

**Before the  
U.S. Copyright Office  
Library of Congress**

In the Matter of:

Section 512 Study

Docket No. 2015-7

**ADDITIONAL COMMENTS OF SONY MUSIC ENTERTAINMENT**

Sony Music Entertainment (“SME”), by and through Julie Swidler its Executive Vice President, Business Affairs & General Counsel (Global) and the other undersigned executives, is pleased to provide these additional comments concerning the operation of Section 512 of the Copyright Act in response to the Copyright Office’s Notice of Inquiry (“NOI”) at 81 Fed. Reg. 78,636 (Nov. 8, 2016).

SME fully supports the Joint Comments of the Music Community that are being provided in response to the NOI (the “Music Community Comments”). As described in the Music Community Comments, the initial comments in this proceeding demonstrate stark differences between service providers and copyright owners in their perspectives concerning Section 512: Service providers generally think Section 512 is working wonderfully, while copyright owners perceive a system that, as interpreted by the courts, has (1) eliminated almost any incentive for copyright compliance by service providers, even when their services are significantly based on dissemination of popular entertainment content from third-party copyright owners like SME, and (2) left copyright owners with little meaningful recourse against massive online infringement that is being successfully monetized by service providers. These differing perceptions are a clear

sign that the balance that Congress sought to achieve in Section 512 has not in fact been realized.<sup>1</sup>

The Music Community Comments describe comprehensively various failings of the Section 512 safe harbors as they affect the music industry. SME has significant direct experience with the failings of the Section 512 system from its efforts to mitigate the effects of online infringement of its catalog of more than a million recordings by artists such as Adele, Billy Joel, Bruce Springsteen, Alicia Keys, and many others. SME has close to 90 internal and contract staff dedicated to protecting its works, and many more shared content protection resources at its contractors and trade associations, at a cost to SME of millions of dollars annually. In 2016, SME recordings were the subject of over 1.3 million takedown notices, and approximately 44.1 million search delisting notices, sent either pursuant to the formal Section 512 process or similar processes provided by digital services. SME's trade association representatives have sent takedown and delisting notices to over 10,000 sites since January 1, 2016. Yet these efforts at best serve only to blunt the significant commercial injury to SME that is being caused by service providers that claim the benefits of Section 512. We provide these separate comments to elaborate on SME's experience and thereby provide the Office tangible examples of failings in the Section 512 system.

The Music Community Comments identify various possible solutions that could help address the issues we identify in these comments and restore the balance Congress intended. SME agrees that these solutions should be explored seriously and with urgency. Service providers must work more effectively and collaboratively to mitigate the online infringement

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<sup>1</sup> See, e.g., S. Rep. No. 105-190, at 40 (1998) (Section 512 “preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements”).

from which they are profiting, and SME is ready to work with them in doing so. However, to the extent such efforts are not fruitful, legislative solutions will be necessary to restore the balance Congress intended.

**I. The Filtering Technologies Implemented by Certain Service Providers are Lacking (NOI Questions 10 & 11)**

Automated content identification and filtering technologies are an important part of the copyright environment, at least for some larger services, and the first line of defense in SME's content protection efforts. They should be adopted across the industry as a standard technical measure, at least by service providers that disseminate large amounts of user-uploaded content. As described further in Part II, service providers have unique control over their services, and a unique ability to mitigate infringement from their position of control over their services. As outsiders looking in, through limited interfaces and sometime even interfaces designed for ordinary users, copyright owners will never be able to identify infringements as quickly and comprehensively as filtering technology incorporated into a service could.

Filtering solutions are commercially available and have been implemented by many service providers. It is important that use of such technology be approached as a standards issue, because in the absence of standards, there is no yardstick against which to measure the effectiveness of filtering technologies, and service providers may be poorly motivated to implement the most state of the art technology. As a result, even when service providers have implemented some form of a filtering technology, they often are not as accurate, effective and comprehensively applied as they could and should be. For example, Facebook has implemented a content identification and management technology it calls "Rights Manager." However, while copyright owners can use Rights Manager to identify and track usage of their content, they

cannot automatically block infringing uses. That requires a manual review and takedown process.

