringed,” section 512(c)(3)(A)(iii) requires that the identification of the infringing material that is to be removed must be accompanied by “information reasonably sufficient to permit the service provider to locate the material.”<sup>98</sup> Section 512(c)(3)(A)(iii), however, does not require URL-specific notifications for each infringing work. As the legislative history makes clear, URLs are just one “example of such sufficient information”—they are not the only type of information that may suffice under particular circumstances.<sup>99</sup> In the context of sites that are dominated by infringement, as was the case in *ALS Scan* and as is presently the case with many “cyberlocker” services, notice of a “single online site”—e.g., a website domain or a particular section thereof—coupled with a representative list of infringed works, is more than reasonably sufficient to notify the provider of the location of the infringing material, without the need for title-by-title and accompanying URL-by-URL based notifications. Indeed, demanding such a notice approach, i.e., one work at one specific URL, would effectively nullify the possibility that multiple works—and a “representative list”—exist at any particular online location, rendering the “representative list” language of the statute superfluous.

**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.**

The MPAA and its members are participating in several inter-industry initiatives that exist in addition to the section 512 procedures. These cooperative processes are the kinds of collaborative efforts intended to be promoted by section 512 and are making progress in

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<sup>94</sup> *Id.* at 642.

<sup>95</sup> *Id.* at 643.

<sup>96</sup> 993 F. Supp. 2d 1192, 1200-01 (C.D. Cal. 2014).

<sup>97</sup> *Id.* at 1201.

<sup>98</sup> 17 U.S.C. § 512(c)(3)(A)(iii).

<sup>99</sup> See H.R. Rep. No. 105-551 (II), at 55 (1998); S. Rep. No. 105-190, at 46 (1998).



combatting online infringement. More progress, however, is needed, particularly with respect to domain name registrars and registries, search engines, and data storage services.

### Copyright Alert System

The Center for Copyright Information (“CCI”) is a partnership between the motion picture and recorded music industries on the one hand and the five largest internet service providers on the other. It is one of the most comprehensive efforts by content owners and technology companies to work together to combat piracy. A centerpiece of CCI is the Copyright Alert System, which was first launched in February 2013. The Copyright Alert System is intended to educate those who use P2P networks to upload and download infringing content about the fact that their activity is illegal, the harms caused by online infringement, the value of copyright protection and its role in encouraging content creation, and online locations where users can find content legally.

The Copyright Alert System works by monitoring publicly available data regarding traffic on P2P networks and notifying a participating ISP when infringement is suspected on its network. The ISP then sends a series of graduated notices to the subscriber—without revealing his or her identity to the copyright holder—to discourage the subscriber from continuing to participate in infringing activities. A subscriber who repeatedly engages in copyright infringement may receive up to six alerts, which increase in severity.

Now in its third year, the Copyright Alert System is making an impact. In a report published on May 28, 2014, CCI revealed that 1.3 million alerts were sent out in the System’s first 10 months, while only 265 challenges were filed as part of the System’s independent review process.<sup>100</sup> Of those challenges, not one was found to involve an invalid notice.<sup>101</sup> Fewer than 3 percent of alerts were sent in the final, mitigation stage.<sup>102</sup> The MPAA and other members of CCI continue to work to improve the Copyright Alert System.

### Payment Processors

As noted above, websites devoted to online copyright infringement are highly lucrative, often bringing in significant advertising and subscription revenue. Through extensive outreach, the MPAA has successfully developed voluntary programs with PayPal, Visa, and MasterCard to help prevent such payment systems and networks from being used to support cyberlockers dedicated to illegally distributing copyright-protected digital content. These payment processors have developed new high risk merchant category rules and other best practices that identify the red flags indicative of unlawful cyberlocker activity. They have in turn required their payment network acquirers to use these red flags to conduct enhanced due diligence review of their

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<sup>100</sup> Copyright Information Center, *The Copyright Alert System: Phase I and Beyond* 1, 2, 8 (May 28, 2014), available at <http://www.copyrightinformation.org/resources-faq/>.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*



merchant cyberlockers and prevent unlawful activity from entering their payment systems. While illicit cyberlockers have undertaken numerous tactics to circumvent the application of these rules, such as using “reseller” websites to help process their payments, PayPal, Visa and MasterCard have all continued to cooperate in good faith with the MPAA to address these developments and try to prevent cyberlockers substantially devoted to copyright infringement from making use of their payment systems.

### Trustworthy Accountability Group

The Trustworthy Accountability Group (“TAG”) is a collaboration between MPAA members and other copyright holders and several major advertising associations and agencies, including the Association of National Advertisers, the American Association of Advertising Agencies, and the Internet Advertising Bureau, to further stem the flow of revenue to content theft sites by cutting off advertising dollars. TAG’s Brand Integrity Program Against Piracy helps advertisers and ad agencies avoid inadvertently placing their advertisements on websites peddling pirated content by helping advertisers and ad agencies identify such websites.<sup>103</sup>

### UGC Principles

As discussed above,<sup>104</sup> several content owners and UGC services have signed on to a series of principles intended to promote the creation and dissemination of original and authorized content, while also combatting online piracy. Among those principles is an agreement to adopt effective and commercially reasonable technological measures to prevent infringing uploads to UGC sites in the first instance and to ensure that content that is taken down stays down.

### Areas Where Collaboration Is Urgently Needed

Despite the promise of the partnerships identified above, there are still a number of areas where more inter-industry cooperation is needed. One area involves domain names utilized by websites that are notorious havens for piracy. Internet users can and do find infringing content through websites operated under domain names that gain a reputation for offering pirated content. A notorious example of this is The Pirate Bay, which operates at [www.thepiratebay.se](http://www.thepiratebay.se), and which provides a massive online index to BitTorrent files and P2P infringing files.

Under the terms of their accreditation agreements with ICANN, most domain name registrars and registries are required to include terms of service that forbid the direct or indirect use of domain names for illegal purposes, including infringement. But those provisions are almost never enforced, and reports of rampant copyright infringement committed and/or facilitated by websites associated with such domain names go largely unaddressed. Furthermore, ICANN appears unwilling to enforce the terms of those agreements to ensure that registrars and registries investigate and respond appropriately to complaints of abuse. Registrars and registries

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<sup>103</sup> TAG, *Fight Internet Piracy*, available at <https://www.tagtoday.net/piracy/>.

<sup>104</sup> See Response to Question 10.



must therefore work with content owners to put policies and systems in place to prevent domain names from being used as vehicles for copyright infringement.

A recent promising example of such collaboration is the conclusion of a “trusted notifier” arrangement between the MPAA and Donuts, one of the largest domain name registries and the registry of by far the largest number of new generic Top Level Domain Names (at just under 200 new gTLDs). Under the terms of the agreement, which is purely voluntary, the MPAA and Donuts have agreed on a process to address complaints about websites operated under Donuts-administered domain names that are engaged in clear and pervasive copyright infringement. The agreement imposes strict standards for such referrals, including that they be accompanied by clear evidence of pervasive copyright infringement and a representation that the MPAA has first attempted to contact the registrar and hosting provider for resolution. The agreement specifies that Donuts will work with registrar partners to contact the website operator and seek additional evidence. If Donuts or its registrar partner determines that the website is engaged in illegal activity and thereby violates Donuts’s Acceptable Use and Anti-Abuse Policy, then they, in their discretion, may act within their already established authority to put the infringing domain on hold or suspend it.

An additional area involving domain names where there is more work to be done is the publicly accessible Whois database of contact information on domain name registrants. The Whois database is an essential investigative tool for identifying online pirates and taking enforcement action against them. Effective enforcement has been plagued by problems, including, notably, the rise of proxy registration services. Such services have effectively hidden the needed contact details for a quarter or more of all registrations in the generic Top Level domains. The ICANN Board—steward of Whois for the past 15 years—currently has before it a proposal to bring greater transparency and predictability to the proxy registration marketplace. The proposal would establish minimum standards proxy services must follow to maintain accurate contact records for their customers and to reveal that data in response to well-documented complaints that the domain name corresponding to the proxy registration has been used for clearly infringing activities. Approval and effective implementation of this proposal will help the MPAA’s members and other right holders to recover Whois as a key part of their toolkit for addressing pervasive online piracy sites. Further steps are needed to improve the accuracy and accessibility of Whois data, especially in light of ICANN’s current effort to replace the technologically outmoded Whois protocol and service with a new system for collecting and disclosing contact information for gTLD domain name registrants.

Another area where cooperation is lagging concerns Internet search engines. As discussed, search engines are one of the primary tools that users—including, in particular, users making their initial searches for content—find and access infringing content. Some search engines have undertaken programs that they say are intended to prevent links to infringing content from appearing in the first page of results that the search engine returns. While encouraging, this limited cooperation by search engines is not nearly sufficient to remedy the problem of search engines facilitating user access to infringing content. For example, among other deficiencies, many search engines still have auto-complete functions that lead users to infringing content (e.g., suggesting the addition of “for free” to searches asking “where can I find [name of movie]”) or feature infringing links on the first page of their search results. Search engines should therefore work with content owners to implement (1) *effective demotion* of search



results linking to infringing sites, and *promotion* of websites where content is available legally; (2) delisting of websites found through judicial proceedings to be liable for large-scale infringement; and (3) modifications to “auto-complete” search functionality, so that the search engine does not generate queries leading users to infringing websites.

A third area where more cooperation is needed is with respect to data storage services, such as hosting services, and companies providing content delivery networks and distributed domain name system (“DNS”) services. Despite their obligations under section 512 to respond to complaints from copyright owners, companies providing these services often refuse to comply with proper requests and/or make it difficult for copyright owners to enforce their rights.

## Counter-Notifications

### **16. How effective is the counter-notification process for addressing false and mistaken assertions of infringement?**

The counter-notification process is effective and works as intended. Congress intended for section 512 to “balance *the need for rapid response to potential infringement* with the end-users legitimate interests in not having material removed without recourse.”<sup>105</sup> Congress recognized that parties whose material or activity was removed or access to it blocked might believe that their use was not infringing, and that the material should be restored. To that end, Congress created statutory counter-notification and “put back” procedures to protect “third parties’ interests in ensuring that material not be taken down.”<sup>106</sup> As discussed above, the statute provides that persons whose material is removed may send a counter-notification if they believe that the removal was made in error.<sup>107</sup> The counter-notification then starts a statutory clock (of no more than 14 days) within which the copyright owner must evaluate the claimed error and either file an infringement action or see the content reposted.<sup>108</sup>

The “notification and counter-notification requirements” are an “attempt to balance the duties of service providers, the rights of copyright owners and the rights of other users,”<sup>109</sup> and they do exactly that. The number of counter-notifications sent is extremely small in absolute terms and particularly when compared with the number of takedown notices sent. It is clear that the overwhelming number of takedown notices sent are legitimate and directed at indisputable infringement. There is no evidence that takedown notices are removing access to large quantities of non-infringing content or that the counter-notification and put-back procedures are inadequate to address errors in the takedown process.

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<sup>105</sup> S. Rep. No. 105-190, at 21 (1998) (emphasis added).

<sup>106</sup> H.R. Rep. No. 105-551 (II) at 59 (1998).

<sup>107</sup> 17 U.S.C. § 512(g)(3).

<sup>108</sup> *Id.* § 512(g)(2)(c); *see also Ouellette v. Viacom*, No. CV 10-133-M-DMW-JCL, 2011 WL 1882780, at \*6 (D. Mont. Mar. 31, 2011).

<sup>109</sup> *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1179 (C.D. Cal. 2002).



**17. How efficient or burdensome is the counter-notification process for users and service providers? Is it a workable solution over the long run?**

There is no evidence that the counter-notification process is burdensome for service providers. As noted above, the members of the MPAA sent takedown notices to hosting and search websites with respect to more than 104.2 million infringing links in 2015, but received fewer than 210 counter-notices. Similarly, during a six-month period in 2013 during which the MPAA sent takedown notices with respect to approximately 25 million infringing links, the MPAA received only eight counter-notices.<sup>110</sup>

There also is no evidence that the counter-notification procedure is burdensome for users. Filing a counter-notification is a straightforward process. Upon removing or blocking infringing material, the service provider must “take[] reasonable steps” to notify the subscriber that it has removed or blocked the material, at which point the subscriber may send a counter-notification to the service provider’s designated agent that includes: (1) the subscriber’s signature; (2) an identification of the material that was removed and the location at which it appeared; (3) a statement under penalty of perjury that the subscriber has a good faith belief that the material was removed as a result of mistake or misidentification; and (4) the subscribers’ name, address, and telephone number and a statement that the subscriber consents to the jurisdiction of the relevant federal district court.<sup>111</sup> Providing the required information is not onerous. A number of services (including Google) provide online forms that users can fill in to complete the process. While the format of the counter-notice is similar to that of the original notice, the burden of complying with it is actually far less than the original notice because users do not need to undertake a search for infringing content in order to generate the notice.

Within 10 to 14 days of receiving the notification, the service provider must replace the removed material unless it receives notice from the person that sent the takedown notice that a lawsuit has been filed.<sup>112</sup>

The counter-notice procedure appears to be very workable for the long run, with the caveat that the notice-and-takedown regime itself is not a sustainable long term solution to piracy online.

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<sup>110</sup> See Bruce Boyden, *The Failure of the DMCA Notice and Takedown System: A Twentieth Century Solution to a Twenty-First Century Problem* 3 (Dec. 2013), available at <http://cpip.gmu.edu/wp-content/uploads/2013/08/Bruce-Boyden-The-Failure-of-the-DMCA-Notice-and-Takedown-System1.pdf>; see also Response to Question 12.

<sup>111</sup> 17 U.S.C. § 512(g)(2)-(3).

<sup>112</sup> *Id.* § 512(g)(2)(C).



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

Given the relatively small number of counter-notifications filed in general, the process does not appear to impose any significant burdens on persons and entities that send or receive counter-notifications, regardless of size.

**Legal Standards**

**19. Assess courts' interpretations of the "actual" and "red flag" knowledge standards under the section 512 safe harbors, including the role of "willful blindness" and section 512(m)(1) (limiting the duty of a service provider to monitor for infringing activity) in such analyses. How are judicial interpretations impacting the effectiveness of section 512?**

The currently prevailing Circuit Court interpretations of "actual" and "red flag" knowledge misread the statutory provisions, undermine Congress's objective for a system of shared responsibility, encourage willful blindness, and are primarily responsible for the ineffectiveness of the section 512 system today.

The actual and red flag knowledge provisions are a cornerstone of the DMCA's system for combatting infringement on the Internet. Pursuant to those provisions, service providers, in order to be eligible for the section 512 (c) and (d) limitations on liability, *must* "act[] expeditiously to remove, or disable access to," infringing material as soon as they "have actual knowledge that the material or an activity using the material on the system or network is infringing" *or* "in the absence of such actual knowledge, [are] . . . aware of facts or circumstances from which infringing activity is apparent."<sup>113</sup> These requirements—triggered upon actual or red flag knowledge—are in addition to and different from the obligations that service providers have to remove infringing material expeditiously in response to takedown notices.<sup>114</sup> The actual and red flag knowledge standards directly further Congress's goal that "[t]he DMCA's protection of an innocent service provider disappear at the moment the service provider loses its innocence"—they mark critical points at which "the Act shifts responsibility to the service provider to disable the infringing matter."<sup>115</sup>

The Second and Ninth Circuits' decisions in, respectively, *Viacom v. YouTube*<sup>116</sup> and *UMG v. Shelter Capital Partners*,<sup>117</sup> sap the actual and red flag knowledge standards of meaning and force, and threaten largely to limit the mental-state provisions of section 512(c)(1) to a

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<sup>113</sup> 17 U.S.C. §§ 512(c)(1)(A)(i)-(iii), 512(d)(1)(A), (B).

