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June 23, 2020

The Honorable Lindsey Graham
Chairman
Committee of the Judiciary
United States Senate
Washington, DC 20510

The Honorable Thom Tillis
Chairman
Committee of the Judiciary
Subcommittee on Intellectual Property
United States Senate
Washington, DC 20510

The Honorable Chris Coons
Ranking Member
Committee of the Judiciary
Subcommittee on Intellectual Property
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
Committee of the Judiciary
Subcommittee on Intellectual Property
United States Senate
Washington, DC 20510

Re: Follow-up to the June 2, 2020 Subcommittee Hearing on section 512

Dear Chairman Graham, Chairman Tillis, Ranking Member Coons and Senator Leahy:

It was an honor to speak with you at the IP Subcommittee's hearing "Is The DMCA's Notice-and-Takedown System Working in the 21st Century?" held on June 2, 2020. The Senators deserve special plaudits for conducting the hearing with thoroughness and full attention to the issues at an unprecedentedly challenging time. I am also grateful for your follow-up questions, which I have answered individually in the enclosed document in consultation with Authors Guild legal experts.

At the hearing, I was heartened by the Senators' acknowledgment of the needs of small, individual creators. Debates around copyright and internet policy often occur between industry titans, with the voices of large rightsholders, like record companies and movie studios, and large internet

platforms drowning out small and individual creators. By inviting working creators to share their experience of using the notice-and-takedown system, which is marked by a Sisyphean “whack-a-mole” struggle, the IP Subcommittee has given us reason to be optimistic that reforms to section 512 will result in a more balanced and equitable system.

The notice-and-takedown system has long been ineffective against online piracy. Now more than ever—with piracy teeming in search results, social media platforms, and online marketplaces, and imperiling the survival of American creators—we need robust legal rules to compel ISPs to uphold their end of the bargain and work *with* rightsholders, not against them.

Thank you,

A handwritten signature in black ink, appearing to read 'Douglas Preston', with a stylized flourish at the end.

Douglas Preston
President
The Authors Guild

Responses to Chairman Tillis’s Questions

- 1. Congress intended for section 512 to provide 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.” There have been numerous voluntary initiatives, but many have faded out over the years. What do you think have been the most successful voluntary initiatives, and what areas do you see for future improvement?**

We are not aware of any formal voluntary initiatives per se that ISPs have undertaken to meaningfully address ebook piracy in the digital environment, certainly not that allow authors, whether self-published or traditionally published, to participate. That said, Amazon, which sells 80% of authorized ebooks in the U.S., does take action to keep pirated ebooks off of its service. Amazon is a publisher and bookseller itself, as well as a third-party marketplace, and uses a fingerprinting system to prevent pirates from uploading full-length infringing copies of ebooks. In our experience, it also responds expeditiously to notices, whether formal takedown notices or the Guild’s requests, to take down pirated ebooks. Similarly, LinkedIn, which is owned by Microsoft, has been receptive to our complaints, and has worked with us to remove pirate accounts and make it harder for pirates to post and sell infringing books. Facebook also took action against groups devoted to piracy once the Authors Guild got involved and escalated the complaints.

These initiatives are informal and ad hoc, but they do show that ISPs have the resources to take more meaningful action if they are properly incentivized. Voluntary initiatives by just a few platform owners, however, are largely ineffectual, as the pirates can simply flock to platforms that are not as vigilant about monitoring and removing infringing material. Studies show that effective enforcement against piracy requires a “multi-channel” approach—i.e., enforcement must be consistently robust across the various platforms. Currently there are scant baseline incentives across the board for all ISPs to target ebook and audiobook piracy, resulting in a checkered approach to dealing with a problem that requires consistency.

Any amendments to the statute or regulations under consideration should focus on recalibrating the balance between the respective incentives for copyright owners and ISPs to induce more voluntary cooperation across the board; they should ensure that sufficient incentives are provided to all ISPs—regardless of the nature of their services—to cooperate with copyright owners. As currently interpreted by the courts, the only incentives section 512 provides are to respond to 100%-compliant takedown notices (as the requirements in section 512(c)(3) are strictly construed) and to reasonably implement a repeat infringer policy (though, as the Copyright Office concludes, courts have set the bar “so low for OSPs as to be largely impractical.”)¹ Many ISPs seem to have taken the approach that it is cheaper in the long run and better for business if they waste resources on the ineffective and absurdist whack-a-mole game of notice and

¹ U.S. COPYRIGHT OFFICE, SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS 109 (2020), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf> (hereafter “Copyright Office’s Section 512 Report”).

takedown, than to engage in any meaningful cooperation with rightsholders to reduce piracy on their services.

ISPs would have far greater incentives to cooperate with rightsholders—and especially individual creators or small businesses—to effectively combat piracy, as Congress intended, if the knowledge, awareness, and vicarious liability standards in sections 512(c) and (d) were understood to have practical, independent meanings apart from notice and takedown, and if the costs of inaction by ISPs in allowing repeat infringers to continue using their services were increased. In turn, ISPs and rightsholders would be far more likely to enter into voluntary initiatives, and small and independent creators, who are currently shut out of many voluntary initiatives and preferred notice sender programs, would be in a far better position to bargain for cooperative arrangements.

2. One of the main goals of the DMCA was to implement a notice-and-takedown system that online service providers and copyright owners would find mutually beneficial. If only one side feels like the current system is working, isn't that a sign of a problem?

Yes, the fact that copyright owners in general do not feel the system is working and that small creative businesses and creators feel shut out and find the system completely ineffective signifies a major problem with the current system. Congress intended to strike a bargain between the interests of copyright owners and service providers online: in exchange for protection from financial liability for the infringement of their users, the ISPs were to cooperate with copyright owners in protecting against copyright infringement on their services. In the 25 years since the DMCA's enactment, ISPs have experienced astronomical growth by developing platforms around user-posted content, including massive amounts of infringing content that is worth billions, while creators in every industry face destitution. The expansion of safe harbors by the courts has allowed ISPs to satisfy their legal obligations with minimal effort and no real reduction of piracy, while individual rightsholders are required to send countless thousands of takedown notices. No wonder ISPs see the system as a success—they are the ones reaping all the benefits of the DMCA, with rightsholders shouldering all of its burdens. Indeed, the system has been an astounding failure for authors, who cannot expect even basic protections for their books. A bargain that only serves one side is no bargain at all.