YouTube has implemented a proprietary filtering technology known as ContentID. In contrast to Facebook's Rights Manager, ContentID does provide copyright owners the option of automatically blocking infringing uses of their works. However, YouTube does not apply that technology to all videos on the service. Many "channels" on YouTube are not scanned by ContentID, including ones operated by YouTube content partners and channels programmed by persons affiliated with "multi-channel networks," which are businesses that aggregate channels and provide services to their programmers. YouTube does not give us visibility into which channels are or are not scanned, so SME and other copyright owners must search all of YouTube for infringements of their works, and then use other means to mitigate those infringements, despite the application of ContentID to many videos on YouTube.

As described above, SME directly or indirectly devotes the efforts of hundreds of people, at a cost of millions of dollars per year, to policing platforms for content missed by filtering technologies. For example, on YouTube alone, SME's contractor has identified and claimed or blocked almost 1.9 million videos since December 2012 that incorporate SME recordings but were not identified by ContentID. The failure of ContentID to identify the videos that SME identified and claimed through its contractor's work would have cost SME and its artists over \$10 million dollars in revenue from approximately 13.8 billion plays were it not for SME's contractor's independent efforts.<sup>2</sup>

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<sup>2</sup> These data are updated from those provided in SME's initial comments in this proceeding.

In view of this experience, the government should encourage the adoption of automated content identification technologies as standard technical measures through the kind of “open, fair, voluntary, multi-industry standards process” called for by Section 512(i).

## **II. The Takedown Processes Implemented by Major Service Providers Interfere with Effective Enforcement (NOI Question 4)**

When a platform does not implement a filtering solution, or infringing material slips past a platform’s filtering solution (as it often does), copyright owners must resort to some form of takedown process.

In SME’s experience, the Section 512 notice and takedown process, as interpreted by the courts and implemented by service providers, has been ineffective against a flood of online infringement that could not have been anticipated by the Congress that drafted Section 512. The obligations of service providers under Section 512 have been interpreted narrowly, and many service providers have responded by taking only minimal efforts to address even widespread infringement on their services. Moreover, it frequently seems that service providers impose unnecessary obstacles to our enforcement efforts, which of course tend to allow them to continue monetizing the copyrighted works of others. This situation is certainly not a fair exchange for the broad and valuable immunity that Section 512 confers upon service providers.<sup>3</sup>

Among the reasons Section 512 has proven ineffective is that copyright owners do not have the visibility to detect infringements on services the way the providers of those services could, and service providers often channel the takedown process into automated workflows that

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<sup>3</sup> References in these comments to particular services are not intended to imply that the service provider is necessarily entitled to the benefits of the Section 512 safe harbors either in general or as to particular uses of copyrighted works.

are efficient for them but do not work well for copyright owners such as SME. We describe each of these issues below.

**A. Limited Interfaces and Content Management Tools Make It Difficult or Impossible for Copyright Owners to Find Infringing Material**

Section 512, as it has been interpreted by the courts, effectively allows service providers to shift to copyright owners all responsibility for policing their services for infringing material. However, the service providers are the ones who have designed and operate their services, and they are poorly motivated to give copyright owners the kinds of access to their services that would be necessary for comprehensive monitoring and policing of a large and complex service. While a few services such as Google and SoundCloud have established programs giving copyright owners access to special enforcement tools on their platforms, most have not. Thus, copyright owners are often left to police major services without the tools necessary to do so effectively.

In the absence of special enforcement tools, many larger platforms provide copyright owners search capabilities by exposing the service's content database through an application program interface ("API"), although some larger platforms (like Facebook) do not provide a search function within an API. Having an API search capability is much better for purposes of content protection investigation than needing to conduct manual searches, to the extent that it allows investigators to retrieve complete lists of responsive search results in a useful form. However, the APIs used by our representatives almost always have limits that prevent daily searching for all commercially significant repertoire. For example, users of the YouTube API are assigned a daily limit of "credits." Every query to locate potentially infringing videos or retrieve metadata concerning a video costs a certain number of credits. In practical terms, this means that the trade association managing SME's YouTube monitoring can enforce against no

more than about 1,100 tracks per day across all the record companies it represents.<sup>4</sup> Vimeo imposes an hourly limit on searches that also prevents daily searching of all commercially significant repertoire.<sup>5</sup>

It also should be recognized that having access to an API for content protection purposes provides a practical solution for only the largest and most well-resourced copyright owners, and only then for the services judged most important from an enforcement perspective. An API can be thought of as a doorway to a service. Seeing what information lies beyond that door requires a copyright owner to design and build an application program to use the search functions exposed by the API. Such an effort requires a copyright owner that wishes to engage in enforcement on the service to devote technological resources specifically to developing an application for the service (since each has its own API), at a material cost. While the investment may be justifiable for a large copyright owner seeking to look for infringements of its works on a large platform, it could not be justified for less popular platforms or by copyright owners with fewer resources to devote to enforcement.