<sup>114</sup> *Id.* § 512(c)(1)(C).

<sup>115</sup> *ALS Scan*, 239 F.3d at 625.

<sup>116</sup> *Viacom*, 676 F.3d at 31.

<sup>117</sup> *Shelter Capital Partners*, 718 F.3d 1006.



notice-and-takedown system. The courts effected this change by holding that *both* the actual and red flag knowledge standards are triggered only upon “knowledge or awareness of specific infringing activity,” which the courts construed to mean knowledge or awareness of “specific and identifiable instances of infringement.”<sup>118</sup> The copyright owners in both cases had argued that such a limited construction rendered the red flag knowledge provision superfluous, since any service provider that (in the words of § 512(c)(1)(A)(iii)) has “awareness” of specific and identifiable instances of infringement also will have (in the words of § 512(c)(1)(A)(i)) “actual knowledge” of the same specific instance of infringement. The courts, however, stated the difference between the two knowledge standards as one between “subjective” and “objective” knowledge—the former being actual knowledge and the latter being “subjective[] aware[ness] of facts that would have made the specific infringement ‘objectively’ obvious to a reasonable person.”<sup>119</sup>

Based on their interpretations of the red flag knowledge standard, the Second and Ninth Circuits (and courts in those Circuits) held that evidence that a service provider knew its site was being used for rampant infringing activity triggered no obligation to act except where the service provider was provided with actual knowledge of specific infringing content at specific individual locations (URLs)—i.e., the type of knowledge provided in a takedown notice.<sup>120</sup> Thus, in *Viacom v. YouTube*, the court found insufficient to show red flag knowledge YouTube’s awareness that “75-80% of all YouTube streams contained copyrighted material”; that at least half of YouTube’s content was unauthorized “premium copyrighted content”; and that the

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<sup>118</sup> *Viacom*, 676 F.3d at 30-32; *see also Shelter Capital Partners*, 718 F.3d at 1023.

<sup>119</sup> *Viacom*, 676 F.3d at 31; *see also Shelter Capital Partners*, 718 F.3d at 1025.

<sup>120</sup> Even before *Shelter Capital Partners*, the Ninth Circuit and courts in that Circuit were interpreting the red flag knowledge provision in a way that shielded service providers who were aware of willful, blatant, and commercial infringing activity. In *Corbis Corp. v. Amazon.com, Inc.*, for example, a federal district court noted that copyright owners could satisfy the red flag knowledge provision by showing that an online location making their content available was “clearly a pirate site”; that court nevertheless held that third-party notices of copyright infringement did not create that knowledge so long as the service provider “promptly cancel[led] a listing after receiving a notice of infringement.” 351 F. Supp. 2d 1090, 1108-1109 (W.D. Wash. 2004) *overruled on other grounds by Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612 (9th Cir. 2010) (*Corbis*) (emphasis added). The court further held that notice of multiple infringing listings on a site selling unauthorized photographs, *even if those notices caused the service provider to visit that site*, was not sufficient to constitute a red flag. *Id.* at 1109.

Similarly, in *Perfect 10, Inc. v. CCBill LLC*, the Ninth Circuit held that the fact that websites had names that blatantly signaled copyright infringement—including “illegal.net” and “stolencelebritypics.com”—was not sufficient to constitute a red flag. 488 F.3d 1102, 1114 (9th Cir. 2007) (*CCBill*). The legislative history, in contrast, explained that a service provider would have red flag knowledge where a site was a “pirate site,” such as sites that “use words such as ‘pirate,’ ‘bootleg,’ or slang terms in their URL and header information to make their illegal purpose obvious.” H.R. Rep. No. 105-551 (II), at 58 (1998).



YouTube defendants were not just generally aware of, “but *welcomed*, copyright-infringing material being placed on their website.”<sup>121</sup> Likewise, in *UMG v. Shelter Capital Partners*, the Ninth Circuit found insufficient to establish red flag knowledge evidence that the service provider, Veoh, knew of reports that it was a “haven for pirated content,” and that Veoh’s own CEO acknowledged his site hosted “a wide range of unauthorized and full-length copies of popular programs.”<sup>122</sup> In both cases, the courts were clear that only evidence showing that the defendants knew of specific instances of infringement would suffice to meet the actual or red flag knowledge standard, along with the corresponding duty to act. In the wake of *Viacom v. YouTube* and *UMG v. Shelter Capital Partners*, no court has found the red flag knowledge standard satisfied in the absence of evidence that also would establish actual knowledge.<sup>123</sup>

The interpretation by these courts of the actual and red flag knowledge standards is wrong for multiple reasons.

First, the courts’ interpretation does violence to the plain statutory language by reading the “red flag” knowledge provision out of the statute. The red flag knowledge provision requires a service provider to act if it is “aware of *facts or circumstances* from which infringing *activity* is *apparent*.”<sup>124</sup> The Second and Ninth Circuits, however, have held that a service provider has red flag knowledge only where it knows of “the existence of *particular instances* of infringement.”<sup>125</sup> Knowledge of a “particular instance of infringement” is *actual* knowledge of infringing material; the service provider does not have to know any additional facts to actually know that infringing activity is occurring on its site.

In addition, because the service provider’s knowledge has to arise with respect to individual instances of infringement, the courts’ interpretation drains “infringing activity,” and thus the red flag knowledge standard, of meaning. The actual knowledge standard applies to “material” or infringing “activity,” whereas the red flag knowledge standard applies to awareness of facts and circumstances making the latter apparent. That difference indicates that Congress believed the red flag knowledge standard would be triggered in circumstances where the service provider did not know of a particular item of infringing material (e.g., identified by a specific URL), but rather knew of widespread infringement. The courts’ interpretation does not heed the statutory distinction.

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<sup>121</sup> *Viacom*, 676 F.3d at 33 (emphasis added) (internal quotation marks omitted).

<sup>122</sup> *Shelter Capital Partners*, 718 F.3d at 1024.

<sup>123</sup> See, e.g., *Capitol Records, Inc. v MP3tunes, LLC*, 48 F. Supp. 3d 703, 716 (S.D.N.Y. 2014) (holding that “knowledge that a high percentage of content on a domain is infringing does not establish actual or red flag knowledge of particular instances of infringement”).

<sup>124</sup> 17 U.S.C. § 512(c)(1)(A)(i)-(ii) (emphasis added).

<sup>125</sup> *Viacom*, 676 F.3d at 33 (emphasis added); see also *Shelter Capital Partners*, 718 F.3d at 1023.



The Second and Ninth Circuits said that their interpretation of the red flag knowledge standard did not render it redundant, based on the subjective-objective knowledge distinction discussed above.<sup>126</sup> That conclusion has been rightly criticized by leading copyright scholars. Indeed, as Professor Nimmer has noted with respect to *Viacom v. YouTube*:

There are several problems with that resolution . . . that “actual knowledge” is *subjective* and “red flag” is *objective*. First, the panel reached this conclusion not through canons of statutory interpretation or adverting to other language used by the legislature, but instead by analyzing how “*courts* often invoke language.” Plainly, a missing step would be required to prove the point that *Congress* used the subject language in that same sense. Second, nothing in the statutory language draws the distinction that [the *Viacom*] opinion derives. In fact, one could, with equal if not more plausibility, posit the opposite—that “actual knowledge that the material . . . is infringing” denotes *objective* facts in the world whereas “aware[ness] of facts” that make infringement “apparent” connotes a *subjective* perception!<sup>127</sup>

Thus, Professor Nimmer concluded that, “[i]n short, the ‘actual knowledge’ prong is reasonably construed to refer to *specifics*, whereas the ‘red flag’ prong deals with *generalities*.”<sup>128</sup> And, whatever the theoretical basis for the courts’ subjective-objective knowledge distinction, the courts’ articulation and application of the test makes clear that the only information that would make infringement “objectively” obvious is the identification of *specific instances of infringement*, i.e., the same information that would make a service provider *subjectively* aware of infringement.

Second, the courts’ interpretation of the actual and red flag knowledge standards ignores evidence of congressional intent from the legislative history. As discussed, the courts effectively limited what will suffice for actual knowledge to reviewing the contents of a takedown notice from the copyright owner. There also is the possibility that a service provider could go looking for infringing content—although the courts’ standard positively incentivizes service providers *not* to look, a point we discuss immediately below. The bottom-line is that the courts’ interpretation largely relegates section 512 to being a notice-and-takedown statute, but that clearly is *not* what Congress intended. As the Nimmer treatise explains, during the process of drafting the DMCA, service providers urged Congress to adopt a structure whereby “copyright owners aggrieved over the illicit usage of their content over the Internet could serve notice on ISPs that afforded access to that content [and] in response, the ISPs would take down the content, or otherwise disable access to it.”<sup>129</sup> Congress, however, rejected a pure notice-and-takedown

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<sup>126</sup> *Viacom*, 676 F.3d at 31.

<sup>127</sup> 4 Melville B. Nimmer and David Nimmer, Nimmer on Copyright § 12B.04[A][1][b] (Matthew Bender, Rev. Ed.) (4 Nimmer on Copyright) (citation omitted).

<sup>128</sup> *Id.* (emphasis in original).

<sup>129</sup> *Id.* § 12B.01[B][2].



model. As explained in the contemporaneous Reports: “A service provider wishing to benefit from the limitation on liability under subsection (c) must ‘take down’ or disable access to infringing material residing on its system or network of which it has actual knowledge or that meets the ‘red flag’ test, *even if the copyright owner or its agent does not notify it of a claimed infringement.*”<sup>130</sup> Thus, while *one* requirement for a service provider to be eligible for protection under section 512(c) is that it expeditiously respond to takedown notices, that is not the only requirement. Congress also enacted knowledge requirements that obligate service providers to act. It did not intend for those additional requirements to simply replicate the notice-and-takedown regime.

Third, the courts’ interpretation of the actual and red flag knowledge standards has bad policy consequences, as it incentivizes service providers not to take any action regarding potential infringement, even if the service providers are well aware that their sites are awash in infringing content. Service providers have every incentive *not* to look into those matters, since observing content for themselves could give rise to actual knowledge of particular instances of infringement. Service providers can and do find it much easier to wait for copyright owners to send takedown notices—a system that comes with all the ineffectiveness and cost discussed elsewhere in these comments.

This judicial construct described above has provided a blueprint for non-innocent service providers who seek to build a business based on infringement and find the implementation of a notice-and-takedown policy to be merely a cost—though not a serious impediment—to doing such business.

That judicial interpretation also encourages willful blindness. The Second Circuit in *Viacom* recognized that the DMCA did not “abrogate” the common law willful blindness doctrine, which provides that a person may not avoid liability by making a “deliberate effort to avoid guilty knowledge.”<sup>131</sup> That, however, is exactly what the Second and Ninth Circuits’ readings of the “red flag” knowledge provision encourages. If a service provider is not liable unless it has knowledge about a specific instance of infringement—even though it is aware of pervasive copyright infringement on its site or service—it will do everything in its power to avoid gaining that knowledge.

Contrary to the reasoning of the Second and Ninth Circuits, section 512(m), which provides that the limitations on liability protection shall not be construed as being conditioned on “a service provider monitoring its service or affirmatively seeking facts indicating infringing activity,” does not mandate these bad policy results. Section 512(m) appears in a section of the statute titled “Protection of privacy,” which was “designed to protect the privacy of Internet users.”<sup>132</sup> It was intended to clarify that a service provider does not have an independent obligation to affirmatively monitor its service. It was not intended to mean that a service

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<sup>130</sup> S. Rep. No. 105-190, at 45 (1998) (emphasis added).

<sup>131</sup> *Viacom*, 676 F.3d at 35 (internal quotation marks omitted).

<sup>132</sup> S. Rep. No. 105-190, at 85 (1998).



provider has no obligation to investigate and take action *when the service provider does have actual or red flag knowledge*. As the Nimmer treatise explains, section 512(m) “only relieves [service providers] of affirmative obligations”; it does not mean that a service provider can avoid gaining knowledge of infringement “by looking the other way.”<sup>133</sup>

**20. Assess courts’ interpretations of the “financial benefit” and “right and ability to control” standards under the section 512 safe harbors. How are judicial interpretations impacting the effectiveness of section 512?**

In establishing the “financial benefit” and “right and ability to control” standards, Congress intended to incorporate the common law standards on vicarious liability, which in and of themselves set a high bar for content owners seeking to hold a service provider liable. The Second and Ninth Circuits, however, have incorrectly interpreted section 512 to require even more than that, rendering the standards nearly impossible to meet. As with the “red flag” knowledge standard, courts’ interpretations of the “financial benefit” and “right and ability to control” standards further shifts the responsibility for combatting digital piracy almost entirely to content owners while protecting even non-innocent service providers, in clear contravention of Congress’s intention in passing section 512.

Under the common law, an entity is vicariously liable for copyright infringement “[w]hen the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials.”<sup>134</sup> Congress clearly drew on that standard, which is one of the principal tests for establishing secondary copyright liability, when it drafted section 512(c)(1)(B). That section provides that a service provider is eligible for safe harbor protection only if it “does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.” One does not have to guess whether Congress intended to adopt the common law standard; it said as much. A House Report preceding the DMCA’s passage states that “[t]he ‘right and ability to control’ language . . . codifies the second element of vicarious liability.”<sup>135</sup> Under the common law, an entity has the “right and ability to control” infringing activity where it can block an infringer’s access or otherwise supervise its users’ conduct.

Notwithstanding the clear legislative purpose, the Second and Ninth Circuits concluded that applying the pure common law standard would render the limitation on liability largely meaningless and rejected the common law control test. The courts reasoned that, since a service provider, in order to be eligible for the section 512(c) and (d) limitations on liability, must be able to block access or remove content in response to takedown notices, the service provider

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<sup>133</sup> 4 Nimmer on Copyright § 12B.04[A][1][b][iii].

<sup>134</sup> See *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963).

<sup>135</sup> H.R. Rep. No. 105-551(I), at 26 (1998). This House Report accompanied a version of the bill that was not enacted, and Congress ultimately did not codify certain principles of secondary liability. However, the “right and ability to control” language appearing in the final version of the DMCA was the same as that used in the version of the bill that this House Report addressed.



inexorably would have the common law right and ability to control, and in many or most cases would be ineligible for the limitation on liability by virtue of sections 512(c)(1)(B) and 512(d)(2).<sup>136</sup> Hence, these courts said that the “right and ability to control” test in section 512 must require “something more” than the common law standard.<sup>137</sup>

To qualify as “something more,” the Second Circuit in *Viacom* suggested that a service provider could “exert[] substantial influence on the activities of users, without necessarily—or even frequently—acquiring knowledge of specific infringing activity.”<sup>138</sup> For example, the Second Circuit suggested that a service provider who: (1) “institute[d] a monitoring program by which user websites received detailed instructions regarding issues of layout, appearance, and content” and “forbade certain types of content and refused access to users who failed to comply with its instructions”; (2) induced copyright infringement through “purposeful, culpable expression and conduct”; or (3) “[was] actively involved in the listing, bidding, sale and delivery of items offered for sale . . . or otherwise control[ed] vendor sales by previewing products prior to their listing, editing product descriptions or suggesting prices” might exercise the type of control required under section 512(c)(1)(B).<sup>139</sup> The Ninth Circuit agreed with the Second Circuit, finding that a service provider would have to exert “substantial influence” over its users to be found to exercise control under section 512(c)(1)(B), and that such influence could take the form of “high levels of control over activities of users” or “purposeful conduct.”<sup>140</sup>

The decision by these courts to require “something more” than the common law “right and ability to control” is not compelled by the language and structure of the statute. Contrary to those courts’ reasoning, a finding of common law right and ability to control would not necessarily render every service provider otherwise eligible for the section 512(c) or (d) limitation subject to the section 512(c)(1)(B) or 512(d)(2) exclusion from eligibility. Both of those provisions require, in addition to the right and ability to control infringing activity, that the service provider “receive a financial benefit directly attributable to the infringing activity.”<sup>141</sup> As the Ninth Circuit has correctly recognized,<sup>142</sup> the directly attributable financial benefit requirement also incorporates the common law standard, and it supports the respondeat superior rationale for common law vicarious liability. The vicarious liability standard properly incentivizes one who profits directly from infringing conduct and is in a position to stop or limit the infringing conduct to exercise their power.<sup>143</sup> Hence, the courts need not have adopted the

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<sup>136</sup> See *Viacom*, 676 F.3d at 36-38.