3. Congress intended for section 512 to provide 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” and to offer “greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.” If Congress were starting from scratch, should we adopt the same balance as in 1998?

Congress's goal of balancing rightsholders' interest in protecting their copyrights with the ISPs' interest in limiting their exposure for third-party acts of infringement remains a salutary starting point for thinking about changes to section 512. This is true whether Congress chooses to rewrite the law from scratch or modify the current regime. A new law should drive real cooperation between copyright owners and service providers; it should provide strong incentives for service providers and copyright owners alike to “cooperate to detect and deal with copyright

infringements that take place in the digital networked environment.” ISPs should still have protection against liability for the infringing actions of users if they cooperate—which might include implementing filtering or other technical measures depending on the revenue of the ISP and the amount of infringement on its service.

As we previously stated, the current system is desperately out of balance. ISPs should not be absolved of “willful blindness” or be incentivized to avoid knowledge of infringement, as they currently are, but should be obliged to cooperate with rightsholders by using reasonable efforts to help to locate and filter out infringing activity on their platforms. And search engines should not continue to link to websites for which they have received thousands of takedown notices and are known to be devoted to piracy. Regarding search engines, defenders of the current system have argued that since most piracy sites are overseas in places like Ukraine and Russia, this is an international problem that should be addressed through bilateral agreements. This misleading argument fails to address the actual problem: that U.S. companies facilitate and direct millions of user searches to these foreign piracy sites, which are aimed almost entirely at U.S. consumers. If U.S. search engine companies did not direct users to notorious piracy sites overseas, those sites would quickly cease to exist. There is an even larger issue at stake. The Administration and Congress have long expressed concern about the theft of US intellectual property by foreign entities. The issue has quite legitimately become a serious source of disagreement between the U.S. and some foreign nations, such as China and Russia, that engage in large-scale copyright and patent infringement. But how can the U.S., in clear conscience, condemn the theft of its IP by foreign nations when its own copyright laws allow US corporations to openly and freely direct millions of consumers to criminal piracy operations in those same nations? This is most certainly a problem that U.S. copyright law can, and should, address.

In sum, we agree with the recommendation in the Copyright Office’s Section 512 Report to Congress to restore the balance originally intended.² I refer you to my written testimony, which contains recommendations for restoring the intended balance.

4. The Copyright Office’s Section 512 Report identified 12 different substantive areas, including eligible types of service providers, knowledge standards, repeat infringer policies, and notice form requirements. What do you think are the most significant reforms that Congress could make to section 512? If you had to pick one, what revision or clarification of the statute would do the most good?

We would support changes in most, if not all, of the 12 substantive areas discussed in the Copyright Office’s Section 512 Report. In addition to those areas, as described in my written testimony, the Authors Guild believes that: (i) the vicarious liability standard in sections 512(c)(1)(B) and (d)(2) needs to be clarified so that it has an independent meaning and effect; (ii) section 512(m)(1) (safe harbors not conditioned on duty to monitor) should be struck or amended to avoid conflict with the knowledge and red flags standards identified by the courts; and (iii) subsection (j) (injunctive relief) needs to be clarified so that it is useful. We also recommend requiring ISPs that have revenue over a certain threshold, say \$10,000,000, and that receive more than a certain number of takedown notices per year, say 1000 or 10,000, be required to

² *Id.*

implement effective, reasonably available technological measures to locate and remove infringing content and to cooperate with copyright owners in such implementation. Alternatively, the statute could impose an explicit notice and staydown regime, which could be expressed as follows: once a copyright owner provides an ISP with information or indicia with which to reasonably identify infringing copies of a work identified in a notice, the ISP would be required to remove or block any copies bearing such indicia – subject to the counter-notice process. Examples of language for such amendments are in the attachment entitled Authors Guild’s Strawman Proposal.

In general, the most important reforms in our view are those that will strengthen section 512 and revert its provisions to their original intent so that section 512 is not just an absurdist, ineffectual, expensive notice-and-takedown statute, but provides ISPs with real incentives to cooperate with rightsholders, both large and small, and keep infringement off of their services to the extent practicable.

If we had to pick just one revision or clarification, it would be revising the “actual knowledge” and “red flags” awareness standards in sections 512(c) and (d). Current interpretations of section 512’s “red flags” awareness standard and the vicarious liability standard defy common sense interpretation and conflict with Congress’s express intent. As currently applied, they have no independent meaning; as a practical matter, it is impossible for an ISP to be disqualified by them unless the rightsholder tells them the specific URL of the infringing content and swears to be the owner and that the item is infringing—a level of notice that is equivalent to a formal takedown notice under sections 512(c)(1)(C) and (d)(3). This means that the ISP has no obligation to take down any other of the many infringing copies that it could easily identify on its website, nor the new infringing copies that inevitably appear immediately after one is taken down, and so the net impact on piracy is null. ISPs that operate platforms that are teeming with piracy know it. They should not be allowed to benefit from that piracy but should be required to cooperate with rightsholders to keep infringing content off their services.

Under the courts’ current interpretations of section 512, ISPs are perversely incentivized to adopt precisely the kind of “willful blindness” that Congress sought to prevent with the statute. An amended section 512 would incentivize real cooperation—both for rightsholders to provide information about the red flags of infringement, and for ISPs to identify and remove infringing material that is readily identifiable by those red flags and not to turn a blind eye.

I refer you to my written testimony for a more specific description of the problem with the courts’ interpretation of the “red flag” awareness standard and our recommendations for revisions, including the deletion of subsection (m)(1).

5. Copyright owners and creators now reportedly spend a lot of their time monitoring the internet for infringement and enforcing against infringers. How does online piracy affect your day-to-day practices? What percentage of time do you spend dealing with infringement? What has been your experience with notice and takedown?