When no special content management tools are available, and API access is unavailable or insufficient, copyright owners must, as a last resort, try to identify infringing uses of their works through the ordinary user interfaces of a service, or sometimes through third-party search engines. Not surprisingly, those interfaces are designed to facilitate the experience of the typical user, not a rightsholder. They determine and present search results in ways that are poorly suited to the investigation of large-scale infringement, and may include arbitrary limits on the results

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<sup>4</sup> This is based on a one million credit per day limit and the IFPI's calculation that obtaining 100 search results for a specific track and viewing the video details of each of the results uses 900 credits. Google's quota calculator used to estimate the quota cost for an API query is available at [https://developers.google.com/youtube/v3/determine\\_quota\\_cost](https://developers.google.com/youtube/v3/determine_quota_cost).

<sup>5</sup> <https://developer.vimeo.com/guidelines/rate-limiting>.

returned. Accordingly, they are generally unsuited to identifying infringing uses of works that have been targeted for enforcement.

For example, the search capabilities may simply be very limited, as in the case of Dubsmash. Dubsmash is a popular video messaging application for iOS and Android devices that allows users to record a video of themselves lip-synching to an audio file.<sup>6</sup> Users can upload audio files themselves or select from a library of audio files previously uploaded by other users. Often, these audio files are clips from popular music recordings. Once a user has added a video track to the audio using the app, the user can disseminate the video through social media platforms. Public distribution of clips of copyrighted musical recordings without authorization is almost always infringing, including when audio files are distributed from the Dubsmash library. However, because Dubsmash is one of relatively few larger services that does not provide API access, a copyright owner that wishes to find infringing uses of its recordings in the Dubsmash library must do so using the app's ordinary user interface. That is, tracks must be identified using a phone or similar device by scrolling through long lists of files that are loosely organized by genre and inconsistently named, or by searching based on the file names through the user search capability.<sup>7</sup> This interface is unsuited to policing generally, and wholly inadequate to identifying multiple infringing copies of tracks from a catalog that includes over a million recordings by thousands of artists.

As a further example, while the standard user search function on YouTube identifies a total number of search results returned, YouTube restricts the search results accessible to the user

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<sup>6</sup> See generally Paul Sawers, 100M Users Strong, Dubsmash Turns Silly Lip-Synching into a Full-Featured Video-Messaging App, VentureBeat (May 17, 2016), <http://venturebeat.com/2016/05/17/dubsmash-video-platform-inapp/>.

<sup>7</sup> At one time Dubsmash's search capability returned a maximum of 100 results. However, it recently seems to have implemented an infinite scroll capability for reviewing search results.



to a maximum of 286 results (14 pages of 20 results/page plus a page of six results).<sup>8</sup> This makes it impossible to identify all the infringements on the service when there are a large number of them. For example, the initial results of a recent search on YouTube for “Miley Cyrus – Wrecking Ball” (a popular artist and the title of one of her recordings) indicated there were about 1.7 million total unfiltered results.<sup>9</sup> Inexplicably, however, upon “filtering” for videos only, the volume of results *increased* to approximately 4 million. A search for “The Chainsmokers – Closer” indicated 4.2 million results. Again “filtering” for videos increased the volume of results to approximately 11.6 million. Despite these massive numbers of reported results, however, in each case, it is only possible to access 286 of the matches through the user interface, so it is impossible to tell how many infringing videos there might really be.

Similarly, Dailymotion is another popular video sharing site. It restricts the search results it returns to a maximum of 1,800 results (100 pages of 18 results/page). A recent<sup>10</sup> search for “Uptown Funk” (the title of a hit recording by Mark Ronson and Bruno Mars) on Dailymotion returned a result indicating that there were 81,852 video matches, but one could only view 1,800 of the matches. In addition, the search algorithm frequently returns a high proportion of results of minimal relevance. For example, a recent search for “The Chainsmokers – Paris” returned 1,665 video matches. Of those, a very small number of the videos Sony reviewed incorporated the track “Paris.” Others pertained to other songs by The Chainsmokers or were completely unrelated.