<sup>137</sup> *Id.* at 38; see also *Shelter Capital Partners*, 718 F.3d at 1030.

<sup>138</sup> *Viacom*, 676 F.3d at 38 & n.13.

<sup>139</sup> *Id.* (internal quotation marks, citations, and alterations omitted).

<sup>140</sup> *Shelter Capital Partners*, 718 F.3d at 1030.

<sup>141</sup> 17 U.S.C. § 512(c)(1)(B), 512(d)(2).

<sup>142</sup> See *CCBill*, 488 F.3d at 1117.

<sup>143</sup> See, e.g., *Shapiro, Bernstein & Co.*, 316 F.2d at 308-09; *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1173 (9th Cir. 2007).



“something more” test as a means of limiting the scope of the 512(c)(1)(B) and 512(d)(2) exclusions.

Even if the courts were correct to require some greater degree of control than the older common law model, the test adopted by the Second and Ninth Circuits simply eliminates vicarious liability for online service providers because realistically nothing will satisfy it. In *UMG v. Shelter Capital Partners*, for example, the Ninth Circuit found that a service provider did not have the right and ability to control infringing activity where the infringing material resided on the service provider’s system, the service provider could remove it, the service provider had implemented filtering systems, and the service provider could have searched for infringing content.<sup>144</sup> Similarly, in a pre-*Shelter Capital Partners* case, a federal district court held that Amazon did not have the right and ability to control copyright infringement occurring on its third party vendor platform even though Amazon had met with the vendors and encouraged them to list their items on the platform.<sup>145</sup> According to the court in that case, Amazon lacked the right and ability to control because it never physically possessed the infringing items, did not review them before listing them, did not edit product descriptions, and did not suggest prices.<sup>146</sup> The reasoning of this court and *Shelter Capital Partners* effectively transforms a right and ability to control test into an active involvement test. That result is counter to the entire underpinning of the right and ability to control test, which premises liability on the defendant *not* exercising rights that it has to stop or limit infringing activity, where the defendant obtains a direct financial benefit from the continuation of the activity. Nothing in the text or history of section 512 compels such a result.

Another example where courts have allowed service providers to have significant involvement in infringing activity without being found to have the “right and ability” to control that activity is *Viacom v. YouTube*, where the district court on remand read the “something more” requirement to mandate “participation in, [or] coercion of, user infringement activity.”<sup>147</sup> The district court further defined “participation” very narrowly; it held that “influence on users is not participation” unless it involves “prescreening content, rendering extensive advice to users regarding content and editing user content,” or active involvement in the sale of content.<sup>148</sup>

Nothing in section 512’s language, structure or history suggests that a service provider lacks the “right and ability to control” unless it participates in the infringement. To the contrary, if a service provider “participates” in infringing activity, then it would be *directly liable* for copyright infringement.<sup>149</sup> In adopting a standard based on vicarious liability, Congress could

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<sup>144</sup> *Shelter Capital Partners*, 718 F.3d at 1031.

<sup>145</sup> *Corbis*, 351 F. Supp. 2d at 1109-1110.

<sup>146</sup> *Id.*

<sup>147</sup> *Viacom Int’l Inc. v. YouTube, Inc. (Viacom II)*, 940 F. Supp. 2d 110, 120 (S.D.N.Y. 2013).

<sup>148</sup> *Id.* at 119 (emphasis added).

<sup>149</sup> *See Screen Gems-Columbia Music, Inc.*, 453 F.2d 552, 554 (2d Cir. 1972) (“Copyright infringement is in the nature of a tort, for which all who participate in the infringement are jointly and severally liable.”).



hardly have intended that the only service providers who would meet the standard would have direct liability.

The district court in *Viacom v. YouTube* further erred in holding that the “inducement” that the Second Circuit said could amount to “something more” was limited to “coercion of” infringing activity or “extensive advice to users regarding content.”<sup>150</sup> That is an erroneous definition of inducement, and indeed would potentially excuse the Grokster service, which gave rise to the inducement test in the Supreme Court.<sup>151</sup> Grokster intentionally structured its business to avoid any appearance of control over or participation in its users’ infringing activity. The Supreme Court, however, saw through that façade, and counseled that an entity is liable for inducing copyright infringement where it has the “object of promoting” the use of the device or service for infringement, “as shown by clear expression or other affirmative steps taken to foster infringement.”<sup>152</sup> Coercion is not required.

The courts’ erroneous construction of the financial benefit/right and ability to control provisions has negative consequences. It allows service providers to exercise significant control over infringing activity and yet take no steps to combat that activity. This is therefore yet another example of how the courts have undermined Congress’s vision of shared responsibility; by interpreting service providers’ immunity from liability from money damages so broadly, courts have largely removed their incentive to work with copyright owners to detect and combat infringement.

**21. Describe any other judicial interpretations of section 512 that impact its effectiveness, and why.**

As discussed in response to Question 14, courts’ interpretations of what constitutes a “representative list” have significantly departed from Congress’s intentions and greatly decreased the effectiveness of the statute. As noted, courts have generally required content creators to identify specific URLs where infringing material is located, forcing content creators to engage in an unending cycle of notice-and-takedown. Because of the large volume of infringing works—and the fact that users can simply upload a new copy of a copyrighted work whenever an old copy is taken down—it is a Sisyphean task for copyright owners to address infringement on a URL-by-URL basis.

As discussed in response to Question 2, courts have also erred in interpreting the scope of activity and types of entities covered by section 512’s limitations on liability, finding that they apply even to entities that have built their business around the use of infringing material stored on their own servers, and not just users’ storing and access of such material.

As also discussed in response to Question 2, courts have erred in finding that service providers can store infringing material for unreasonable lengths of time while still being eligible

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<sup>150</sup> *Viacom II*, 940 F. Supp. 2d at 118, 120.

<sup>151</sup> *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005).

<sup>152</sup> *Id.* at 919.



for section 512's limitations on liability for storage that is meant to be transitory. This reading of the statute also disincentivizes cooperation with copyright owners in combatting online piracy.

Further, courts must make clear that section 512 does not shield service providers who induce others to infringe copyright. Some courts have recognized this: The district court in *Columbia Pictures Industries, Inc. v. Fung*, for example, recognized that if a defendant is liable for inducement “the defendant *is not* entitled to Digital Millennium Copyright Act immunity” because “inducement liability and the Digital Millennium Copyright Act safe harbors are inherently contradictory.”<sup>153</sup> That is because “inducement liability is based on *active bad faith conduct* aimed at promoting infringement [while] the statutory safe harbors are based on *passive good faith conduct* aimed at operating a legitimate internet business” that may otherwise make a service provider liable.<sup>154</sup> Other courts, however, have not been so clear. Indeed, as discussed with respect to Question 20, some courts have defined inducement so narrowly as to make it almost irrelevant.<sup>155</sup> As noted, section 512 was intended to protect only *innocent* service providers. Service providers who induce copyright infringement are not innocent. The Copyright Office would do well to make this clear to courts applying section 512.

## **Repeat Infringers**

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

Section 512(i)(1)(A) provides that the section 512 limitations on liability apply only if a 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.” The requirement that service providers terminate repeat infringers is critical to the section 512 system. The percentage of individuals who repeatedly use Internet services to infringe is relatively small compared to the universe of Internet users, and even the universe of all Internet users who ever have committed infringement online. The serial infringers, however, account for a disproportionate share of the overall prevalence of infringing content: They upload and download infringing copies much more heavily than those who do so once or twice; and they keep infringing content online and available for others to stream or download illegally for much longer than do other users.

An effective repeat infringer policy must ensure that “those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others [] know that there is a realistic threat of losing that access.”<sup>156</sup>

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<sup>153</sup> *Columbia Pictures Indus., Inc. v. Fung*, No. CV 06-5578 SVW(JCx), 2009 WL 6355911, at \*15, 18 (C.D. Cal. Dec. 21, 2009).

<sup>154</sup> *Id.* at \*18 (emphasis added).

<sup>155</sup> See, e.g., *Viacom II*, 940 F. Supp. 2d at 120.

<sup>156</sup> S. Rep. No. 105-190, at 52 (1998).



In *Perfect 10, Inc. v. CCBill LLC*, for example, the Ninth Circuit held that a service provider reasonably implements a repeat infringer policy if it (1) has a working notification system; (2) has a procedure for dealing with DMCA-compliant notifications; (3) “does not actively prevent copyright owners from collecting information needed to issue such notifications”; and (4) “terminates users who repeatedly or blatantly infringe copyright.”<sup>157</sup> Other courts have similarly required that a repeat infringer policy track infringing users and terminate those who repeatedly infringe.<sup>158</sup>

Courts have also recognized that the definition of “repeat infringer” matters—and that the definition does not require that a court *adjudicate* the user to be an infringer. In *BMG Rights Management (US) LLC v. Cox Communications, Inc. (Cox)*,<sup>159</sup> discussed in greater detail below,<sup>160</sup> for example, the court rejected the argument that service providers must only terminate users who have been adjudicated as infringers. Instead, they must act “at a minimum” when they have “sufficient evidence to create actual knowledge of blatant, repeat infringement by particular users, particularly infringement of a willful and commercial nature.”<sup>161</sup> Crucially, the *Cox* court found that a valid takedown notice is at least strong evidence of such knowledge.<sup>162</sup>

While the courts generally have correctly construed many of the statutory requirements for implementing a repeat infringer policy, service providers rarely give effect to such policies. For example, in the suit by MPAA members against the “cyberlocker” service Hotfile, discovery revealed that the service had received more than 8 million notifications of infringing content on its website, but had terminated a grand total of just 43 accounts (and not all on the grounds of repeat infringement) before the commencement of the lawsuit.<sup>163</sup>

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<sup>157</sup> 488 F.3d at 1109.

<sup>158</sup> See *Vimeo*, 972 F. Supp. 2d at 514 (listing cases); see also *Disney Enters., Inc. v. Hotfile Corp.*, No. 11-20427-CIV, 2013 WL 6336286, at \*8 (S.D. Fla. Sept. 20, 2013).

<sup>159</sup> No. 1:14-cv-1611, 2015 WL 7756130, (E.D. Va. Dec. 1, 2015).

<sup>160</sup> See Response to Question 23.

<sup>161</sup> *Cox*, 2015 WL 7756130, at \*13 (internal quotation marks omitted).

<sup>162</sup> *Id.* at \*19.

<sup>163</sup> See *Disney Enterprises, Inc. v. Hotfile Corp.*, No. 11-CV-20427, 2013 WL 6336286, at \*4, 8 (S.D. Fla. Sept. 20, 2013). After the litigation commenced, Hotfile adopted and implemented a three-strikes policy; pursuant to that later-implemented policy, Hotfile terminated 20,000 users. *Id.* at \*24.



**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?**

As discussed above, recent case law has helped to clarify what constitutes a reasonably implemented repeat infringer policy.<sup>164</sup> In particular, courts have confirmed that service providers, to remain eligible for the section 512 limitations on liability, must terminate users who repeatedly and blatantly infringe copyright, regardless of whether there has been a judicial determination that the user is liable for copyright infringement. Courts also have required service providers to track DMCA notices so that they can identify repeat infringers, implement a system that creates a realistic possibility that repeated abuse will result in termination, and terminate users, not just content.

A recent example of a judicial decision that correctly construes 512(i)(1)(A) is *BMG v. Cox*.<sup>165</sup> In that case, owners and administrators of approximately 1,400 musical works sued Cox, a provider of high-speed internet services. The plaintiff alleged that numerous Cox users were engaged in illegal P2P file-sharing of copyrighted music files. One issue was whether Cox had reasonably implemented a repeat infringer policy. In concluding that Cox had not, the court analyzed the statutory requirements for such a policy, namely that a service provider (1) must have a working notification and a procedure for dealing with DMCA-compliant notifications; (2) must not actively prevent copyright owners from collecting the information they need to issue notifications; (3) must impose termination, “and not some lesser consequence,” as a penalty for repeat infringers; and (4) must respond when it has “sufficient evidence to create actual knowledge of blatant, repeat infringement by particular users.”<sup>166</sup> Notably, the court held that a DMCA-complaint notice from content-owners is at least “powerful evidence” of a service provider’s knowledge of infringement.<sup>167</sup> Applying these principles, the court had no difficulty finding that Cox’s policy—in which Cox never actually terminated anyone or would reactivate them following termination—was inadequate.<sup>168</sup>

Another example is *Capitol Records LLC v. Escape Media Group, Inc.*<sup>169</sup> In that case, Capitol Records sued Grooveshark, an online music streaming service. Capitol argued that Grooveshark was ineligible for section 512’s limitations on liability on the ground that Grooveshark had not reasonably implemented a statutorily compliant repeat infringer policy. The court agreed with Capitol. The court noted that “over time, courts have looked at certain recurring features to determine whether a service provider’s repeat infringer policy is implemented within the meaning of § 512(i),” including “keep[ing] adequate records of

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<sup>164</sup> See Response to Question 22.

<sup>165</sup> *Cox*, 2015 WL 7756130.

<sup>166</sup> *Id.* at \*12, 13.

<sup>167</sup> *Id.* at \*19.

<sup>168</sup> *Id.* at \*14-20.

<sup>169</sup> No. 12–CV–6646 (AJN), 2015 WL 1402049 (S.D.N.Y. Mar. 25, 2015).



infringement,” allowing copyright owners to “collect[] information necessary to issue DMCA takedown notifications,” and actually terminating repeat infringers.<sup>170</sup> The court held that the service provider’s failure to satisfy any one of these conditions forfeited the service provider’s eligibility for section 512’s limitations on liability. In particular, the court held that Grooves shark failed the statutory test because (1) it did not keep any records of repeat infringers; (2) it prevented copyright owners from obtaining the information necessary to send takedown notices by organizing multiple files containing the same song together but removing only the “primary file” in response to a takedown notice, such that each time a primary file was removed, a non-primary file “is slotted in to take its place”; and (3) it terminated, at most, a user’s uploading privileges, not the user’s account.<sup>171</sup> The court also found that “hundreds or thousands of users were not stripped of their uploading privileges after receiving notices of infringement.”<sup>172</sup> Like the court in *BMG v. Cox*, the court in the Grooves shark case also viewed takedown notices as one method by which a service provider could learn of a repeat infringer.

As noted in response to Question 22, these courts and others generally have furthered Congress’s intent with respect to the definition of reasonably implemented repeat infringer policies. The challenge now will be to have courts consistently enforce these rules against noncompliant services. Courts should also make it clear that an effective and compliant policy must not allow terminated users simply to create new accounts on the same service.