For authors, the shadow of piracy on their day-to-day activities is ever-present. Most authors, including myself, have Google alerts set to their names and book titles, which notify them

whenever their name or books are newly mentioned online. Every week, authors get alerts to new pirate or pirate-like scam and phishing sites. On social media platforms like Facebook, authors watch helplessly as groups containing thousands of members request, post, and exchange pirated copies of their books. Links to pirated copies appear alongside search results for their books on Google and can be purchased at cut-rate prices using Google Shopping, just a click away. Users on LinkedIn, eBay, and other platforms, none of which are authorized ebook sellers, offer digital copies of pirated ebooks and audiobooks, each digital file available for download to any and all customers. In the case of popular bestselling authors, a single pirated digital file can be sold many thousands of times over, with no limit, on platforms like eBay and Google Shopping. Each platform has its own complaint reporting process that authors must first navigate before even sending a complaint. Individual authors report spending hours every week navigating these systems and sending takedowns, only to find that when one pirate post or link is taken down, five more may appear instantly; if one site goes offline, hundreds more take its place in a short period of time. The unchecked avalanche of pirate offers on the internet seems insurmountable, and many authors quickly give up. Even if authors spent 100% of their time sending takedown notices, they would not make any appreciable dent in piracy under the current “whack-a-mole” system of “notice and takedown.”

Responses to Ranking Member Coons's Questions

- 1. The Senate Judiciary Committee's 1998 report on the Digital Millennium Copyright Act (DMCA) stated that "technology is likely to be the solution to many of the issues facing copyright owners and service providers in the digital age," and the Committee "strongly urge[d] all of the affected parties expeditiously to commence voluntary, interindustry discussions to agree upon and implement the best technological solutions available to achieve these goals." Unfortunately, as noted in the recent Copyright Office report on section 512, "Congress' vision of broad, open, cross-industry standards-setting for the creation of standard technical measures has not come to pass." Why do you think that is, and do you have any hope that future voluntary standardization of technical measures will combat digital piracy effectively?**

The failure to develop "standard technical measures" is largely due to the fact many major ISPs *benefit* from user-posted or user-distributed infringing content and the lack of effective legal incentives for adopting piracy-prevention measures. Many user-posted content platforms earn revenue through advertising, and that revenue is directly related to the number of eyeballs or clicks they can attract. Infringing content is often a draw for users, especially if provided for free. And platforms that allow users to sell digital content are often paid a fee on transactions through their services. Many ISPs thus have a financial incentive to allow users to post, share, or sell infringing content on or through their services, and search engines have similar financial incentives to direct users to known pirate sites, and not to implement technical measures that would prevent piracy.³

Section 512(i)(2)(A) defines "standard technical measures" as those developed by broad consensus through a multi-industry process. With the case law interpreting section 512 so staunchly in their favor, ISPs have no incentive to participate in such multi-industry processes or concede the need for standard technical measures. The technical measures that are in use today, such as "hashing" or "digital fingerprinting," do not decisively fall under the statutory definition, as they were not developed through multi-industry processes. As we explain in our written testimony, a better definition of "standard technical measures" would include all effective, contemporary standard technical measures that are generally accepted in the pertinent industry (i.e., that are commonly used and readily available), regardless of whether they are developed from a voluntary multi-industry standards-setting process. This would encompass the technical measures that are already available and provide the flexibility necessary to cover new technical measures adopted in an industry.

³ See Lauren Gallo, *The (Im)possibility of Standard Technical Measures for UGC Websites*, 34 Colum. J. L. & Arts 283, (2011) ("Right holders and UGCs have unmistakably competing interests: the former to protect copyright and the latter to attract web traffic, including by reproducing and displaying popular, sometimes copyrighted works. Furthermore, the nature of UGC technology, by which the sites provide and organize a platform for user-uploaded material, does not currently support a business model that includes substantial effort at policing infringement. And the DMCA endorses this inactivity, at least to some degree."). *Id.* at 303.

To ensure that the “standard” measures both continue to be aligned with changes in technology and the statutory definition, Congress could instruct the Copyright Office or another government agency to conduct periodic rulemakings on what technical measures should be considered “standard” within the meaning of section 512, as well as the measure that certain ISPs—particularly those that handle takedown notices or earn revenue from user-posted content at scale—might be required to adopt in each industry.⁴ A regulatory process would also encourage industry-specific needs assessments to promote the use of the most effective available technologies. For instance, the primary digital rights management (“DRM”) technology used on ebooks to protect against infringement is notoriously easy to circumvent. Pirates can easily disable ebook DRM, create DRM-free copies, and upload them to any site, including social media platforms. In contrast, the digital fingerprinting technology that some user-generated content platforms use against video and music infringement is not commonly used for ebook files (with the exception of Amazon, which does use digital fingerprinting for ebooks to identify identical copies and prevent their uploads). Yet a good deal of piracy could be alleviated by the use of ebook fingerprinting on other services if “digital fingerprinting” or other effective technologies were adopted as a standard with respect to ebook content.

In short, the Authors Guild supports the development and broad adoption of robust, effective standard technological measures. But ISPs will need stronger incentives to develop and implement them than the current law provides. These incentives should be designed to elicit *ongoing* cooperation so that the standards and technologies evolve and remain viable in a fast-changing technological environment.

2. The Copyright Office report made several recommendations for possible legislation, including clarifying the scope of eligible online service provider (“OSP”) activity; promoting clarity and transparency in OSP repeat infringer policies; clarifying standards like “red flag knowledge” and “willful blindness”; clarifying the right to submit representative lists of infringing material; increasing penalties for misrepresentations in abusive notices or counter-notices; shifting the notice requirements to a regulatory scheme to provide flexibility; establishing an alternative dispute resolution mechanism; clarifying the right to subpoena OSPs to identify alleged infringers; and considering whether injunctive relief beyond notice and takedown is warranted. Do you agree with these recommendations? How would you suggest we approach these issues, and how would you prioritize them?