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<sup>8</sup> ContentID provides a separate search function. That function includes a capability to exclude videos claimed by SME, which narrows the pool of results. However, we do not have visibility into the scope of this search functionality, or into any search limitations that may be present.

<sup>9</sup> YouTube search result numbers sometimes vary materially from day to day. The numbers reported here are as of February 17, 2017.

<sup>10</sup> Again, all results are as of February 17, 2017.

Finally, search results are sometimes returned incrementally, in ways that may never allow an investigator to get a complete set of results. For example:

- SoundCloud is a popular audio site. It does not say how many search results it finds if there are more than 500 results (it just says “500+”). When looking for infringements of popular tracks (as to which searches tend to return 500+ results), investigators need to use the service’s infinite scroll functionality to determine the number of results and identify infringements. SME’s investigators have experienced frequent technical difficulties with this functionality, including browser crashes after scrolling through roughly 2,000 results. Lower-ranked search results also are not returned in a consistent order. Between these phenomena, it is impossible (or nearly so) to access a full set of results for popular tracks. Searches for less popular tracks tend to return a high volume of irrelevant search results, making it difficult to determine or ascertain which SoundCloud tracks contain SME sound recordings.
- Facebook does not indicate the number of results returned by its search algorithm, and like SoundCloud, one must use its infinite scroll functionality to determine the number of results returned and identify specific infringements. SME’s investigators have experienced technical difficulties in doing so, and the relevancy of the results has been inconsistent.

All service providers disseminating large amounts of content should provide legitimate content owner investigators the ability to easily search the services’ entire database of works for infringing content, and not place unnecessary and burdensome limitations on the ability of copyright owners to locate infringing content.

## **B. Service Providers' Web Forms and Workflows Discourage and Complicate Takedowns**

Identifying infringing material is only the first step in the takedown process. Takedown notices also must be submitted. The statutory Section 512 takedown process is itself poorly suited to submission of takedown notices on a large scale. However, service providers have sometimes accentuated these deficiencies in their implementation of workflows to handle takedown notices.

Many service providers – particularly the ones that host a lot of user-uploaded infringing material, and so presumably receive a lot of takedown notices – have specified their own preferred procedures for submitting takedown notices. Of course, Section 512 prescribes the content and delivery requirements for a compliant notice, and a service provider that ignores a notice provided in accordance with the statutory procedure does so at its peril. *See* 17 U.S.C. § 512(c)(2), (3). However, SME's primary motivation in seeking takedowns is to actually stop infringement, and to do so quickly. Services have explained, and SME's experience has confirmed, that one is most likely to obtain prompt action on a requested takedown by complying with the service provider's preferences concerning the means of submission of a takedown notice.

Some service providers' takedown workflows go out of their way to discourage copyright owners from submitting takedown notices. For example, Google Play provides a warning identified as "**IMPORTANT**" (bold and all-caps in original) cautioning a complaining party against misrepresentations and even providing a horror story: "a company paid more than

\$100,000 in costs and attorneys fees after targeting content protected by the U.S. fair use doctrine.”<sup>11</sup>

As a particularly extreme example, the process for online submission of takedown notices to Google Search is so well obfuscated that only the most determined copyright owner could even find it, let alone complete it. *See* Stephen Carlisle, How to Send a Takedown Notice to Google in 46 (or more) Easy Steps!, Nova Southeastern University Copyright Blog (Mar. 31, 2016), *available at* <http://copyright.nova.edu/takedown-notice-google/>. In threading an online maze to the submission of a notice, a would-be submitter encounters multiple warnings against providing a takedown notice and ultimately must create a Google account and accept Google’s terms of use.

Variation in the preferences of individual service providers makes a burdensome and inefficient takedown process even more so. For example, some platforms prefer takedown notices in the form of narrative emails, while many others prefer use of proprietary web forms that vary from service to service. Dubsmash prefers that we use the in-app “Report” function to report infringements (one sound file at a time). If we are to have any hope of having our takedown notices acted upon promptly, these differences among services force us to expend redundant efforts on formatting and delivery to remove the same piece of content from multiple services.