## Standard Technical Measures

### **24. Does section 512(i) concerning service providers’ accommodation of “standard technical measures” (including the definition of such measures set forth in section 512(i)(2)) encourage or discourage the use of technologies to address online infringement?**

The effectiveness of section 512(i) in encouraging the use of technologies to address online infringement will depend on how courts interpret the requirements of section 512(i)(2): That technical measures (a) be “developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process,” (b) be “available to any person on reasonable and nondiscriminatory terms,” and (c) “do not impose substantial costs on service providers or substantial burdens on their systems or networks.” Courts have said that interfering with a standard technical measure “might entail a service provider that advises or encourages users to conceal a work’s copyrighted status.”<sup>173</sup> However, courts have not examined in detail the meaning of “standard technical measures.”<sup>174</sup>

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<sup>170</sup> *Id.* at \*6.

<sup>171</sup> *Id.* at \*7-11.

<sup>172</sup> *Id.* \*13.

<sup>173</sup> *Gardner v. CafePress Inc.*, No. 3:13-cv-1108-GPC-JMA, 2014 WL 794216, at \*5 (S.D. Cal. Feb. 26, 2014) (internal quotation marks omitted).

<sup>174</sup> *See, e.g., CCBill*, 488 F.3d at 1115 (remanding to the district court to determine whether blocking the plaintiff’s access to a website constituted interference with a “standard technical (footnote continued)



This is another area where voluntary, cross-industry collaboration can and should play a large role. Indeed, the very definition of a standard technical measure *requires* such cooperation. As discussed above, however, the courts' interpretations of service providers' obligations under other provisions of section 512 have removed much of the incentive that service providers would have to participate in processes to develop technological tools for combatting infringement.

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

There are a number of technical measures in widespread use that could meet the definition of “standard technical measures.” Regardless of whether these technologies satisfy the statutory definition, the technologies are robust and effective. Service providers genuinely concerned about infringing use of their networks have begun to implement such technologies. This is a trend that should continue.

Both copyright owners and service providers currently are using a variety of audio and video fingerprinting technologies, which are both inexpensive and widely used. In general, content identification technologies work by having copyright owners provide reference data for content that the service provider can use to establish a match; the technologies then allow for automated instructions as to how the service should treat matching content. The technologies also can be programmed to accommodate various business rules, such as requiring that content include a particular percentage of a copyright work to be considered a match.

## **Remedies**

**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?**

In its experience to date, the MPAA’s members have not seen significant abuses of the counter-notification and put-back procedures. Accordingly, section 512(g)(2)(C) presently is functioning as a reasonable and effective component of Congress’s system for dealing with takedown notices claimed to be in error. When a service provider receives a DMCA-complaint takedown notice, it must expeditiously remove or disable access to the infringing material. That is not the end of the matter, however. The subscriber then may submit a counter-notice, which requires the service provider to repost the removed material within 10 to 14 days *unless* the content owner files a federal lawsuit for copyright infringement.<sup>175</sup>

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measure”; *CafePress Inc.*, 2014 WL 794216, at \*6 (finding that whether the use of metadata qualified as a standard technical measure created a question of material fact, but not reaching a conclusion).

<sup>175</sup> See 17 U.S.C. § 512(c)(1)(C), (g)(2)-(3).



It is important to note that the system does create a potential for abuse: Because it is expensive for the copyright owner to file a lawsuit, a user could submit a frivolous counter-notice and take a gamble that it would not be worth the copyright owner's time to sue. As of now, the MPAA's members have only seen a relatively small number of abusive counter-notices. If those numbers increase the provision may need to be revisited.

The experiences of the MPAA's members to date, however, has been that these procedures balance the need to remove potentially infringing content as quickly as possible with the need to protect third parties' interests in not having their legitimate content taken down.<sup>176</sup> Recognizing that the need to rapidly send and respond to takedown notices will almost inevitably lead to mistakes, section 512(g)(2)(C) provides a mechanism for determining whether the removed material is infringing. If a mistaken takedown notice is sent, and a counter-notification is received, the copyright owner will likely realize its mistake and refrain from filing a lawsuit. If the copyright owner believes its takedown notice is valid, the lawsuit provision allows it to obtain an adjudication of whether its copyright has been infringed.

That Congress gave copyright owners only 10 days in which to file a lawsuit demonstrates that it did not anticipate that significant numbers of counter-notices would be sent or that the ones that were sent would generate significant numbers of disputes; it expected that counter-notifications would be infrequent and noncontroversial, and they generally have been. Google alone has received requests to remove more than 83 million URLs from more than 73,000 domains in the past month, but the number of counter-notices and lawsuits is miniscule.<sup>177</sup> At this time, the MPAA members therefore believe that this provision of section 512 is adequate and does not require revision.

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

The injunctive relief that section 512(j) authorizes has the potential to be an important tool for copyright owners to obtain relief from egregious online infringement. This is particularly true with respect to foreign infringing sites like The Pirate Bay. The courts, however, have not yet had significant occasion to apply section 512(j).

Section 512(j) provides for multiple forms of injunctive relief where a service provider is otherwise "*not subject* to monetary remedies under this section," i.e., where the service provider is eligible for the limitations on monetary liability based on the provisions of sections 512(a)-(d).<sup>178</sup> Thus, it "allows highly circumscribed injunctions to issue against those service providers

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<sup>176</sup> See H.R. Rep. No. 105-551(II), at 59-60 (1998) ("The put-back procedures were added to balance the incentives created in new Section 512 for service providers to take down material against third parties' interest in ensuring that material not be taken down.").

<sup>177</sup> See Response to Question 12.

<sup>178</sup> 17 U.S.C. § 512(j) (emphasis added).



who find shelter within its safe harbors,” subject to limitation as to their scope.<sup>179</sup> By contrast, “[p]arties who fail to qualify for one of the applicable safe harbors thereby risk being adjudged copyright infringers. In those instances, any injunction issues under the infringement provisions of the Copyright Act itself, rather than under the instant provision.”<sup>180</sup>

The injunctive relief that section 512(j) authorizes includes, with respect to the conduct of Transitory Digital Network Communications, an “order restraining the service provider from providing access, by taking reasonable steps specified in the order to block access, to a specific, identified, online location outside the United States.”<sup>181</sup> Where applicable, the provision authorizes a court to require a service provider to block access to all users to “offshore entities that nonetheless may be infringing U.S. copyrights.”<sup>182</sup> And with respect to “System Caching,” “Information Residing on Systems or Networks at Direction of Users,” and “Information Location Tools” conduct, section 512(j) authorizes, *inter alia*, an “order restraining the service provider from providing access to infringing material or activity residing at a particular online site on the provider’s system or network.”<sup>183</sup> “This type of order amounts to compulsory disabling such as is contemplated in response to proper notification.”<sup>184</sup>

The courts have not definitively addressed whether the injunctive relief that section 512(j) authorizes would be available where a service provider is eligible for one of the section 512(a)-(d) limitations on liability but is not itself subject to liability under the substantive standards for infringement liability (whether primary or secondary liability). The structure and

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<sup>179</sup> 4 Nimmer on Copyright, § 12.B.11 n.2.

<sup>180</sup> *Id.* § 12.B.11(A)(1); *see also* *Wolk v. Kodak Imaging Network, Inc.*, 2011 WL 940056, at \*7 (S.D.N.Y. Mar. 17, 2011) (“Because Photobucket qualifies for § 512(c)’s safe harbor, the relief available to Plaintiff is circumscribed to that provided by § 512(j).”); *Corbis*, 351 F. Supp. 2d at 1110-1111 (“Amazon has satisfied all of the threshold conditions for DMCA protection and all of the requirements for protection under the § 512(c) safe harbor. As a result, Amazon is immune from all monetary relief and, save the limited relief in 17 U.S.C. § 512(j), all forms of injunctive relief for any copyright infringement committed by zShops vendors on the Amazon site. . . . The only relief Corbis could seek is the limited injunctive relief set forth in § 512(j) of the DMCA.”).

<sup>181</sup> 17 U.S.C. § 512(j)(1)(B)(ii).

<sup>182</sup> 4 Nimmer on Copyright, § 12.B.11[A][1].

<sup>183</sup> 17 U.S.C. § 512(j)(1)(A)(i).

<sup>184</sup> 4 Nimmer on Copyright, § 12.B.11[A][2]); *see also* H.R. Rep. No. 105-551 (II), at 62 (1998); S. Rep. No. 105-190, at 53 (1998) (this is “essentially an order to take the actions identified in new subsection (c)(1)(C) to ‘remove, or disable access’ to the material that is claimed to be infringing or to be the subject of infringing activity”); *Recording Industry Ass’n of America, Inc. v. Verizon Internet Services, Inc.*, 351 F.3d 1229, 1235 (D.C. Cir. 2003) (“Congress considered disabling an individual’s access to infringing material and disabling access to the internet to be different remedies for the protection of copyright owners, the former blocking access to the infringing material on the offender’s computer and the latter more broadly blocking the offender’s access to the internet (at least via his chosen ISP).”).



logic of section 512(j), however, indicates that it should be available at least in certain cases where a service provider itself is not liable for infringement. Indeed, Congress intended in enacting the DMCA to provide copyright owners with “reasonable assurance that they will be protected against massive piracy” in the online environment<sup>185</sup>—particularly with respect to foreign sites that are dominated by infringing material. The DMCA’s legislative history further confirms that section 512(j) “defines the terms and conditions under which an injunction may be issued against a service provider that qualifies for the limitations on liability set forth in new subsections (a) through (d), but is otherwise subject to an injunction *under existing principles of law*.”<sup>186</sup> Those principles include authorizing injunctions against parties who themselves may not be liable where the injunctive measures are “necessary to grant complete relief” and their effect on the non-liable party would be “minor and ancillary.”<sup>187</sup>

Further, even assuming that a plaintiff must establish liability under the common law, eligibility for the safe harbor provisions does not mean *a fortiori* that the provider would not be liable under the liability standards for secondary infringement, which, as discussed, courts have held are different than the statutory standards set forth in sections 512(c) and (d).<sup>188</sup> But courts rarely, if ever, go through the secondary step of determining whether there is infringement under the common law after determining that the safe harbor has been satisfied. Thus, to the extent common law liability must be established, this generally has meant that section 512(j) has not been an effective or useful enforcement mechanism to restrain infringement.

Finally, construing section 512(j) as authorizing injunctions where a service provider is not itself subject to liability for infringement would be consistent with the approach taken by European countries who have permitted injunctions against ISPs to block sites like The Pirate Bay that are overwhelmingly dominated by infringement.<sup>189</sup> Article 8(3) of the EU Information Society Directive provides that rights holders may apply for an injunction “against intermediaries

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<sup>185</sup> S. Rep. No. 105-190, at 8 (1998).

<sup>186</sup> H.R. Rep. No. 105-551 (II), at 62 (1998); S. Rep. No. 105-190, at 52 (1998) (emphasis added).

<sup>187</sup> *Gen. Bldg. Contractors Ass’n, Inc. v. Pennsylvania*, 458 U.S. 375, 399-400 (1982); *see also United States v. Local 30*, 871 F.2d 401, 406-07 (3rd Cir. 1989) (noting court’s “authority to subject [a party] to injunctive relief even though the [party] itself was not liable”); *United States v. Visa U.S.A., Inc.*, 183 F. Supp. 2d 613, 617 (S.D.N.Y. 2001) (“[R]egardless of whether Visa International is found to be liable, the injunctive relief provisions to which it is subject are ‘minor and ancillary’ and therefore appropriate.”).

<sup>188</sup> *See, e.g., Shelter Capital Partners*, 718 F.3d at 1028 (discussing safe harbor “qualifying service providers who would otherwise be subject to vicarious liability”).

<sup>189</sup> The German Supreme Court recently confirmed the legality of such injunctions in Germany. *See* <http://www.lexology.com/library/detail.aspx?g=ea5408e8-5327-4cbb-96f3-f23f1bcc1077>. The European Court of Justice also is expected to rule shortly on “whether The Pirate Bay’s actions infringe European copyright laws and to what extent a court can order ISPs to block subscribers access to illegal websites” under EU law. *See id.*



whose services are used by a third party to infringe a copyright or related right.” An injunction is available under Article 8(3) even if the service provider’s actions are otherwise exempt under Information Society Directive Article 5(1)(a)—the equivalent of the section 512 limitations on liability—and do not constitute copyright infringement under EU law.<sup>190</sup>

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

As discussed above,<sup>191</sup> the remedies for knowing misrepresentation in section 512(f)—which supplement the counter-notification and put-back procedures of section 512(g)—are sufficient to deter and address fraudulent or abusive notices and counter-notifications.

To reiterate, there is no evidence of widespread fraudulent or abusive notices. To the extent that an Internet poster believes his or her content was noticed for takedown fraudulently or otherwise in bad faith, section 512(f) provides a more than adequate remedy. Section 512(f) creates a limited cause of action against copyright owners who “knowingly materially misrepresent[]” that material or activity is infringing. It applies where a copyright owner has actual knowledge that its takedown notice is false. That provision reflects Congress’s intention that section 512 “balance *the need for rapid response to potential infringement* with the end-users [sic] legitimate interests in not having material removed without recourse.”<sup>192</sup> The task of keeping up with the sheer quantity of material available on the Internet is enormous. For example, YouTube, which is large, but by no means the only site that hosts content that users post, reported in July 2015 that users now upload more than 400 hours of video to the site *every minute*.<sup>193</sup> That is more than five times the 72 hours per minute that the site reported in May 2013.<sup>194</sup> Given the rapid pace at which content is posted or linked to on the Internet, and the fact that infringing material can be reposted or moved faster than it can be noticed, it is vital that copyright owners have the ability to send DMCA notices quickly. To illustrate the point with just one example, Google reported that in March 2016, it received more than 83 million requests to remove URLs, i.e., links to websites showing up in Google search results, containing

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<sup>190</sup> Information Society Directive recital 59; *see also* Commission Staff Working Document: Analysis of the application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights in the Member States, at 16, SEC (2010) 1589 final (Dec. 12, 2010) (stating that “neither Article 11 (third sentence) of [Directive 2004/48], nor Article 8(3) of Directive 2001/29 link injunctions with the liability of an intermediary”).

<sup>191</sup> *See* Response to Question 12.

<sup>192</sup> *See* S. Rep. No. 105-190, at 21 (1998) (emphasis added).

<sup>193</sup> *See* IMDB, *YouTube Now Gets Over 400 Hours Of Content Uploaded Every Minute*, (accessed Mar. 9, 2016) *available at* <http://www.imdb.com/news/ni58835136/>.

<sup>194</sup> *See* YouTube, *Statistics* (accessed Mar. 9, 2013), *available at* <https://www.youtube.com/yt/press/statistics.html>.



infringing material.<sup>195</sup> The requests to Google are only a part of the massive number of takedown notices copyright owners are forced to send to service providers, including requests to other search engines and services that host websites containing infringing material.

Section 512(f) does not operate in a vacuum. It supplements the counter-notification and put-back procedures in section 512(g). The section 512(g) provisions address takedown notices claimed to be erroneous in a manner that minimizes the burden on users, service providers, and copyright owners. As noted above, in the real-world experience of the MPAA and its members, the numbers of counter-notifications or other communications asserting either fair use or any type of mistake in the takedown process are negligible, both in absolute terms and in proportion to the massive number of takedown notices content owners must constantly send. Indeed, during one six-month period, the MPAA and its members received counter-notifications in response to only .00003 percent of the takedown notices that it sent.<sup>196</sup> The MPAA and its members therefore believe that sections 512(f) and (g) adequately address any issues of erroneous takedown notices.