We would support changes within many, if not all, of the 12 substantive areas discussed in the Copyright Office’s Section 512 Report. We generally agree with the Copyright Office’s analysis of the issues and their broad conclusions and recommendations.

In addition to the areas listed above, as described in my written testimony, the Authors Guild believes that: (i) the vicarious liability standard in sections 512(c)(1)(B) and (d)(2) needs to be clarified so that it has an independent meaning and effect; (ii) section 512(m)(1) (safe harbors not conditioned on duty to monitor) should be struck or amended to avoid conflict with the

⁴ For e.g., ISPs that have revenues over, say \$10,000,000 per year and received over, say, 1,000 takedown notices in the last 12 months. (See response to question 2 below.)

knowledge and red flags standards identified by the courts; and (iii) subsection (j) (injunctive relief) needs to be clarified so that it is more useful. We also recommend requiring ISPs that have revenue over a certain threshold, say \$10,000,000, and that receive more than a certain number of takedown notices per year, say 1,000 or 10,000, be required to implement effective, reasonably available technological measures to locate and remove infringing content, and to cooperate with copyright owners in such implementation.

As a general matter, the most important reforms in our view are those that will strengthen section 512 and revert its provisions to their original intent so that section 512 is not just an absurdist, ineffectual, expensive notice-and-takedown statute, but provides ISPs with real incentives to cooperate with rightsholders, both large and small, and keep infringement off of their services to the extent practicable. Among the areas identified by the Copyright Office in their report on section 512, we would prioritize the following two areas: revisions or clarifications of the “actual knowledge,” “red flag knowledge,” and “willful blindness” standards, and the standardization of takedown forms, as these would likely hold the greatest benefit for individual rightsholders.

Knowledge requirements; clarifying standards like “red flag knowledge” and “willful blindness”

Current interpretations of section 512’s “actual knowledge” and “red flags” awareness standards require that the ISP be notified of the precise online location (i.e., URL) of the infringing content before they have a duty to take it down. As explained in my written testimony, even if an ISP—under a reasonable person standard—should know that certain content at a certain location is infringing, they are off the hook. Rather, counter to the accepted legal understanding of knowledge standards, the ISP must have *certain* knowledge that the item at a certain URL is infringing. This type of knowledge is gained, as a practical matter, only by a formal DMCA-compliant takedown notice for each infringing copy. This interpretation defies common sense and conflicts with Congress’s express intent; and it allows ISPs to benefit from mass infringement and remain protected by the same harbor. ISPs have no obligation to take down any other of the easily identifiable infringing copies on its service. Rather, the current interpretations of section 512 incentivize ISPs to adopt the kind of “willful blindness” that Congress sought to prevent with the statute. Section 512 should be amended to restore actual knowledge and awareness to their ordinary meaning. Amendments could also clarify that the copyright owner should provide information to the ISP to help the ISP identify the clear red flags for infringement of their works, and once they do would require ISPs to remove material that is uploaded with such red flags, rather than to turn a blind eye.

In establishing the “red flag” standard in particular, Congress intended to exempt ISPs from safe harbor protection if they “turned a blind eye to ‘red flags’ of obvious infringement.”⁵ Courts have interpreted it, however, to mean something that is identical in its practical effect to a heightened actual knowledge standard. For instance, even after the streaming giant YouTube admitted that it was aware that “significant quantities of material on the YouTube website were infringing” and emails among executives showed that they knew of specific instances of infringement, the Second Circuit concluded that there was insufficient evidence of either actual

⁵ H.R. Rep. No. 105-551, pt. 2, at 42 (1998).

knowledge or red flag awareness to create a triable issue of fact.⁶ The motivation behind that decision boils down to the understandable reluctance of courts to burden ISPs with the responsibility of locating and identifying infringing material on their services when a separate provision (subsection 512(m)) provides that ISPs have no duty to monitor their services to be eligible for the safe harbors.

For this reason, we recommend deleting section 512(m)(1), or in the alternative amending it to apply only to ISPs that have received fewer than a fixed number of takedown notices in a fixed period of time (e.g., fewer than 1,000 or 10,000 over the course of a year). Under this system, once an ISP is given notice that there is a significant amount of infringing activity on its service, the burden would shift to the ISP to take measures to remove infringing content from its service.

Additionally, sections 512(c)(1)(A)(ii) and (d)(1)(B) could be amended to create a presumption of red flag awareness when an ISP knows its service is hosting or linking to a significant amount of infringing content. For instance, red flag awareness should be presumed if the service provider has received over a fixed number of takedown notices within a month or year (which could be the same or different to the proposed section 512(m) limits). Such awareness would not mean the ISP is automatically liable, but would trigger the obligation to take steps, such as filtering, to eliminate infringing content or links to it. As described briefly above, sections 512(c)(1)(A)(ii) and (d)(1)(B) also could be amended to add that the awareness is presumed if the rightsholder has provided the ISP with sufficiently detailed and clear indicia of infringing copies of their works so that the ISP can readily identify the infringement and remove or disable access to it. It would also effectively create a staydown regime since, once notified and given the clear indicia of infringement with which to reasonably identify infringing copies of a work identified in a notice, the ISP could not “turn a blind eye” but would have to implement measures to expeditiously take down each copy that bore the same indicia – subject to counter-notice. That would foster real cooperation between ISPs and all rightsholders, including individual creators.

Examples of language for such amendments are in the attachment entitled Authors Guild’s Strawman Proposal.

Simplified, standard takedown forms

We reiterate and attest to the observation in the Copyright Office’s Section 512 Report that “[t]he proliferation of new web-based submission forms and ISP-imposed requirements for substantiation of takedown notices in order to ensure the efficiency of the process has had the effect of increasing the time and effort that smaller rightsholders must expend to send takedown notices.”⁷ Individual authors report spending a frustrating amount of time navigating the complex takedown systems and divergent policies of the various platforms before they can even send a takedown complaint. We support the Copyright Office’s recommendation to Congress to “consider shifting the required minimum notice standards for a takedown notice to a regulatory process, enabling the Copyright Office to set more flexible rules and ‘future-proof’ the statute against changing communications methods.”⁸

⁶ *Viacom v. YouTube*, 676 F.3d 19, 30(2d Cir. 2012).