When services provide web forms or other web-based processes for submission of takedown requests, these forms and processes are often poorly suited to the needs of rightsholders or impose additional burdens on copyright owners seeking to stop an ongoing infringement. For example, such forms sometimes require that a copyright owner identify a

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<sup>11</sup> [https://support.google.com/legal/contact/lr\\_dmca?&product=googleplay](https://support.google.com/legal/contact/lr_dmca?&product=googleplay).

reason for a takedown from a menu of options that may not fully capture the range of infringements on the service. As one illustration, eBay's form has asked for a "reason code" from a list prescribed by eBay. However, the reason codes for copyright infringement encompass only counterfeit products, software, images and text, while some of the infringing recorded music products for which we seek takedowns from eBay are not what we would usually consider to be "counterfeits," in that they do not duplicate our original album products as such.

Because infringement of SME's works is so rampant, SME typically finds itself seeking takedowns of many infringing files from a particular service at a time. When doing so, they are particularly frustrated by web forms designed to require multiple manual steps for the submission of the Uniform Resource Locator ("URL") of each infringing item. For example, Twitter and Vimeo provide web forms for the submission of takedown notices. However, they do not allow a list of infringing URLs to be pasted into those web forms. Instead, these services require a single URL to be pasted in, and then the investigator to click a button that says "add additional URL" or something to that effect, and then paste in another single URL. These arbitrary processes are unnecessary and frustrate the ability of copyright owners to address infringement at the rate it occurs on those services.

These procedures have the effect of preventing efficient use of the takedown process by copyright owners seeking to obtain prompt attention to infringing uses of their works. Given the high volume of infringement that exists, service providers should be channeled into use of a standardized takedown form and process suited to high volume use, with the option for copyright owners to continue sending one-off notices by email or other means when circumstances warrant.

### **III. The Requirement that Takedowns Occur “Expediently” Is Too Imprecise and Regularly Permits Infringing Material to Remain Online for Commercially-Damaging Periods of Time (NOI Question 5)**

Section 512 requires a service provider to remove an infringement “expeditiously” upon receipt of a notice if it wishes to retain the benefit of the safe harbor. 17 U.S.C. § 512(c)(1)(C), (d)(3). In 1998, Congress declined to specify a more precise timeframe for acting upon takedown notices. However, courts have subsequently interpreted the term expeditiously to encompass responses that are by almost any standard quite leisurely.<sup>12</sup> While acting within a period of weeks might be considered expeditious within the context of federal court litigation, it certainly is not expeditious in the context of business or content protection operations on the Internet. In the current environment, the statutory term “expeditiously” leaves service providers far too much discretion to decide how quickly they will comply with a takedown notice. Not surprisingly, most service providers have chosen not to process takedowns with the same alacrity as uploads, ensuring that there will always be a supply of popular infringing content on their services.

First, it is difficult to overstate the importance of prompt responses to takedown notices. When infringing material is online, it is available for the taking by all the world. Consumption of any kind of entertainment content is hits-driven. When popular content is readily available on popular services, the volume of infringing use that can occur in a short time is staggering. For example, a lyric video for Adele’s Grammy-winning hit single “Hello” was uploaded to YouTube on October 30, 2015, at a time SME had used ContentID to set a policy to

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<sup>12</sup> See, e.g., *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500, 535-36 (S.D.N.Y. Sept. 18, 2013) (when notice identified 170 infringing videos, removal “within approximately three and one-half weeks” was expeditious), *amended on reconsideration on other grounds*, 972 F. Supp. 2d 537 (S.D.N.Y. Dec. 31, 2013), *aff’d in part and vacated in part*, 826 F.3d 78 (2d Cir. June 16, 2016), *petition for cert. filed* (U.S. Dec. 14, 2016) (NO. 16-771).

automatically block user uploads of the video. That video was viewed 5,817,486 times before SME detected it and issued a takedown on November 24, 2015. Moreover, even though YouTube is ostensibly a streaming service, it has to be assumed that many of those streams resulted in the download of infringing copies through so called “stream-ripping” apps, which are software and services that record streams, overwhelmingly from YouTube. Approximately 30% of Internet users engage in stream ripping.<sup>13</sup> As a further example, Beyoncé’s hit single “Lemonade” hit the top of the BitTorrent “piracy charts” within less than 24 hours following an HBO exclusive that aired on April 23, 2016,<sup>14</sup> and within a week, it had been downloaded several hundred thousand times.<sup>15</sup> When the commercial injury caused by infringement grows by the hour, takedown that is genuinely expeditious is a critical part of the Section 512 structure.