## Other Issues

### **29. Please provide any statistical or economic reports or studies that demonstrate the effectiveness, ineffectiveness, and/or impact of section 512's safe harbors.**

There are several relevant publicly available reports and studies relevant to the issues discussed in these comments. These include:

1. Liye Ma, et al., *An Empirical Analysis of the Impact of Pre-Release Movie Piracy on Box-Office Revenue* (July 2014), available at [https://papers.ssrn.com/sol3/Data\\_Integrity\\_Notice.cfm?abid=1782924](https://papers.ssrn.com/sol3/Data_Integrity_Notice.cfm?abid=1782924).
2. Michael D. Smith & Rahul Telang, *Assessing The Academic Literature Regarding the Impact of Media Piracy on Sales* (Aug. 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2132153](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132153).
3. World Intellectual Property Organization, Advisory Committee on Enforcement, *Copyright Enforcement in the Digital Age: Empirical Economic Evidence and Conclusions* (Aug. 2015), available at <http://www.mpaa.org/research-and-reports/>.

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<sup>195</sup> Google Transparency Report (accessed Apr. 1, 2016), available at <http://www.google.com/transparencyreport/removals/copyright/>.

<sup>196</sup> Bruce Boyden, *The Failure of the DMCA Notice and Takedown System: A Twentieth Century Solution to a Twenty-First Century Problem* 3 (Dec. 2013), available at <http://cpip.gmu.edu/wp-content/uploads/2013/08/Bruce-Boyden-The-Failure-of-the-DMCA-Notice-and-Takedown-System1.pdf>.



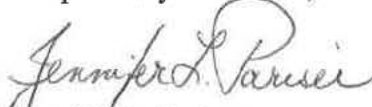
4. Digital Citizens Alliance, *Good Money Still Going Bad: Digital Thieves and the Hijacking of the Online Ad Business* (May 2015), available at <http://www.digitalcitizensalliance.org/cac/alliance/content.aspx?page=GMGB2>.
5. Chris Dodd, *New Study Finds Vast Majority of Top Films and TV Shows Available Legally Online in the US* (Sept. 24, 2014), available at <http://www.mpa.org/new-study-finds-vast-majority-of-top-films-and-tv-shows-available-legally-online-in-the-us/#.VtZ-2OY9fWK>.
6. NetNames Report, *Sizing the Piracy Universe* (Sept. 2013), available at <https://copyrightalliance.org/sites/default/files/2013-netnames-piracy.pdf>.
7. Liye Ma, Alan Montgomery, Michael D. Smith, *The Dual Impact of Movie Piracy on Box-Office Revenue: Cannibalization and Promotion* (Feb. 2016), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2736946](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736946).
8. Bruce Boyden, *The Failure of the DMCA Notice and Takedown System: A Twentieth Century Solution to a Twenty-First Century Problem* (Dec. 2013), available at <http://cpip.gmu.edu/wp-content/uploads/2013/08/Bruce-Boyden-The-Failure-of-the-DMCA-Notice-and-Takedown-System1.pdf>.
9. MilwardBrown Digital, *Understanding the Role of Search in Online Piracy*, (accessed Apr. 1, 2016) available at [https://copyrightalliance.org/content/understanding\\_role\\_search\\_online\\_piracy](https://copyrightalliance.org/content/understanding_role_search_online_piracy).

The MPAA has attached an additional relevant study, SNL Kagan, *U.S. Availability of Film and TV Titles in the Digital Age* (March 2016), in the Appendix to this submission.

**30. Please identify and describe any pertinent issues not referenced above that the Copyright Office should consider in conducting its study.**

The MPAA believes that the Copyright Office's list of questions and issues is very comprehensive. The MPAA once again expresses its appreciation for the Copyright Office's attention to these important issues.

Respectfully submitted,



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# APPENDIX





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## **U.S. Availability of Film and TV Titles in the Digital Age**

MARCH 2016

SNL Kagan is an offering of S&P Global Market Intelligence.



## Introduction

Motion picture and television content has been delivered over the Internet for more than 15 years. Advanced set-top boxes and high-speed data connections helped open the gateway for the digital delivery of content and expand the user base. The segment really began to take off in 2007 when Netflix launched its streaming service, which at the time was free for all of its DVD-by-mail subscribers. Today, a multitude of services offer digital video on demand in a variety of ways, allowing consumers to choose between subscription, electronic sell-through, and both ad-supported and rental VOD.

Studios have embraced digital delivery as the future of home video, not only by providing their content to service providers like Netflix and Apple, but also by building their own digital services. In 2006, Disney/ABC Television Group, Fox Broadcasting Company and NBCUniversal Television Group formed a joint venture and launched Hulu in 2008, one of the more popular streaming services.

The growth of digital video services has led to healthy competition and a boom in both original and licensed content as providers look to attract consumers and differentiate between services. For example, Netflix struck a deal for Walt Disney films in the pay TV window, while Hulu has deals with several major networks to air new shows the day after they are broadcast on TV. As a result, consumers can now access box-office hits and top-rated shows from a variety of digital video services.

SNL Kagan was commissioned by Motion Picture Association of America (MPAA) to carry out a study to quantify the availability

of, and growth in, legitimate digital film and TV series offerings in the U.S.

We reviewed the availability of such digital content provided by 33 major online video-on-demand distributors and by 14 TV Everywhere on-demand services. These services are described as follows:

**Online Video On Demand (VOD)** – These are services where consumers can view digital film and TV series via four different categories: electronic sell-through (EST), online rental, subscription video on demand (SVOD) and advertising-supported video on demand.

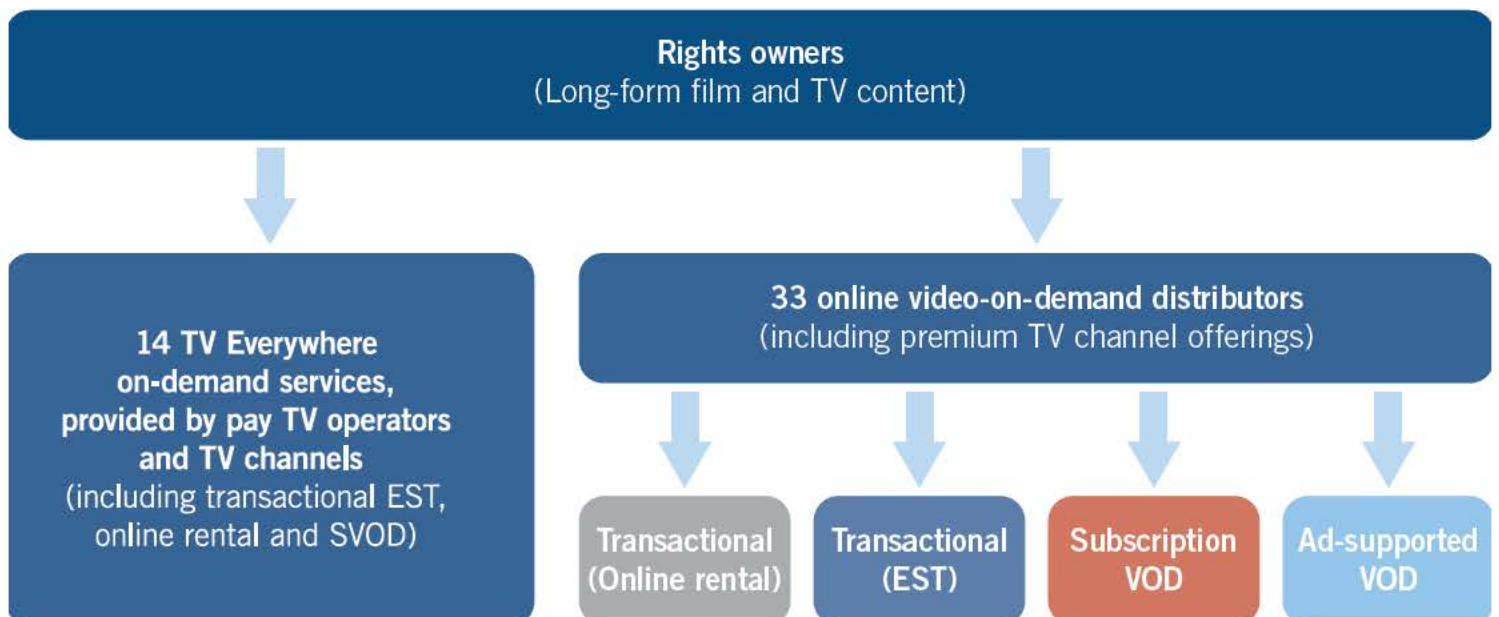
**TV Everywhere On Demand** – These are services such as HBO GO or offerings from multichannel video programming distributors (MVPDs) that allow consumers to watch films and TV series via an authenticated, online service with their paid subscription. An additional payment is required from subscribers for any EST, online rental or subscription online video offering.

This report does not cover free online catch-up TV<sup>1</sup> (services from broadcast and cable networks to view a limited number of recent TV episodes at least a week after they are aired on TV channels).

In terms of the type of films and TV series, SNL Kagan investigated the availability of digital “premium content”

<sup>1</sup> Catch-up content: TV video content that has already been aired on a TV network at an earlier date.

**Chart 1: The supply of film and TV series through online services**





(defined as legitimate long-form popular<sup>2</sup> and critically acclaimed films and TV series<sup>3</sup>) and independent film titles, across the 47 online video services.

A brief overview of our approach follows:

To determine the proportion of premium film titles available in the U.S., SNL Kagan compiled lists of popular films (as measured by box office success) as well as critically acclaimed and independent films and looked up the availability of each of these on the online services described above.

In total, there were 1,067 films falling into the following eight sub-samples:

- 2015 box office hits;
- 2014 box office hits;
- 2013 box office hits;
- Box office hits between 2002 and 2012;
- All time box office hits;
- American Film Institute top 100 films;
- Oscar-winning best pictures; and,
- Top 60 independent films between 2013 and 2015

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2 Most popular film and TV titles are based on highest gross box office receipts for films and highest TV ratings for television shows. See methodology section for further explanation.

3 Critically acclaimed film and TV titles are based on award-winning films (Oscar 'best film' winners) and TV series (Emmy and Golden Globe winning TV series). See methodology section for further explanation.

This equates to a total of 857 unique film titles, when duplicates appearing in multiple sub-samples are counted only once. We report findings by both the total unique film titles and by the eight sub-samples.

To determine the proportion of premium TV content that was available in the U.S., SNL Kagan compiled lists of popular TV titles (as measured by TV ratings) and award-winning TV series, and then checked the availability of each of these across the selected online services.

In total, there were 933 individual TV series falling into the following eight sub-samples:

- 2015 TV hits;
- 2014 TV hits;
- 2013 TV hits;
- 2012 TV hits;
- 2011 TV hits;
- Pre-2011 TV hits;
- Golden Globe TV winners; and,
- Emmy TV winners

*Please see the methodology section for detailed information.*



## Executive Summary

There are three main findings to SNL Kagan's study of film and TV series title availability in the digital age:

- There is a high proportion of most popular, critically acclaimed and independent films and TV series available through dozens of online services. We found that 98% of premium films and 94% of premium TV series were digitally available on at least one of the online services we reviewed (including online VOD and TV Everywhere on-demand services).
- Most popular, critically acclaimed and independent films and TV series are widely available online to U.S. consumers. The findings show that the online availability of popular and critically acclaimed films was not limited to one or a few online services. We found that 95% of premium films and 84% of premium TV series were digitally available on at least five of the online services we reviewed.
- There has been an increase in the number of most popular and critically acclaimed digital films and TV series made available when compared to a similar study carried out by KPMG two years ago. We found that 97% of premium films were digitally available on at least one of the online VOD services we reviewed – up from 94% in 2013. We also found that 93% of premium TV series were digitally available on at least one of the online VOD services we reviewed – up from 85% in 2013.

### Chart 2: Summary Findings

	On at least one of the 47 online services reviewed	On at least five of the 47 online services reviewed	On at least one of the online VOD services reviewed	On at least one of the TVE services reviewed
Films	98%	95%	97% (up from 94% in 2013)	96%
TV series	94%	84%	93% (up from 85% in 2013)	82%

## KEY FINDINGS - FILM TITLES

### 1.1 Film titles on online VOD and TV Everywhere on-demand services

As of December 2015, SNL Kagan found that 98% of the 857 unique popular, critically acclaimed and independent films reviewed were available via online services on at least one of the 47 service offerings studied.

- The availability of film titles in certain sub-samples was as follows:
  - 100% of 2014 U.S. top 100 box office hits
  - 100% of U.S. top 20 box office hits each year from 2002-2012
  - 99% of 2013 U.S. top 100 box office hits
  - 98% of the AFI's top 100 critically acclaimed films
  - 98% of the Oscar winners for best picture
  - 98% of the top 60 independent films from 2013-2015
- As of December 2015, SNL Kagan found that 95% of the 857 unique popular, critically acclaimed and independent films reviewed were available via online services on at least five of the 47 service offerings reviewed.



## 1.2 Film titles on online VOD

- As of December 2015, SNL Kagan found that 97% of the 819 unique premium films (excluding independents) reviewed were available via online VOD distribution on at least one of the 33 service offerings studied.
- This is a higher proportion than the situation two years ago when in December 2013, KPMG found that 94% of 808 premium films were available digitally.

## 1.3 Film titles on TV Everywhere on-demand services

- In addition to the analysis of current availability of premium films on online VOD services, SNL Kagan expanded its focus to include digital availability on TV Everywhere on-demand services.
- As of December 2015, SNL Kagan found that 96% of the 857 unique premium films reviewed were available via TV Everywhere on demand on at least one of the 14 service offerings studied.

# KEY FINDINGS – TV SERIES

## 2.1 TV series on online VOD and TV Everywhere on-demand services

As of December 2015, SNL Kagan found that 94% of the 933 popular and critically acclaimed TV series reviewed were available via online services on at least one of the 36 online VOD and TV Everywhere on-demand services studied.

- The availability of TV series in certain sub-samples was as follows:
  - 100% of pre-2011 modern TV hits
  - 99% of U.S. top 100 popular TV series hits from each year 2013 to 2015
  - 98% of 2012 top 100 popular TV series
  - 96% of 2011 top 100 popular TV series
- We found that 84% of the 933 popular and critically acclaimed TV series reviewed were available via online services on at least five of the 36 services studied.

## 2.2 TV series on online VOD

- SNL Kagan found that 93% of the 933 premium TV series reviewed were available via online VOD on at least one of the 22 services studied.
- This is a higher proportion than the situation two years ago when in December 2013, KPMG found that 85% of 724 premium TV series were available digitally.

## 2.3 TV series on TV Everywhere on-demand services

- In addition to the analysis of current availability of premium TV series on online VOD services, SNL Kagan expanded its focus to include digital availability on TV Everywhere on-demand services.
- As of December 2015, SNL Kagan found that 82% of the 933 premium TV series reviewed were available via TV Everywhere on demand on at least one of the 14 service offerings studied.



## Digital availability of premium and independent films

There is a high proportion of popular, critically acclaimed and independent films available through dozens of online video services.

When film titles that appeared in more than one sub-sample were excluded, the total sample of unique films was 857, of which 98% were available on at least one of the 47 online video offerings reviewed.

Of the 857 unique film titles at the time of sampling, only 17 of those film titles were not available online. Based on our experience, we believe that the unavailability of these online included titles where the rights owners decided not to make these films available online for commercial reasons, or were titles where complicated rights between various rights owners (e.g., film distributors, producers and music companies) needed to be negotiated and cleared before such film titles could be made available in a digital format.