⁷ Copyright Office’s Section 512 Report, *supra* note 1, at 5.

⁸ *Id.*

3. The Copyright Office also recommended that we reject a one-size-fits-all approach to modern internet policy. How would you suggest that we accommodate differences among stakeholders as we evaluate the DMCA?

We agree with the Copyright Office that modern internet copyright policy demands flexibility, particularly when applied to smaller rightsholders and ISPs. As such, we recommend building in exemptions for smaller startups with relatively low revenue and that receive few takedown notices from the heightened knowledge and technical requirements proposed here and in our written testimony. For instance, as previously explained, Congress could provide that heightened requirements only apply to ISPs that receive over the fixed number of notices (e.g., 1,000 or 10,000 in the last 12 months) and have revenue of over \$10,000,000 per year. The latter requirement is modeled on Article 17 of the European Union’s Digital Single Market Copyright Directive, which subjects ISPs that have annual revenues below €10 million to lower safe harbor prerequisites. We believe these provisions would provide smaller, legitimate services with more concrete insulation from liability while also holding larger, more technologically and financially capable ISPs accountable for preventing blatant user infringements.

We also believe that small copyright owners and creators are differently situated from large rightsholders. Small copyright owners and individual creators have no ability to work out special arrangements with ISPs, and do not have the deep pockets required to file a legal action as required under subsections (j) (for injunctive relief) and (g) (to counter a counter-notice). Section 512 needs to provide incentives for ISPs to cooperate with them as well, other than through mere notice and takedown, which barely makes a dent in piracy and strains the limited resources most independent creators have.

4. How can the notice-and-takedown process be improved, particularly for small creators? Would you recommend standardizing the process across service providers? If so, who should be responsible for establishing and enforcing those standards?

Yes. As we discuss in our response to Question 2, a simpler, standard process across the various service providers will have tremendous benefits for small creators. We support the Copyright Office’s recommendation to shift standards-setting for notice forms and for enforcement to a regulatory process overseen by the Copyright Office. With respect to overall improvements to the notice-and-takedown process, short of replacing the current notice-and-takedown system with a “notice-and-staydown” system, we believe that amendments to clarify Congress’s original intended meaning of the knowledge, awareness, and vicarious liability standards in sections 512(b) and (c) would supplement the notice-and-takedown system established by sections 512(c)(1)(C) and (c)(3) in a manner that would have the same effect as an express notice-and-staydown system. That is, if the provisions that courts have effectively struck from section 512 (namely, subsections (c)(1)(A)–(B) and (d)(1)–(2)) were given their intended effect, and “red flags” awareness given its own meaning, section 512, as drafted, would in practice serve as a staydown law. Under our proposal, if a small copyright owner provided clear indicia from which an ISP could reasonably identify infringing copies, it would not have to send a new takedown notice for every infringing copy.

5. The Copyright Office declined to make recommendations regarding a “notice-and-staydown” system. Should Congress consider this alternative to the “notice-and-takedown” framework? Why or why not? Would you support a middle ground that would require OSPs to ensure that once infringing content has been removed pursuant to section 512, the same user cannot repost the same content on any platform controlled by that provider?

The Authors Guild believes that Congress should consider a notice-and-staydown regime to cure the Sisyphian “whack-a-mole” problem endemic to the notice-and-takedown regime. The Authors Guild has long advocated for a system that would require some action by ISPs to ensure that infringing content stays off their platforms. The question, of course, is what that means from a drafting perspective; how would Congress legislate a staydown system? For reasons identified by the Copyright Office in their report on section 512, it may not be as simple as legislating a requirement that once an ISP receives a notice of infringement of a particular work, it must never allow infringing copies of that same work to be posted again. In most cases, a staydown system would require ISPs to adopt the kinds of technical measures discussed above and in my written testimony.

Similarly, were red flags awareness and the vicarious liability standards restored to their common sense and common law meanings, which Congress assuredly intended, ISPs that are aware that their users are regularly posting infringing material on their services, and/or ISPs that financially benefit from the infringement and have the ability to remove or block it, would have to adopt technical measures to ensure that the infringing material were expeditiously removed or access to it disabled.

The Authors Guild is less concerned with whether section 512 is restored to its original meaning or a new staydown regime is enacted than it is with ensuring that the large ISPs that profit from infringement, directly or indirectly, have the obligation to adopt effective technical measures or otherwise work with rightsholders to keep infringing content off their services.

To be clear, the Authors Guild’s focus is on preventing the distribution of full-length, *identical* infringing copies of ebooks, audiobooks, and other works. Once a particular copy has been identified (for instance, through application of digital fingerprinting) as being a pirated copy, the same pirated file should not be allowed to appear again on any platform controlled by the service provider. In short, Congress should consider amendments that would revert section 512 to a law that encourages ISPs and rightsholders to collaborate on taking and *keeping* down infringing content off their services. The statute that Congress enacted in 1998 *was* a staydown statute, not a “whack-a-mole” one. Our written testimony makes specific recommendations for modifying section 512 to bring it in line with Congress’s original intent.

The Authors Guild would *not* support the adoption of the “middle ground” of blocking the same user from reposting the same content. As our experiences with LinkedIn and other similar platforms have illustrated, the anonymous nature of the internet makes it relatively easy for banned users to create new, untraceable accounts through which they may freely repost the same infringing content. Put simply, this solution would do little to solve the central “whack-a-mole” issue of online piracy. Instead, we recommend that any legislation focus on requiring

technological solutions, such as content filtering and fingerprinting, that ensure that full-length, identical infringing copies of ebooks remain offline after being identified.

