

April 1, 2016

The Honorable Maria A. Pallante
Register of Copyrights
U.S. Copyright Office
101 Independence Avenue, SE
Washington, DC 20559-6000

RE: Comments of ACT | The App Association in Response to the U.S. Copyright Office's
Notice of Inquiry, Section 512 Study, 80 FR 81369 (Dec. 29, 2015)

Dear Ms. Pallante:

ACT | The App Association, representing over 5,000 app companies and software firms creating and licensing digital content, submits these comments in response to the Copyright Office's Notice of Inquiry regarding the impact and effectiveness of the DMCA safe harbor provisions contained in 17 U.S.C. 512.¹ ACT | The App Association is widely recognized as the foremost authority on the \$120 billion mobile app economy and its intersection with public policy. As the only organization focused on the interests of small business app developer entrepreneurs around the world, ACT | The App Association advocates for policies that inspire and reward innovation and provides resources to help its members leverage their intellectual assets to raise capital, create jobs, and continue innovating.

As detailed in ACT | The App Association's latest *State of the Mobile App Economy* report,² the app industry has existed for less than a decade and has experienced exponential growth alongside the rise of smartphones. It now represents a \$120 billion ecosystem, which is led by U.S. companies, the vast majority of which are startups or small businesses. The explosion of mobile apps being deployed by non-traditional software companies is dramatically changing the independent software vendor economy.

¹ *Section 512 Study: Notice and Request for Public Comment*, 80 FR 81862 (Dec. 31, 2015).

² ACT's annually-released *State of the Mobile App Economy* provides further information on this growing industry that continues to grow, creating jobs and revolutionizing how consumers work, play, and manage their health. See <http://actonline.org/2016/01/04/act-the-app-association-releases-latest-app-industry-report/>.

For ACT | The App Association member companies, the creation of IP is a critical part of success for individual developers and the industry as a whole. App developers are both creators and users of intellectual property, who recognize that infringing and counterfeit apps hurt the app industries through consumer confusion, reducing customer confidence, increasing security and privacy risks, lost revenues, and increasing support and infrastructure costs. For this reason, ACT | The App Association members strongly support intellectual property protection, both when an app is being developed and when it is made available in app stores, to ensure users know they are obtaining authentic apps.

The mobile app economy, much like other content industries, has been plagued with piracy. A 2014 paper placed the piracy rate for apps between 60-90%.³ It referenced one study that found when an app has 100,000 downloads, only 10% are paid. This results in millions of dollars in lost revenue and investment in developing innovative new products and services.

As a relatively young industry comprised mostly of small software companies, app developers are utilizing the section 512 notice-and-takedown procedures to enforce their rights or protect themselves, though not to the extent other industries have. Still, ACT | The App Association hopes these comments will explain how app developers are important stakeholders when considering revisions to copyright law. Understanding how Section 512 impacts the mobile app economy and how some ACT | The App Association members used the process to protect their rights will hopefully add valuable perspective to this study.

³ Choi, et al., "Is Digital Piracy an Enemy of the Mobile App Industry? An Empirical Study on Piracy of Mobile Apps", Twentieth Americas Conference on Information Systems, Savannah (2014), *available at* <http://aisel.aisnet.org/cgi/viewcontent.cgi?article=1550&context=amcis2014>.

I. General Effectiveness of Safe Harbors

App developers create products and services that may qualify them for the safe harbors from infringement liability under Section 512 (b), (c), or (d). Mobile apps can cache or store user-generated content as well as refer or link users to online sites.

The majority of app developer companies are start-ups and small companies without a legal department. As a result, understanding legal obligations under this section of copyright law and adoption of compliant policies are in the early stages for the industry. There is an emerging market to provide app companies with these services as well as private industry agreements and association efforts to help educate developers.

ACT | The App Association understands that service providers have concerns about the quantity and accuracy of takedown notices that must be processed. Even though app companies are not currently experiencing this business process concern, it is expected that the industry growth could have a similar impact on the mobile economy.

While Section 512 has not had a negative impact on the growth and development of innovative new mobile app products and services, it is clear that app developers are and will continue to be an important stakeholder in any discussion on legislation to revise the safe harbor provisions.

II. Notice-and-Takedown Process

App developers are content creators too. They hold rights in the app software, artwork, and content. As the value of mobile apps has risen in the global marketplace, so too has the problem of app piracy. In response, app developers have increased their efforts to utilize technological and legal means to protect their work, including the use of the Section 512 notice-and-takedown procedure.

Apps are most commonly pirated or counterfeited in the following ways:

- **Copy the App Itself.** Pirates remove the DRM from an app and publish it on illegitimate websites or legitimate app stores.
- **Extract the Content.** Pirates extract assets- images, sounds, animation, or video- and use them elsewhere.
- **Disable Locks or Advertising Keys.** Pirates change the advertising keys of an app to redirect ad revenue or remove locks functionality such as in-app purchases.
- **“Brand-Jack” an App.** Pirates inject malicious code into an app that collects private information and then republish the app. This use of the app name, logos, or homepage graphics trades on the brand value to trick consumers in to using counterfeit and dangerous apps.

Curated app stores have far less infringing or counterfeit apps due to the extensive developer requirements in order for an app to be made available in the store. Uncurated stores, on the other hand, have a much higher rate of pirated apps available to consumers around the world.

Developers have had varying levels of success with notice-and-takedown requests to the app stores. One ACT member produces an app called “Mobile Yogi.”⁴ Upon finding the app had been pirated by someone in China, the owner used the notification process provided by the app store and the pirated app was taken down within 24 hours. Another ACT member had a very different experience trying to get a counterfeit/brand-jacked copy of its’ childrens’ app “Zoo Train”⁵ removed from Google Play. It took six months before the offending app was finally removed. In this case, the additional concern was that the counterfeit app had used the name, logo and graphics from the app and injected malware to collect personal information. The privacy risk from counterfeit apps grows the longer it is available for download on an app store.

⁴ <http://www.themobileyogi.com/>.

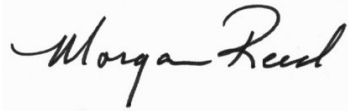
⁵ <https://itunes.apple.com/us/app/zoo-train/id407870968?mt=8>.

ACT | The App Association has and will continue to work with content and technology industries to collaborate on finding ways to provide app developers with efficient and effective ways to utilize the takedown provisions in Section 512. ACT | The App Association members agree that it is also important to work with service providers to address real concerns about prompt response to notices and repeat infringers.

To summarize, ACT | The App Association does not seek any changes to the safe harbor and notice-and-takedown provisions of 17 U.S.C. 512 at this time. Consistent with its experience on other federal regulatory initiatives, ACT | The App Association believes that voluntary industry efforts between service providers and rights owners should be encouraged to improve the effectiveness of the notice-and-takedown process. Private industry agreements are more likely to result in flexible long-term solutions than legislative reform. However, should this process result in a legislative proposal to revise Section 512, ACT | The App Association believes app developers are an important constituency that needs to be a part of the discussion.

ACT | The App Association appreciates the opportunity to submit comments to the USCO to help inform the record and its study regarding the operation of the DMCA safe harbor provisions in 17 U.S.C. 512 and looks forward to the opportunity to meet with you and your team to discuss these issues in more depth. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Morgan Reed". The signature is written in a cursive style with a large, prominent 'M' and 'R'.

Morgan Reed
Executive Director
ACT | The App Association