In terms of the popular film titles, 96% of the 2015 top 100 U.S. box office hits; all of the 2014 top 100; 99% of the 2013 top 100; all of the top 20 in each of the years 2002 to 2012; and 96% of the all-time U.S. box office hits were available on at least one of the 47 online video service reviewed at the end of 2015 (October – December 2015).<sup>4</sup>

In terms of critically acclaimed film titles, 98% of the Oscar winners for best picture and 98% of the AFI's top 100 films were available on at least one of the 47 online services at the end of 2015.

Of the top 60 independent films between 2013 and 2015, 98% were available on at least one of the 47 online services at the end of 2015.<sup>5</sup>

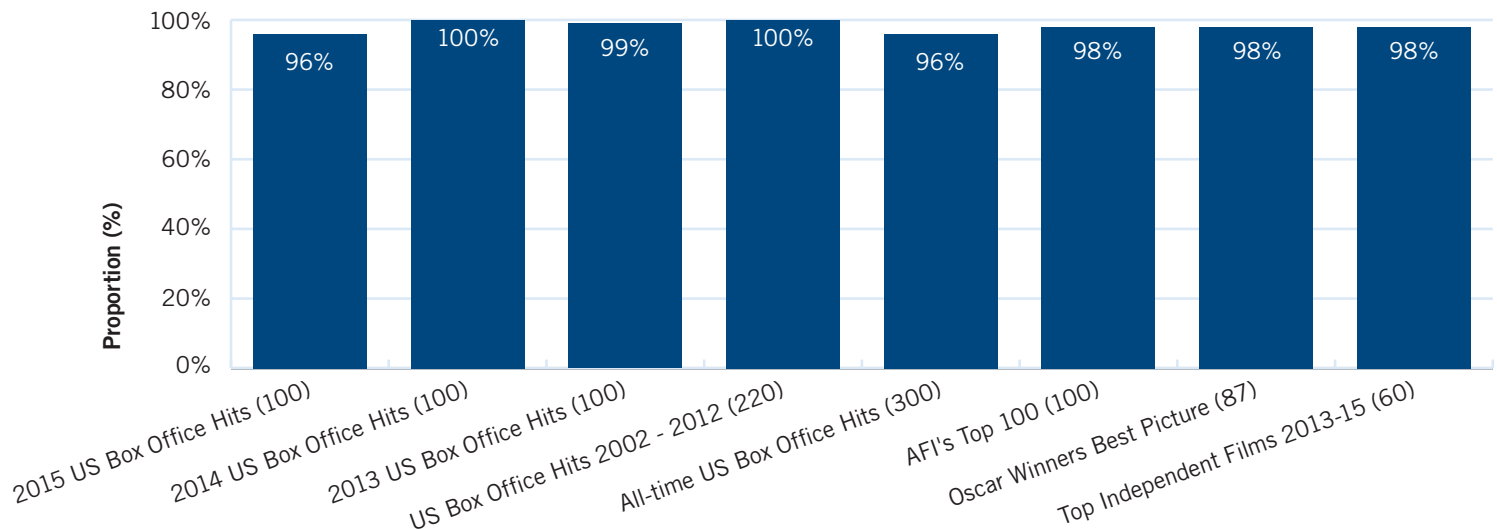
The eight sub-samples shown above were selected to represent the most popular, critically acclaimed and Independent film titles. There were, inevitably, films that appeared in more than one of the sub-samples. For example, “Ben-Hur” (1959) was an Academy Award best picture winner, appeared in the AFI's list of top 100 films, and was one of the 300 ‘All-time box office hits.’<sup>6</sup>

4 The 47 online video services include 33 legitimate online VOD offerings and 14 TV Everywhere on-demand services provided by pay TV providers and TV channels.

5 The top 60 independent films were made up of the top 20 independent box office hits in each of the years 2013, 2014 and 2015, as compiled by Indiewire.

6 The list of “All-time U.S. box office hits” was compiled after SNL Kagan adjusted gross box office hits to take account of inflation. See methodology section for further details.

**Chart 3: Proportion of popular, critically acclaimed and independent film titles available on at least one U.S. online video service, as of December 2015**



Source: SNL Kagan (December 2015)

Notes: The eight sub-samples shown above were selected to represent the most popular, critically acclaimed and independent film titles. The online availability of all 1,067 film titles were reviewed on 33 online VOD and 14 TV Everywhere On-demand services – a total of 47 online video services. There were, inevitably, films that appeared in more than one of the sub-samples. When we excluded all such films that appeared in more than one sub-sample, SNL Kagan's total sample of unique films was 857.

The numbers in parentheses depict the number of individual film titles in the sub-sample.



## Digital availability of premium and independent films across multiple online categories

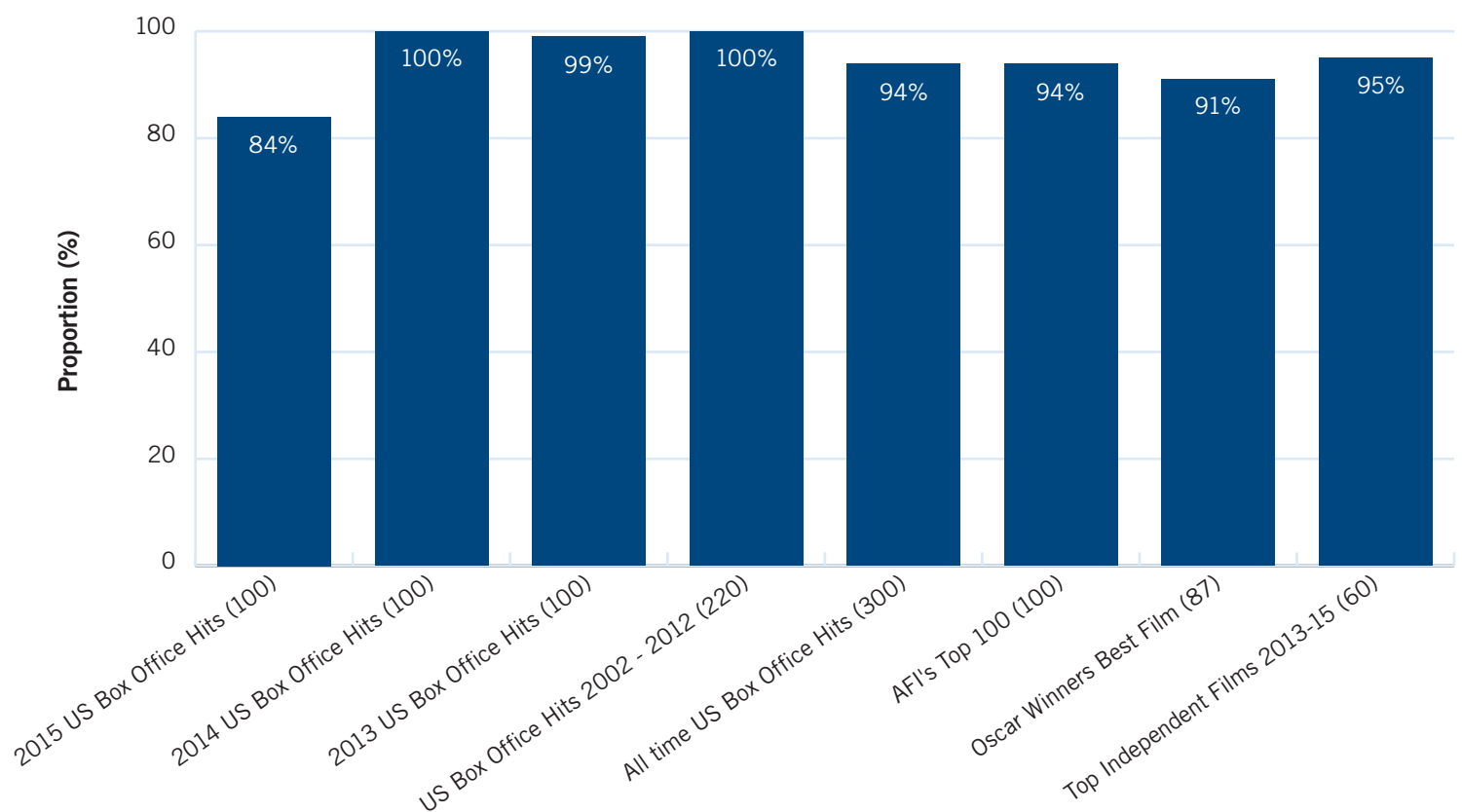
Popular, critically acclaimed and independent films are widely available via online services to U.S. consumers, as our findings show that 95% of premium and independent films were available via online services on at least five of the 47 service offerings reviewed.

In terms of the most popular film titles, 84% of the 2015 top 100 U.S. box office hits; 100% of the top 100 in 2014; 99% of the top 100 in 2013; 100% of the top 20 in each of the years 2002 to 2012; and 94% of the all-time U.S. box office hits were available on at least five of the 47 online services at the end of 2015.

In terms of critically acclaimed film titles, 91% of the Oscar winners for best picture and 94% of the AFI's top 100 films were available on at least five of the 47 online services at the end of 2015.

Of the top 60 independent films between 2013 and 2015, 95% were available on at least five of the 47 online services at the end of 2015.

**Chart 4: Proportion of popular, critically acclaimed, and independent film titles available on at least five U.S. online video services, as of December 2015**



Source: SNL Kagan (December 2015)

Notes: The eight sub-samples shown above were selected to represent the most popular, critically acclaimed, and independent film titles. The online availability of all 1,067 film titles were reviewed on 33 online VOD and 14 TV Everywhere On-demand services – a total of 47 online video services. There were, inevitably, films that appeared in more than one of the sub-samples. When we excluded all such films that appeared in more than one sub-sample, SNL Kagan's total sample of unique films was 857.

The numbers in parentheses depict the number of individual film titles in the sub-sample

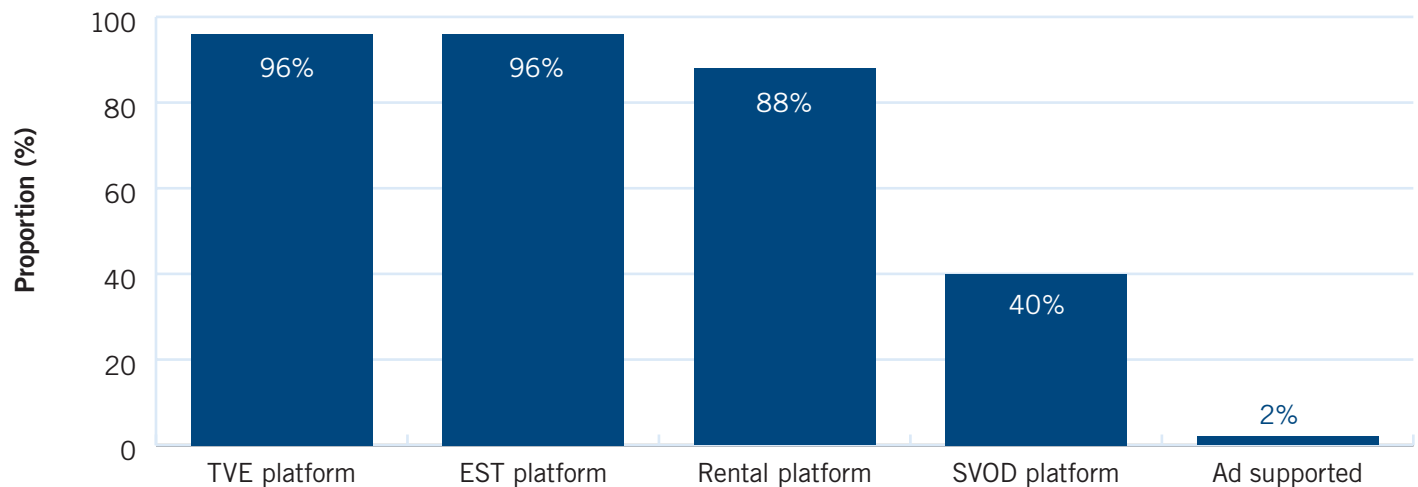


## Digital availability of premium and independent films by online categories

We found that the majority of popular, critically acclaimed and independent film titles were available on the two online transactional categories: 96% were available on EST and 88% via online rental; and on TVE on-demand services, 96%.

A lower proportion of popular, critically acclaimed and Independent films were offered under the SVOD model (40%) and fewer still under the advertising-supported VOD model (2%).

**Chart 5: Proportion of popular, critically acclaimed and independent film titles (1,067 titles) available on at least one of the online video distributors by business model, as of December 2015**



Source: SNL Kagan (December 2015)

Notes: The sample of 1,067 popular, critically acclaimed and independent film titles was made up of the top 100 U.S. box office hits of each of the years 2013, 2014 and 2015 (300 titles); plus the top 20 U.S. box office hits from each year from 2002 to 2012 (220 titles); plus the All-time top 300 U.S. box office hits, inflation adjusted (300 titles); plus the AFI's top 100 critically acclaimed films (100 titles); plus the 87 Academy Award winners for best picture (87 titles); plus the top 20 independent box office hits of each of the years 2013, 2014 and 2015 (60). See methodology section for further details.



## Trends in availability across online categories

There has been an increase in the number of digital film titles made available to U.S. consumers when compared to a similar survey carried out by KPMG two years ago.

In KPMG's survey of two years ago ("Film and TV title availability in the Digital Age" published in August 2014), TV Everywhere on-demand services (services from pay TV providers and TV channels) were not covered.

However, since SNL Kagan conducted its 2015 study using the same methodology and data coverage as KPMG did two years ago, SNL Kagan is able to make some like-for-like comparisons using the updated results for premium titles on online VOD services.

Comparing like for like, there are proportionately more popular and critically acclaimed film titles available in the transactional EST, transactional rental and SVOD categories. The highest growth being in SVOD where digital availability increased from 16% in December 2013 to 39% in December 2015. This increase is mainly due to the launch of new SVOD services during 2015 from HBO, Showtime and Sling TV.

**Chart 6: Proportion of popular and critically acclaimed film titles (1,007 titles) available on at least one of the online video distributors by business model, as of December 2013 and December 2015**

Online Category	Digital availability as of December 2013	Digital availability as of December 2015	Percentage point number change in two years
EST	94%	96%	+2%
Rental	77%	88%	+11%
SVOD	16%	39%	+23%
Ad-supported	3%	1%	(2%)

*Note that to make like-for-like comparisons with data findings from two years ago, the current digital availability of the 60 independent film titles has been excluded from the figures above.*



SNL Kagan's latest survey found that in most sub-samples of popular and critically acclaimed films, the proportion available online increased to 97% in 2015, from an already high proportion of availability, 94%, in 2013.

As mentioned above, the sub-samples shown above were selected to represent the most popular and critically acclaimed film titles; however, there were films that appeared in more than one of the sub-samples.