Some defenders of the current system have argued that since most piracy sites are overseas in places like Ukraine and Russia, this is an international problem that should be addressed through bilateral agreements and not through U.S. copyright law. This argument fails to address the fact that U.S. search engine companies facilitate and direct millions of user searches to these foreign piracy sites, which are aimed almost entirely at U.S. consumers. If U.S. search engine companies did not direct users to notorious piracy sites overseas, those sites would quickly cease to exist. There is an even larger issue at stake. The Administration and Congress have long expressed concern about the theft of US intellectual property by foreign entities. The issue has quite legitimately become a serious source of disagreement between the U.S. and some foreign nations, such as China and Russia, that engage in large-scale copyright and patent infringement. But how can the U.S., in clear conscience, condemn the theft of its IP by foreign nations when its own copyright laws allow US corporations to openly and freely direct millions of consumers to criminal piracy operations in those same nations? The problem of foreign pirate sites is a problem that should, and can, be addressed through U.S. copyright law.

Responses to Senator Leahy's Questions

1. **In your testimony, you advocated for replacing the notice-and-takedown system with a notice-and-staydown system. Others have advocated for this and other changes to the law, including website blocking. Consumer advocates and online service providers have expressed concern that these changes would have a chilling effect on freedom of expression and would allow for abuse through illegitimate claims of infringement against legal uses of content.**

- a. **How would you respond to these concerns?**

As an organization, the Authors Guild has long championed freedom of expression. It is one of the three prongs of our advocacy. No one understands the importance of free expression, or of fair use, as authors do, as we engage in them on a daily basis as part of our profession and often quote from our peers and predecessors in our writing. Our recommendations regarding updates and clarifications to section 512 are therefore mindful of potential effects on free expression.

To be clear, the legal and technological suggestions we have advanced, including notice and staydown, are focused on preventing the distribution of full-length, *identical* infringing pirated copies of ebooks and audiobooks. Once a particular copy has been identified (for instance through the application of digital fingerprinting) as a pirated copy, preventing the same pirated file from being re-uploaded by the same or another user does not affect fair use or free expression. Piracy—the copying and dissemination of exact copies—is illegal copying, not original, free expression deserving of protection. For any incidental (and largely speculative) negative effect on fair use, far greater economic and legal harm results from piracy.

The Authors Guild believes that website blocking by ISPs that provide internet access or search services can be useful in preventing users from accessing standalone pirate websites, particularly those hosted in pirate-friendly jurisdictions, beyond enforcement by U.S. courts. Both the Copyright Office's Section 512 Report and evidence from the E.U., where website blocking is more widely implemented than in the U.S., dispel misperceptions about its efficacy and the potential for abuse.⁹ The Authors Guild strongly supports the use of website blocking by search engines (also called “delinking” in the search engine context) after a certain number of takedown notices have been issued against a particular site and it is clear that the site is devoted to piracy. Currently, Google, for instance, only demotes such piracy websites, and does not delink or block them. As described in my written testimony, this means that notorious and well-known piracy sites, even those that have been previously enjoined by U.S. courts, such as SciHub/Libgen, can be found through a simple search if you type in a close approximation to the name. Website blocking would finally allow U.S. rightsholders some relief from these foreign-based piracy sites that are able to drain significant income from U.S. rightsholders. Defenders of the current system have argued that since most piracy sites are overseas in places like Ukraine and Russia, this is an international problem that should be addressed through bilateral agreements and not through U.S.

⁹ Copyright Office's Section 512 Report, *supra* note 1, at 58 (noting that “[r]ecent studies have shown that website blocking has operated as an effective tool in addressing digital piracy, despite the familiar misperceptions about its efficacy and alleged potential for abuse.”).

copyright law. This argument fails to address the fact that U.S. search engine companies facilitate and direct millions of user searches to these foreign piracy sites, which are aimed almost entirely at U.S. consumers. If U.S. search engine companies did not direct users to notorious piracy sites overseas, those sites would quickly cease to exist. There is an even larger issue at stake. The Administration and Congress have long expressed concern about the theft of US intellectual property by foreign entities. The issue has quite legitimately become a serious source of disagreement between the U.S. and some foreign nations, such as China and Russia, that engage in large-scale copyright and patent infringement. But how can the U.S., in clear conscience, condemn the theft of its IP by foreign nations when its own copyright laws allow US corporations to openly and freely direct millions of consumers to criminal piracy operations in those same nations? The problem of foreign pirate sites is a problem that should, and can, be addressed through U.S. copyright law.

Website blocking is not sufficient, however, as it does not solve the problem of piracy on U.S.-based online marketplaces and other platforms, such as Google Shopping and eBay. As we discuss in our written testimony, piracy thrives on convenience. Studies show that limiting the availability of pirated content drives consumers to acquire the content legally. For this reason, we think that Congress should also focus on creating rules that compel legitimate platforms that are used for rampant piracy as well as legitimate purposes to cooperate with rightsholders to keep pirated content off of their services. Dedicated consumers of pirated content will find workarounds to access pirate websites even when they are taken down; we are more concerned about the average internet user who encounters pirated offerings in everyday browsing, social media, and searches, and may knowingly or unwittingly take advantage of free or low-cost pirated ebooks and audiobooks offered on legitimate platforms. Indeed, many readers do not want to steal from their favorite authors. Piracy sites, knowing this, dress up their sites as legitimate and sometimes explain the low prices by claiming to partner with the authors in question.

Finally, we want to caution Congress against the view championed by some anti-copyright voices that copyright law stands in opposition to free expression. Copyright law is the “engine of free expression,” supplying necessary “economic incentive[s] to create and disseminate ideas.”¹⁰ Piracy destroys these incentives, and a system that allows it to thrive presents a more serious challenge to free expression than a system that marginally raises the costs for large internet platforms.¹¹ No organization is more concerned about free expression than the Authors Guild, for obvious reasons, and we are highly sensitive to and have carefully considered issues of free expression with regard to our recommendations for reform of section 512.

b. If a change were to be made from a notice-and-takedown system to a notice-and-staydown system, how could online service providers ensure that the mechanism is not being abused?

¹⁰ *Harper & Row Publishers, Inc., v. Nation Enterprises*, 471 U.S. 539, 558 (1985).