While that is true for all copyrighted material for which there is significant consumer demand, it is particularly true in the case of pre-release material for which there is significant pent-up demand and no authorized source of supply. For that reason, SME focuses many of its Internet content protection resources on containing pre-release leaks (situations where copies of recordings appear online before authorized copies are available for purchase in online stores). Such leaks tend to result in particularly high volumes of views or downloads. This infringing use can substantially diminish demand for a recording when it becomes commercially available,

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<sup>13</sup> Ipsos & the International Federation of the Phonographic Industry, Music Consumer Insight Report 2016, at 14, *available at* <http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2016.pdf>.

<sup>14</sup> Tim Ingham, Beyoncé’s Lemonade Is a Piracy Smash – But It’s Taken TIDAL to No.1, Music Business Worldwide (Apr. 24, 2016), *available at* <http://www.musicbusinessworldwide.com/beyonces-lemonade-is-a-piracy-smash-but-its-taken-tidal-to-no-1/>.

<sup>15</sup> This example is provided primarily to illustrate the speed of Internet infringement. Its inclusion here is not intended to imply that any particular service using the BitTorrent protocol is eligible for a Section 512 safe harbor.

leading to significant commercial injury, including loss of revenues, disruption of marketing plans for the new release, impairment of SME's relationship with the performing artist, and even injury to the artist's career.

For example, on August 20, 2016, a retailer leaked the Britney Spears album "Glory" before its official release date (August 26, 2016). In such a situation, a copyright owner is presented with a difficult choice between accelerating the release (disrupting the orderly roll-out of the album) or releasing the product when originally planned (but having the leak cannibalize the official release in the interim). In this case, RCA chose to stick with its original marketing plans and move aggressively to suppress the leak. The album was downloaded tens of thousands of times in the intervening six days just using the BitTorrent network,<sup>16</sup> setting aside further distribution on other platforms. The leak disrupted the release and probably had a negative effect on the album's commercial trajectory. Thus, even a few hours of availability of an unreleased track can have significant adverse effects.

When the leaked recording is not the final version of the artist's work, its availability can be particularly injurious. For example, last summer there was also a leak of a video of the Britney Spears track "Make Me" that was not the official version. Once the official version was released, there was consumer confusion as to which one was official.

In contrast to the urgency with which SME views the takedown process, services vary widely in their responsiveness to takedown notices. Some platforms, such as SoundCloud, have an automated tool that allows for takedowns that are nearly instantaneous. When a service receives a high volume of takedown notices, and a copyright owner provides the URLs of infringing material through the service's automated process, one should expect just that kind of

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<sup>16</sup> See note 15 *supra*.



response, as one would expect a near instantaneous response when buying a download or consummating any other kind of electronic transaction.

Many other services do not approach the takedown process with the urgency that we believe it deserves, and vary considerably in their responsiveness. To assess the variation in responsiveness quantitatively in these comments, SME asked the International Federation of the Phonographic Industry (“IFPI”), which sends many takedown notices on behalf of SME (both using platform-supplied tools and processes and through formal Section 512 processes), for data concerning responses to the notices it sent for SME in 2016. According to IFPI, the times for compliance broke down as follows:<sup>17</sup>

<b>Type of Service</b>	<b>Instantaneous (0 hours)</b>	<b>&gt;0-2 hours</b>	<b>&gt;2-24 hours</b>	<b>&gt;24-48 hours</b>	<b>&gt;48 hours to 1 week</b>	<b>&gt;1 week</b>
<b>Cyberlocker</b>	2%	8%	32%	19%	23%	16%
<b>User Generated Content</b>	20%	0%	50%	10%	20%	0%
<b>Other</b>	0%	7%	22%	23%	35%	13%

As can be seen from the proportion of notices addressed instantaneously, the data above include platforms that provide tools allowing us to effectuate takedowns without manual intervention by the service provider. Knowing what we know today about the volume of online infringement, it is a simple practical necessity that service providers operating at a sufficient scale need to process takedown requests in a manner that is largely automated. Once one accepts that, requests made in a manner susceptible to automatic processing should be processed nearly instantaneously. The platforms to which these takedown notices are addressed are sophisticated multinational businesses that process instantly the transactions they have chosen to prioritize,

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<sup>17</sup> The times indicated reflect average response times on a service-by-service basis.

including the creation of user accounts and posting of content. Everyone accepts, and indeed expects, that those activities will be completed nearly instantaneously. An automated or largely automated takedown process should be similarly responsive.