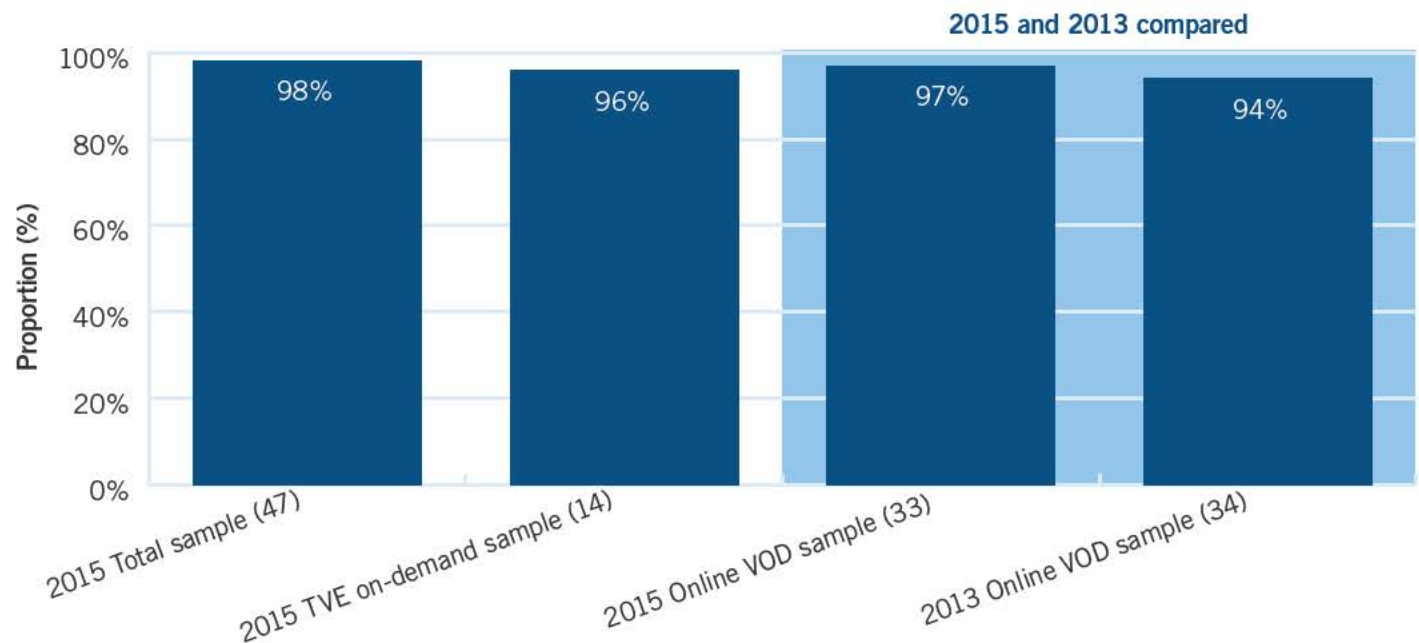
When film titles that appeared in more than one sub-sample were excluded, the total sample of unique "premium" films

(excluding independent films) was 819, of which 97% were available on at least one of the 33 online VOD offerings reviewed<sup>7</sup>.

This is a higher proportion than the situation two years ago when in December 2013, it was found that 94% of 808 premium films were available digitally on 34 online VOD services.

<sup>7</sup> To make like-for-like comparisons with data findings from two years ago, the current digital availability of the 60 independent film titles has been excluded.

**Chart 7: Proportion of unique "premium" film titles available on at least one online VOD offering, as of December 2013 and December 2015, and on at least one online service provided by TV Everywhere on-demand services**



Source: SNL Kagan (December 2015)

Notes: In KPMG's study of 2013, a total of 808 unique films were reviewed for availability on 34 online VOD service offerings studied. SNL Kagan's most recent study reviewed the availability of 819 unique films (excluding independents) on 33 online VOD services and 14 TV Everywhere on-demand services. The numbers in parentheses depict the number of individual online sources by category.



## Availability of popular and critically acclaimed TV series

SNL Kagan looked up the online availability of 933 TV series during November and December 2015 and found that 877 (94%) were available in part or whole on at least one of the 36 online VOD and TV Everywhere on-demand services analyzed.

Eleven legitimate online video services offered film titles only on an online rental basis (i.e. TV Series were not marketed on an online rental platform). As a result, our total sample bases consisted of 47 online services for the analysis of digital film title availability and 36 online services for digital TV Series availability.

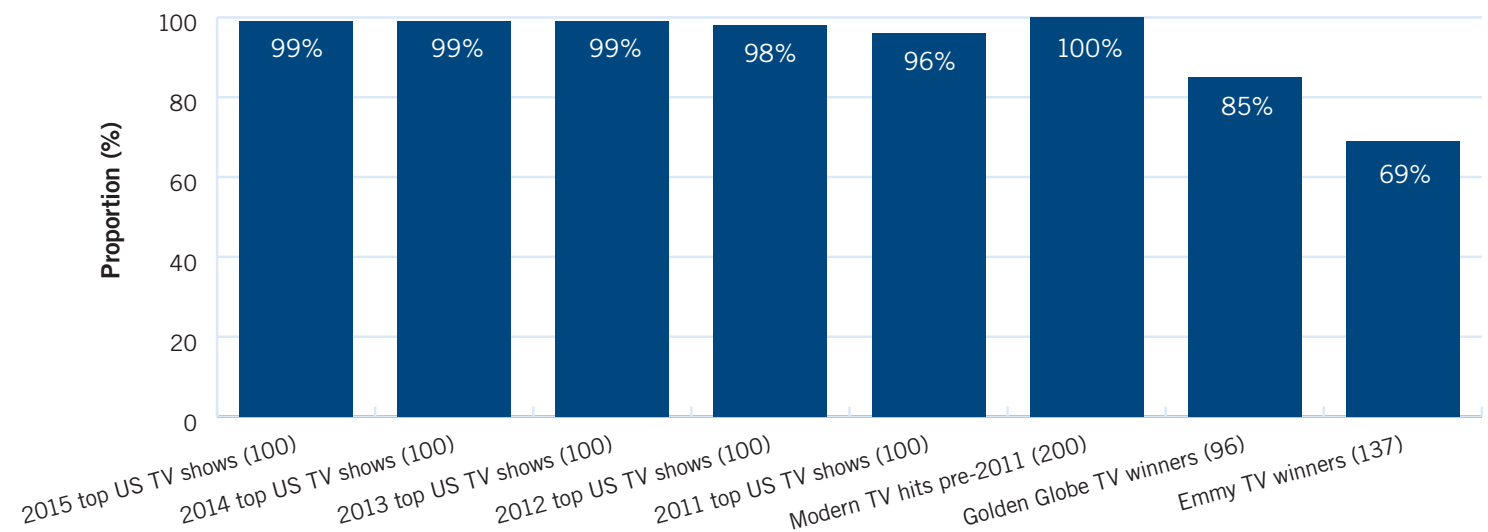
A high proportion of popular TV series were available online, we found that 99% of popular TV series in 2013, 2014, and 2015 (current season episodes only) were available on at least one of the 36 online services we researched. From a list of top 200 popular TV series, we found that all of them were available on at least one legitimate online service, and that

98% of the top 100 TV series of 2012 and 96% of the top TV Series of 2011 were available on a digital online service.

In terms of critically acclaimed TV titles, lower proportions of online availability were found, with 85% of Golden Globe TV winners and 69% of Emmy TV winners being available on at least one of 36 online video services. This was because the samples of Golden Globe and Emmy TV winners included older TV series, when compared to TV series in the other sub-samples.

In conducting this research, we found that there were instances when a TV season was only partially available online (i.e., not all the episodes of a TV season were made available). We therefore investigated further to see if there were any material differences when we took account of partial availability of TV series, and found that there were none.

**Chart 8: Proportion of popular and critically acclaimed TV series available on at least one of the 36 U.S. online video services as of December 2015 (Availability of complete TV series only)**



Source: SNL Kagan (December 2015)

Notes: The numbers in parentheses depict the number of individual TV titles in the sub-sample. A total of 933 TV titles were reviewed.



## Availability of popular and critically acclaimed TV series across multiple online categories

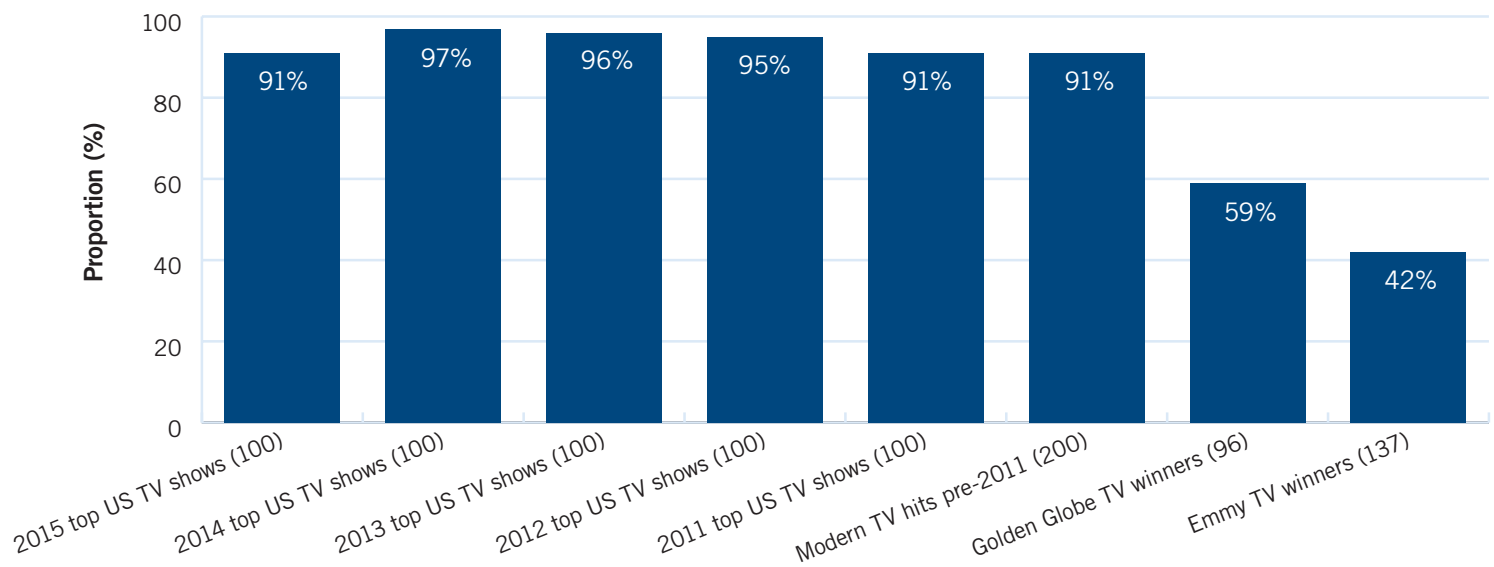
SNL Kagan investigated the online availability of 933 TV series during November and December 2015 and found that 84% were available in part or whole on at least five of the 36 online VOD and TV Everywhere on-demand services analyzed.

A high proportion of popular TV series were available online – we found that 91% of popular TV series in 2015 (current season episodes only); 97% of popular TV series in 2014; and 96% of popular TV series in 2013 were available on at least five of the 36 online services we researched. From a list of top

200 popular TV series, we found that 91% were available on at least five legitimate online services, and that 95% of the top 100 TV series of 2012 and 91% of the top TV series of 2011 were available on a digital online service.

In terms of critically acclaimed TV titles, lower proportions of online availability were found with 59% of Golden Globe TV winners and 42% of Emmy TV winners being available on at least five of 36 online video services.

**Chart 9 : Proportion of popular and critically acclaimed TV series available on at least five of the 36 U.S. online video services, as of December 2015 – Availability of complete TV series only (%)**



Source: SNL Kagan (December 2015)

Notes: The numbers in parentheses depict the number of individual TV titles in the sub-sample. A total of 933 TV titles were reviewed.



## Trends across multiple online categories by sub-sample

SNL Kagan’s most recent survey has found that during the past two years, there has been an increase of eight percentage points in the availability of long-form legitimate “premium” TV Series in the U.S.

In 2013, KPMG found that 85% of premium TV series (618 out of 724 TV titles reviewed) were available on the 33 digital services they reviewed. Our most recent SNL Kagan survey found that a higher proportion, 93% of premium TV series (872 out of 933 TV titles) were available on the 22 comparable digital services we analyzed. (See methodology section for further details.)

SNL Kagan found that the greatest increase in the proportion of premium TV series availability (popular and critically acclaimed TV series) was in the most recent popular TV series sub-sample (popular TV hits that were 0-12 months old when the survey was conducted). This relatively high proportion of digital availability and greatest increase from two years ago is attributed to the availability of most recent top TV hits on digital services launched in 2015, namely HBO NOW and Showtime Anytime, and the earlier release of most recent TV hits on EST.

**Chart 10: Proportion of popular and critically acclaimed TV series available on at least one of the online video offerings, as of December 2013 and December 2015**

Sub-samples of popular and critically acclaimed TV series	Digital availability as of December 2013	Digital availability as of December 2015	Percentage point number change in two years
Most recent popular TV series (0-12 months old)	87%	99%	+12%
Popular TV series (13-24 months old)	96%	99%	+3%
Popular TV series (25-36 months old)	95%	99%	+4%
Modern TV hits (pre-2011)	96%	99%	+3%
Golden Globe TV winners	72%	84%	+12%
Emmy Award TV winners	62%	67%	+5%
<b>Total TV series sample</b>	<b>85%</b>	<b>93%</b>	<b>+8%</b>



## Availability across multiple online categories

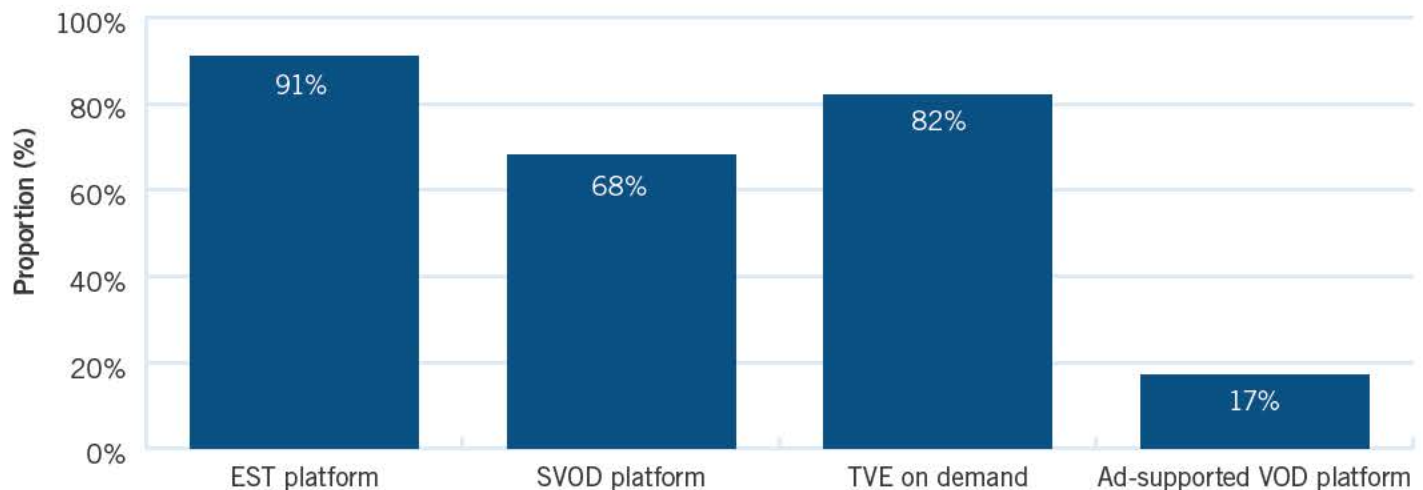
The highest proportion of popular and critically acclaimed TV series by online category was via EST (91%). The next highest availability was through TV Everywhere on-demand services, where 82% of the 933 TV series were available on at least one of the offerings from pay TV operators and TV channels.<sup>8</sup>

When these findings are compared to a similar survey carried out by KPMG two years ago, SNL Kagan found that online availability increased markedly.