¹¹ As we state in our written testimony, heightened legal and technological requirements should ideally only apply to internet platforms a certain size and scale (for e.g., ISPs that earn over \$10 million in yearly revenue and have receive than 1000 takedown notices per year).

The Authors Guild does not think that a staydown regime is any more susceptible to abuse than a takedown regime, and the incidents of abuse of the current takedown regime through knowing misrepresentations are rare and subject to serious penalties under section 512(f). The Authors Guild has been made aware of a few incidents of authors or others in the independent publishing industry using the takedown system against authors that compete in the same space, due to a lack of understanding regarding copyright law, ownership, and fair use. Such use of notice and takedown to remove competing books from Amazon, for instance, should not be tolerated. The Authors Guild intervenes on behalf of the targeted authors to have their books reinstated immediately, and we educate authors as to when the use of takedowns is appropriate or not, to prevent unknowing abuse of the system and provide authors who are targeted with the knowledge to fight back.

The Copyright Office's Section 512 Report addresses the issue of bad takedown notices, and concludes that "it is difficult to ascertain, in the notice-and-takedown system as a whole, either the true rate of inaccurate notices or the relative frequency of merely inaccurate or incomplete notices versus notices sent containing knowingly false misrepresentations."

Neither the current regime nor the proposed staydown regime impose any obligation on ISPs to assess the legal propriety of notices they receive, but only to take the alleged infringing content down and to put it back up upon receipt of a counter-notice. Some ISPs have adopted additional requirements for notice senders (such as asking them for certificates of registrations, fair use vetting, etc.) voluntarily, which further discourage potential abuses of the notice-and-takedown system, but they may also deter bona fide complaints. In revising the DMCA, it would be helpful for Congress to consider whether there are any additional, reasonable requirements that could further deter abusive takedown/staydown notices, recognizing that no system is likely to prevent 100% of piracy or abuse.

As a starting point, we have proposed language to amend section 512 that would serve in practice as a staydown law that would incorporate the counter-notice system: once a copyright owner provides an ISP with information or indicia with which to reasonably identify infringing copies of a work identified in a notice, the ISP would be required to remove or block any copies bearing such indicia – subject to counter-notice. Examples of language for such amendments are in the attachment entitled Authors Guild's Strawman Proposal.

2. In what ways has policing the internet for copyright infringements become more difficult for creators over the past two decades? What technological developments in particular have made preventing infringements either easier or more difficult? How accessible are technologies that make preventing infringements easier?

The internet's mind-boggling growth over the past two decades combined with judicial expansion of DMCA safe harbors has made meaningful policing of infringement online almost impossible. By some estimates, there are 400 million websites active today.¹² In 1998, only 3.6% of the world's population had internet access; today 59.6% of the world's population is online,

¹² How many websites are there? How many are active in 2020?, <https://hostingtribunal.com/blog/how-many-websites/#gref> (last accessed June 22, 2020).

across multiple devices.¹³ Pirating content, especially books, has also become vastly easier. Numerous tutorials online teach users how to easily disable DRM on ebooks—the primary technological to protect against infringement—create DRM-free copies, and upload them to any site, including on social media platforms. The small file size of ebooks makes their distribution virtually effortless, almost instantaneous, and free.

Yet, the notice-and-takedown system requires rightsholders to notify ISPs of every single infringing URL location in this vast, ever-changing environment. Even large rightsholders that have private agreements with platforms or that hire services with automated web crawling and notice tools cannot keep up. The average piracy website will have tens of thousands of URLs. Infringing content gets reposted immediately at a different URL, and many pirates have learned to stay one step ahead of the takedown services' tools. Small, individual authors, who cannot afford commercial takedown services, do not stand a chance. Even when DRM measures are applied to their books, pirate copies appear almost instantaneously and spread quickly once the book is released. And with the absurd “whack-a-mole” notice-and-takedown system, authors could spend all their time sending takedowns, and still find new pirated copies. We would rather talented writers spend their days writing and producing new original expression than ferreting out infringement and sending takedown notices.

Since 2006, some user-generated content platforms have used “hashing” or “digital fingerprinting” to target infringement (which they also apply to prevent dissemination of child pornography); however, to our knowledge only Amazon, which is just one of many platforms pirates use to disseminate infringing ebooks, applies this technology to ebook content. These technologies could be very useful in obstructing the flow of pirate ebooks if applied broadly across the industry. The effect would be a notice-and-staydown system. Once an infringing copy is identified, the copyright owner could provide the ISP with a legitimate copy for fingerprinting (if the ISP does not already have one), along with a list of other authorized distributors, if any. The ISP could then keep future infringing copies off of the platform by automatically rejecting any match to the fingerprinted file and preventing it from being uploaded unless by the copyright owner or authorized distributor(s). Amazon uses fingerprinting and its large platform is largely free of pirated ebooks. If industry is truly incentivized to create new and better technologies as pirates get more sophisticated, it can and will.

¹³ World internet users statistics, <https://www.internetworldstats.com/stats.htm> (last accessed June 22, 2020).

Authors Guild's Strawman Proposal
for Amendments to Clarify Select Provisions of Section 512 of the Copyright Act

(c) Information Residing on Systems or Networks at Direction of Users.—

(1) In general.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright 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, if the service provider—

(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which the infringing activity is apparent, including

(a) information provided by the copyright owner identifying specific red flags of infringing copies of its works from which the service provider could readily identify the infringing copies through a reasonable search of its service, or

(b) a general awareness that there is pervasive infringing material on the system or network, whether or not the service provider is aware of the specific location of the infringement or of specific infringing material. A general awareness of infringement shall be presumed if the service provider has received over [10,000] takedown notices that comply with subsection (c)(3) within the prior 365 days or less; or

(iii) upon obtaining such knowledge or awareness, (a) acts expeditiously to remove, or disable access to, the material; and (b) if the copyright owner provided the service provider with specific indicia common to infringing copies, that are “red flags” of infringement, takes measure to ensure that all infringing copies that bear such indicia are removed and not reposted; and

(B) if the service provider has revenue of over [\$10,000,000] per year and has received over [10,000] takedown notices that comply with subsection (c)(3) in the prior 365 days or less, it implements reasonably effective and available technological measures to locate and remove infringing content; and cooperates with copyright owners in such implementation; and

(C) does not receive a financial benefit attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity (including by removing or disabling access to the infringing activity); and (D) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

(2) Designated agent.—The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive

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notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the agent.