Even where a process that is significantly manual might be justifiable, services should be motivated to move with the same urgency as copyright owners. If a high proportion of notices are currently processed in under 24 hours, and many of those in under two hours, all service providers should be aiming to process all notices in the space of a few hours, at least absent extraordinary circumstances. There can be no good excuse for allowing a valid notice to languish for days or weeks. In some cases, delay seems to be a matter of design. For example, SME understands that the Dailymotion service routinely allows content that was the subject of a takedown notice to remain accessible for an additional 24 hours after it has processed a takedown notice, ostensibly to allow the user an opportunity to dispute the notice. In other cases, service providers may employ less efficient processes, and/or be under-resourced, relative to other services. It also sometimes has seemed that certain services are particularly slow to act outside of normal business hours. This is not acceptable. Companies with a large volume of infringements that provide services around the clock, and staff their data centers and customer service operations accordingly, should similarly be expected to address the injury they are imposing on copyright owners by implementing takedowns instantaneously, or within a matter of hours, not days or weeks.

#### **IV. The Counter-Notice Processes Implemented by Major Service Providers Invite Abuse by Infringers (NOI Questions 6 & 7)**

As ineffective as the Section 512 takedown process is, it is undermined further by abuse of the counter-notice process contemplated by Section 512(g) and similar processes that services have implemented with respect to their own automated filtering. Services have made it very easy

for users to submit counter-notices (sometimes much easier than it is for copyright owners to submit takedown notices). They seldom include severe warnings against submitting improper counter-notices (even when they do so for submitting takedown notices, as in the case of the Google examples in Part I.B above). In addition, service providers sometimes provide users information about the counter-notification process that is incomplete or misleading, and encourages users to submit counter-notices that are not warranted. Not surprisingly, these practices result in a high proportion of baseless requests for reinstatement of infringing material.

For purposes of this discussion, we consider the formal statutory counter-notice process together with put-back processes that service providers have established for instances in which their filtering technology identifies a match to copyrighted material. For example, YouTube provides two separate but similar processes relevant to copyright issues: a formal Section 512 process and a process involving its filtering technology ContentID. YouTube encourages copyright owners to submit formal Section 512 takedown notices through its online webform.<sup>18</sup> It also provides a manual claim and takedown tool within the ContentID system. We understand that when takedown requests are submitted through these mechanisms, the video that is the subject of the notice is blocked and the uploader receives a notification that YouTube calls a “copyright notice” notifying him or her of that fact. In addition, YouTube screens many uploaded videos (but as explained in Part I, not those on certain channels) with ContentID. If ContentID concludes that an uploaded video incorporates copyrighted material that has been identified to YouTube, YouTube will also provide a “copyright notice” to the uploading user, and depending on the preferences of the copyright owner, block the video, monetize it for the copyright owner, or allow the copyright owner to monitor the use. The uploading user has the

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<sup>18</sup> <https://support.google.com/youtube/answer/2807622?hl=en>.

opportunity to dispute the takedown or content match using YouTube supplied webforms as part of both the formal Section 512 process and the Content ID dispute process. The webforms for formal Section 512 counter-notices and ContentID disputes vary to some extent,<sup>19</sup> as do the actions when the user submits a counter-notice.<sup>20</sup> Nonetheless, these processes are similar in significant respects.

While many larger services have created webforms for users to request reinstatement of their uploads, most of those webforms and the associated workflows do not do much to educate users about proper bases for reinstatement, or provide any meaningful impediment to improper reinstatement. For example, YouTube’s webform for disputing a ContentID match provides the user radio buttons to select the basis for the dispute. These include some dummy options (*e.g.*, “I own the CD” and “I gave credit”) as well as options that are potentially legitimate as a matter of copyright law (“[t]he video is my original content,” “I have a license,” “fair use” and “public domain”). If the user selects a dummy option, a short educational message is provided. However, the webform does not provide similar messaging concerning the potentially legitimate options such as fair use, and users who initially select one of the dummy options are permitted to keep trying until they select one of the options that will permit them to continue through the reinstatement workflow. If the user selects fair use, the user is asked to provide a narrative explanation. Many Internet sources provide boilerplate narratives reciting words from 17 U.S.C. § 107 that users can copy and paste into the webform to have a dispute satisfy YouTube’s requirements. However, it is not apparent that users even need to go to those lengths. SME has

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<sup>19</sup> For example, the Section 512 counter-notice form has check boxes for the statements required by 17 U.S.C. § 512(c)(3)(v) and (vi).