There are now more popular and critically acclaimed TV series available in the transactional EST, SVOD and ad-supported VOD categories than there were two years ago. The highest increase being in SVOD, where digital availability rose from 44% in December 2013 to 68% in December 2015. This increase is mainly due to the launch of new SVOD services during 2015 from HBO, Showtime, Starz and CBS.

<sup>8</sup> Pay TV operators (or MVPDs) offer a number of on-demand TV series via TV Everywhere services and online EST, online rental and free of charge with advertising to their pay TV subscribers. For the purpose of this study, we considered the availability of a TV series by any TV Everywhere and online business model provided by MVPDs.

**Chart 11: Proportion of popular and critically acclaimed TV series (933 titles) available on at least one of the online video distributors by category, as of December 2015**



Source: SNL Kagan (December 2015)

Notes: The sample of 933 popular and critically acclaimed TV titles was made up of top 100 TV hits of each of the years 2011 to 2015 (500 titles); plus 200 top TV hits pre-2011; plus 96 Golden Globe award winners; and 137 Emmy award winners. See methodology section for further details.

The largest ad-supported category is catch-up TV. However, this report does not cover free online catch-up TV (services from broadcast and cable networks to view a limited number of recent TV episodes at least a week after they are aired on TV channels).

**Chart 12: Proportion of popular and critically acclaimed TV titles available on at least one of the online video distributors, by business model, as of December 2013 and December 2015**

Online Category	Digital availability as of December 2013	Digital availability as of December 2015	Percentage point change in 2 years
EST	81%	91%	+10%
SVOD	44%	68%	+24%
Ad-supported VOD	5%	17%	+12%



## Methodology

### OUR APPROACH

SNL Kagan has undertaken a study with the objective of analyzing the current availability and quantifying the growth of film and television series on long-form legitimate online services in the U.S.

This study generally follows the KPMG study “Film and TV title availability in the Digital Age,” which was published in 2014, in terms of methodology and data coverage, updating the results for current online video services’ present day availability. In addition to the data and analysis in the prior study, SNL Kagan expanded its focus on film and television services to include TV Everywhere on-demand services.

SNL Kagan carried out research, looking up the availability of popular, critically acclaimed and independent film and TV titles between October 2015 and December 2015.

#### Definitions and references

SNL Kagan researched the supply of legitimate long-form digital content (film and TV titles) in the video industries made available by a number of online video distributors under different categories. The description of the categories under online video-on-demand (VOD) services is described below:

- **Transactional Electronic Sell-Through (EST)** – These are online services where consumers pay for a permanent ownership of a digital copy and/ or with unlimited access via a digital locker;
- **Transactional Online Rental** - These are online services where consumers pay for a digital copy to watch within a certain time period on a temporary basis online;
- **Subscription Video on Demand (SVOD)** – These are online services where consumers pay a subscription fee to access video content on an ongoing manner; and,
- **Ad-supported VOD** - These are online services where consumers can watch content free of charge with advertising.

SNL Kagan looked up the availability of popular, critically acclaimed and independent film and TV series on 33 online VOD services. In addition to covering the online VOD services, SNL Kagan expanded its coverage of online video distribution to include the availability of “premium” and independent content on:

- **TV Everywhere (TVE) on-demand services** – These are online services from pay TV providers (i.e. Multichannel Video Programming Distributors - MVPDs) or TV channels that allow the consumer to watch films/TV series via an authenticated, online service with their paid subscription<sup>9</sup>

#### Primary research on the availability of popular and critically acclaimed films

The methodology for selecting “premium” films (the most popular titles) was based on theatrical box office receipts. The methodology for selecting critically acclaimed films was based on industry awards and acclamations. The methodology for selecting Independent film titles was based on highest grossing theatrical box office receipts for “indie” films, as compiled by Indiewire.<sup>10</sup>

For premium films, excluding independents, we identified seven sub-samples – a total of 1,007 individual film titles – and then looked-up the availability of each of these film titles across 33 legitimate online VOD and 14 TV Everywhere on-demand services in the U.S. The seven sub-samples of film titles were made up in the following way:

- **Popular recent film releases – hits of 2015 (100 titles)** - Sample of 100 feature films – top 100 U.S. box office hits of 2015 from Jan. 1 - Sept. 30, 2015<sup>11</sup>
- **Popular recent film releases – hits of 2014 (100 titles)** - Sample of 100 feature films – top 100 U.S. box office hits of calendar year 2014
- **Popular recent film releases – hits of 2013 (100 titles)** - Sample of 100 feature films – top 100 U.S. box office hits of calendar year 2013
- **Popular film releases from the recent past (220 titles)** - Sample of 220 feature films – top 20 U.S. box office hits in each of the years from 2002 to 2012
- **Most popular film releases of all time (300 titles)** - Sample of 300 – top 300 U.S. box office film hits of all time (inflation-adjusted box office receipts)
- **Critically acclaimed films (100 titles)** - Sample of 100 films – includes American Film Institute’s top 100 films
- **Critically acclaimed films (87 titles)** - Sample of 87 films – includes all 87 of Academy of Motion Picture Arts and Sciences Awards (Oscar winners) for best picture

9 MVPDs offer a number of on-demand films and TV series via TV Everywhere services and online EST, online rental, and free of charge with advertising to their pay TV subscribers. For the purpose of this study, we considered the availability of a film or TV title by any TV Everywhere and online business model provided by MVPDs. Note that some MVPDs offered only online rental (DIRECTV, Time Warner Cable and Cablevision) and some online offerings by a number of business models (Comcast XFINITY and Verizon).

10 Independent films include specialty films (indie, foreign and/or documentary) that opened in limited release (initially change under to fewer than 500 screens) in North America and were released by an independent distributor or a studio specialty division.

11 In order to complete the survey of digital availability by the end of 2015, SNL Kagan conducted its research in October to November 2015, and looked-up the availability of the most recent box office hits (2015), defined as box office hits from Jan. 1 - Sept. 30, 2015.



When SNL Kagan excluded all films that appeared in more than one sub-sample, our total sample of unique films was 819.

### Primary research on the availability of independent Film titles

In addition to investigating the online availability of “premium” films (popular and critically acclaimed films), SNL Kagan looked up the digital availability of a sample of independent films. This was made up in the following way:

- **Independent films (60 titles)** - Sample of 60 films – includes the 20 highest grossing indie films in each of the years 2013, 2014 and 2015, as compiled by Indiewire

Once again we looked up the availability of each of these film titles across 33 legitimate online VOD and 14 TV Everywhere on-demand services in the U.S.

### Primary research on the availability of popular and critically acclaimed TV titles

In determining the online availability of premium TV titles in the U.S, SNL Kagan compiled lists of popular TV series (as measured by TV ratings) and award-winning TV series. We identified eight sub-samples – a total of 933 individual TV Series – and then looked up the availability of each of these TV titles on 22 legitimate online VOD offerings and 14 TV Everywhere on-demand services from pay TV operators and TV channels.

As TV series are not commonly offered via online rental in the U.S., we did not research the online availability of TV series via the online rental category.<sup>12</sup>

The eight sub-samples of TV series were made up in the following way<sup>13</sup>:

- **2015 Currents** - top TV series on broadcast and cable networks (100) - Sample of 100 TV programs from 2015 (Jan. 1 - Sept. 30) – top 40 shows on broadcast networks; Top 40 shows on basic cable networks; Top 20 shows on premium cable networks

- **2014 Currents – top TV series on broadcast and cable networks (100)** - Sample of 100 TV programs from calendar year 2014 – top 40 shows on Broadcast Networks; Top 40 shows on Basic Cable Networks; Top 20 shows on Premium Cable Networks
- **2013 Currents – top TV series on broadcast and cable networks (100)** - Sample of 100 TV programs from calendar year 2013 – top 40 shows on Broadcast Networks; Top 40 shows on Basic Cable Networks; Top 20 shows on Premium Cable Networks
- **2012 Currents – top TV series on broadcast and cable networks (100)** - Sample of 100 TV programs from calendar year 2012 – top 40 shows on Broadcast Networks; Top 40 shows on Basic Cable Networks; Top 20 shows on Premium Cable Networks
- **2011 Currents – top TV series on broadcast and cable networks (100)** - Sample of 100 TV programs from calendar year 2011 – top 40 shows on Broadcast Networks; Top 40 shows on Basic Cable Networks; Top 20 shows on Premium Cable Networks
- **Modern TV Hits – Pre 2013 (200)** – Sample of 200 TV series compiled from a number of sources: a combination of top 100 TV series ranked on Internet Movie Database ([www.imdb.com](http://www.imdb.com)) and top 10 regularly scheduled prime-time drama and sitcom TV programs on broadcast, cable and premium network TV
- **Critically Acclaimed, Golden Globe winners (96)** – Sample includes the 96 Drama and Comedy Golden Globe winners from the 1969/70 to the 2014/15 TV season
- **Critically Acclaimed – Emmy TV winners (137)** – Sample includes Drama, Variety and Comedy TV show Emmy award winners from 1990/91 to 2014/15

<sup>12</sup> This explains the difference between the total number of online VOD offerings between our research on film titles (where there were 33 online VOD offerings) and our research on TV Series (where there were 22 online VOD offerings)

<sup>13</sup> The lists for popular TV series were compiled from data on TV ratings success, as identified by industry commentators and analysts, and published in trade media (*Variety*, [tvbynumbers.com](http://tvbynumbers.com), *Hollywood Reporter*, *Los Angeles Times* etc.). Other sources included lists and ratings data of top TV series provided by TV studios and leading TV channels. The TV series ranked for popularity exclude repeats, specials, films, news and sports, reality live events, and programs with less than three telecasts.



## Checking the availability on online video distributors

The 47 legitimate online video offerings from 30 different online video distributors included in our sample are listed below by each of the categories:<sup>14</sup>

### Ad-supported VOD

CBS.com  
Crackle  
Hulu  
SnagFilms

### Subscription VOD

Amazon Prime  
CBS All Access  
HBO Now  
Hulu Plus  
Mubi  
Netflix Instant  
Showtime Now  
Sling TV

### Transactional EST

Amazon Instant Video  
Apple iTunes  
CinemaNow  
Flixster  
Google Play  
M-Go  
Microsoft Movies & TV (formerly xBox Video)  
PlayStation Video (PlayStation Store)  
VUDU  
YouTube

### Transactional Rental

Amazon Instant Video  
Apple iTunes  
Blockbuster  
CinemaNow  
Flixster  
Google Play  
M-Go  
Microsoft Movies & TV (formerly xBox Video)  
PlayStation Video (PlayStation Store)  
VUDU  
YouTube

### TV Everywhere On Demand

Bright House Networks  
Cablevision (Optimum)  
Charter  
Cox Communications  
DIRECTV  
DISH Network TV  
HBO GO  
PlayStation Vue  
Showtime Anytime  
Starz Play  
Time Warner Cable  
U-verse Online (AT&T)  
Verizon On Demand  
XFINITY (Comcast)

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<sup>14</sup> TV series are not commonly offered via an online transactional rental offering in the U.S. Consequently, SNL Kagan did not research the online availability of TV series via the online rental category.



## Glossary

**Authentication** – A process used by content owners and MVPDs to verify a pay TV user’s credentials (via user accounts, unique customer IDs, etc.) before allowing access to view TV Everywhere long-form video content through connected devices

**Ad-Supported Video on Demand** – A media distribution business model that provides online access to video content free-of-charge in return for viewers seeing intermittent advertisements as they stream content

**Box Office Hits** – The popularity of films as measured by: Total cinema gross ticket revenue sales for films screened commercially at theaters

**Catch-up Content** – TV video content that is made available online sometime after it has already been aired on a TV channel

**Connected Devices** – Devices with built-in connections to the Internet that enable users to access Web-hosted content or information. These devices usually augment traditional forms of content delivery. Examples include smartphones, tablets, gaming consoles and TV sets

**Digital Locker** – A system for storing content online (which could be cloud-based) whereby content could be retrieved from any device over the Internet

**Electronic Sell-Through (EST)** – A media distribution business model whereby consumers pay a one-time fee to download a piece of digital content for permanent storage and viewing

**Golden Globe Awards** – An annual media award presented by the members of the Hollywood Foreign Press Association (HFPA) recognizing excellence in film and television, for both domestic (U.S.) and foreign content

**Independent Film** – A film produced without the creative or financial input from any of the major U.S. Studios (Walt Disney Studios Motion Pictures, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, and Warner Bros. Entertainment Inc.)

**Linear Programming** – Traditional TV programming where the user watches content as per a fixed schedule (scheduled TV programming)

**Long-Form Video Content** – Professional video content that runs over a specific duration such as a full-length feature film (typically 90 minutes or longer) or a full episode of a TV show (typically 20-30 minutes for a Comedy show or 40 to 60 minutes for a Drama program). Excludes trailers, short clips and user-generated content

**Live Online Streaming** – The streaming of video content through the Internet at the same time that the content is being aired on TV

**Majors** – Refers to MPAA member film studios including their subsidiaries [e.g., including Focus (NBCU) and Screen Gems (Sony Pictures)]

**Motion Picture Association of America** – MPAA member film studios include: Walt Disney Studios Motion Pictures, Paramount Pictures Corporation, Sony Pictures Entertainment, Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, and Warner Bros. Entertainment Inc.

**Multichannel Video Programming Distributor (MVPD)** – also referred to as pay TV operator. These include cable, satellite and telecom operators retailing pay TV video services to U.S. households

**Non-Theatrical Exhibition** – Screenings of films in a non-traditional cinema environment such as film societies, community groups, village halls, etc., to specific members; not advertised generally to the public

**Online In-Home viewing** – The ability for consumers to stream video content to connected devices within their own homes using the same Wi-Fi network that connects the pay TV operator’s set-top box

**Online Out-of-Home Viewing** – The ability for consumers to stream video content to connected mobile devices from outside their homes, using any Wi-Fi network or cellular network (in some cases, out-of-home viewing is possible only on specific cellular networks, depending on the arrangements between the pay TV operators and the cellular operators)

**Online Rental** – A media distribution business model whereby consumers pay for a digital copy of a movie/TV show through the Internet and view it on a temporary basis. The content is available on the user’s device for playback within a stipulated period of time after purchase and expires after a stipulated period from the time playback begins

**Pay TV Operator** – also referred to as MVPD. These include cable, satellite and telecom operators retailing pay TV video services to U.S. households

**Premium Cable Networks** – Cable networks (such as HBO, Cinemax, Starz, Showtime, etc.) that encrypt their signals to restrict viewership to only those subscribers who pay an additional monthly subscription fee



**Release Windows** – The period of time after the primary release (theatrical release for films and network runs for TV series) that content distributors must adhere to before releasing films/TV series to extended delivery platforms such as DVDs, pay TV, VOD, etc.

**Subscription Video On Demand (SVOD)** – A media distribution business model whereby consumers sign up and pay a monthly fee to access a certain amount of video content online. Examples of providers include Netflix, Hulu Plus and Amazon Prime Instant Video

**TV Everywhere (TVE)** – Services that allow pay TV customers to view authenticated long-form television content (live linear streams or time shifted catch-up/on-demand titles) on multiple connected devices inside or out of the home

**Video On Demand (VOD)** – A service that allows consumers to view video content at their convenience. Unlike traditional linear programming, users can pause, rewind and fast-forward content to suit their preferences. VOD services can be accessed through the traditional set-top box for viewing on the TV set, or through the Internet for viewing on a wide array of connected devices



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