(B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

(3) Elements of notification.—

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site, meaning that the copyright owner need not list every work that is infringed, nor its precise location.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material, such as a description of the infringing content and any URL's for infringing content to the extent known, provided that the precise location is not necessary.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(B)(i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

(ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the

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receipt of notification that substantially complies with all the provisions of subparagraph (A).

(d) Information Location Tools.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider—

(1) (A) does not have actual knowledge that the material or activity is infringing;

(A) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent, including

(a) information provided by the copyright owner identifying specific red flags of infringing copies of its works from which the service provider could readily identify the infringing copies through a reasonable search of its service, or

(b) a general awareness that there is pervasive infringing material on the system or network, whether or not the service provider is aware of the specific location of the infringement or of specific infringing material. A general awareness of infringement shall be presumed if the service provider has received over [10,000] takedown notices that comply with subsection (c)(3) within the prior 365 days or less; or

(B) upon obtaining such knowledge or awareness, (a) acts expeditiously to remove, or disable access to, the material and (b) if the copyright owner provided the service provider with specific indicia common to infringing copies, that are “red flags” of infringement, takes measure to ensure that all infringing copies that bear such indicia are removed and not reposted; and

(C) if the service provider has revenue of over [\$10,000,000] per year and has received over [10,000] takedown notices that comply with subsection (c)(3) within the prior 365 days or less, it implements reasonably effective and available technological measures to locate and remove infringing content; and cooperates with copyright owners in such implementation; and

(2) does not receive a financial benefit attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity (including by removing or disabling access to the infringing activity); and

(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

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(e) Limitation on Liability of Nonprofit Educational Institutions.—

(1) When a public or other nonprofit institution of higher education is a service provider, and when a faculty member or graduate student who is an employee of such institution is performing a teaching or research function, for the purposes of subsections (a) and (b) such faculty member or graduate student shall be considered to be a person other than the institution, and for the purposes of subsections

(c) and (d) such faculty member's or graduate student's knowledge or awareness of his or her infringing activities shall not be attributed to the institution, if—

(A) such faculty member's or graduate student's infringing activities do not involve the provision of online access to instructional materials that are or were required or recommended, within the preceding 3-year period, for a course taught at the institution by such faculty member or graduate student;

(B) the institution has not, within the preceding 3-year period, received more than 2 notifications described in subsection (c)(3) of claimed infringement by such faculty member or graduate student, and such notifications of claimed infringement were not actionable under subsection (f); and

(C) the institution provides to all users of its system or network informational materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright.

(2) For the purposes of this subsection, the limitations on injunctive relief contained in subsections (j)(2) and (j)(3), but not those in (j)(1), shall apply.

(f) Misrepresentations.—Any person who knowingly materially misrepresents under this section—

(1) that material or activity is infringing, or

(2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

[\(3\) Claims for misrepresentation under this section may be brought before the \[Copyright Small Claims Board\] on an expedited basis, pursuant to regulations issued by the Board.](#)

...

(g) Replacement of Removed or Disabled Material and Limitation on Other Liability.—

...

(2) Exception.—Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled

by the service provider, pursuant to a notice provided under subsection (c)(1)(A)(iii), (c)(1)(C), or (d)(1)(B) unless the service provider—

...

(i) Conditions for Eligibility.—

(1) Accommodation of technology.—The limitations on liability established by this section shall apply to a service provider only if the service provider—

(A) 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; and

(B) accommodates and does not interfere with standard technical measures.

(2) Definition.—As used in this subsection, the term “standard technical measures” means technical measures that are used to identify or protect copyrighted works and—

(A) are commercially available;

(B) are available to any person on reasonable and nondiscriminatory terms; and

(C) do not impose unreasonable costs on service providers or substantial burdens on their systems or networks.

(j) Injunctions.—The following rules shall apply in the case of any application for an injunction under [section 502](#) against a service provider that is not subject to monetary remedies under this section:

(1) Scope of relief.—(A) With respect to conduct other than that which qualifies for the limitation on remedies set forth in subsection (a), the court may grant injunctive relief with respect to a service provider only in one or more of the following forms:

(i) An order restraining the service provider from providing access to the infringing material or activity identified by the copyright owner residing on the provider's system or network.

(ii) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is engaging in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

(iii) Such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a particular website.

(B) If the service provider qualifies for the limitation on remedies described in subsection (a), the court may only grant injunctive relief in one or both of the following forms:

(i) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is using the provider's service to engage in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

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(ii) 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.

(2) Considerations.—The court, in considering the relevant criteria for injunctive relief under applicable law, shall consider—

(A) ~~the magnitude of the harm likely to be suffered to the operation of the provider's system or network, as a result of such the injunctive relief;~~

(B) the magnitude of the harm likely to be suffered by the copyright owner in the digital network environment if steps are not taken to prevent or restrain the infringement;

(C) whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations.

(3) Notice and ex parte orders.—Injunctive relief under this subsection shall be available only after notice to the service provider and an opportunity for the service provider to appear are provided, except for orders ensuring the preservation of evidence or other orders having no material adverse effect on the operation of the service provider's communications network.

...

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

(1) ~~[strike this subsection or alternatively provide one of the following]~~

~~Option 1: a service provider monitoring its users' accounts for personal information or any information other than the identification and location of infringing activity by a user; or~~

~~Option 2: a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i), if the service provider has annual revenue under [\$10,000,000] and has received fewer than [10,000] takedown notices that comply with subsection (c)(3) in the prior 365 days;~~

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

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Deleted: whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider under this subsection,

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Deleted: (D) whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available.¶

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