<sup>20</sup> For example, a Section 512 counter-notice results in put-back within 10-14 days, as contemplated by 17 U.S.C. § 512(g)(2)(C), while a copyright owner has a longer opportunity to review a ContentID dispute before a put-back occurs.

seen no evidence that YouTube screens such narratives at all. We sometimes receive dispute notices that convey no intelligible information relevant to a copyright dispute. And on review of the videos, they are almost always clearly infringing (as discussed further below). Nonetheless, YouTube concludes that the explanation it has requested is sufficient for its purposes. Dailymotion and Vimeo do even less to educate the user on legitimate reasons for counter-notices, and instead simply provide a text box for the user to provide an explanation. Boilerplate responses seem to be acceptable to these services (and again, we see no evidence of screening at all).

Facebook's user messaging concerning reinstatement of content is particularly misleading. It makes no meaningful attempt to educate the user concerning legitimate bases to file a counter-notice, and encourages users to file counter-notices if they "believe the content was removed as a result of mistake or misidentification." Similarly, when a video upload to Facebook is matched by its filtering technology, the user is given the option to post the video notwithstanding. In such a case, Facebook advises that "you might be able to post your video if the matched content in question isn't the main focus of your video." While there are circumstances in which brief background uses of copyrighted works in videos have been held to be fair use,<sup>21</sup> this is a meaningless suggestion for a user who is not steeped in copyright law, and could readily lead to users' concluding that the infringing audio track of a video is not the video's main focus.

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<sup>21</sup> See *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215 (2d Cir. 1998) (use of photographs in background of movie is fair use). But see *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997) (reversing finding of fair use as to poster used in the background of television show).

SoundCloud, by contrast, does a better job of trying to channel users into knowing responses. Users are led through a workflow in which they are presented with narrowly crafted, plain English explanations like “I have written permission from the rightsholder” or “[t]he original work is not protected by copyright.” Choice of invalid reasons leads to links to explanatory information.

Given service providers’ poor and unbalanced messaging about counter-notices, and an abundance of online resources to help users get their infringing uploads reinstated, SME’s investigators see a very large number of improper put-backs. To quantify that phenomenon, SME chose a random sample of 356 user disputes from the pool of 4,928 YouTube user disputes pending with respect to SME recordings on January 13, 2017.<sup>22</sup> These were instances in which the ContentID system had automatically identified a YouTube video as incorporating an SME recording (and accordingly either blocked it or set it to be monetized for SME, as prescribed by SME’s Content ID policy for the recording), and the user had disputed that action. To be clear, these are not instances in which SME sent a DMCA takedown notice or had any other involvement before the dispute was raised. We selected a sample of 356 videos, because with a pool of 4,928 disputes, a sample of 356 provides a margin of error of  $\pm 5$  percentage points, with a 95% level of confidence.<sup>23</sup> Experienced content protection staff then reviewed each video and the reason for reinstatement cited by the user.

In all instances where we were able to review the videos, the user-supplied justifications were erroneous, with the exception of a small percentage of users who claimed that their videos were their original content (and our review confirmed that these uses did not involve an SME

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<sup>22</sup> These were disputes in SME’s review queue on that day. The disputes did not all arise on that day.

<sup>23</sup> <http://www.surveysystem.com/sscalc.htm>.

recording but were incorrectly automatically matched by YouTube’s Content ID technology). Fair use was the reason cited as the reason for reinstatement by nearly half of the requesting users, but after review by SME, none of these videos were found to involve a colorable claim of fair use. Similarly, the next highest cited basis for reinstatement was a claim that the recording was public domain, but all the SME recordings involved are under copyright. In a few instances, by the time of our review, the videos were no longer active (and we could not access the reasons for the requested reinstatement). We believe this means that the users requested reinstatement, but then had second thoughts, and deleted the videos (presumably because they recognized they were infringing). These results are presented in tabular form below.

Dispute Reason	# of Disputes	% of Total	# of Disputes Deemed Legitimate	% of Disputes Deemed Legitimate
Fair Use	172	48%	0	0%
Public Domain	89	25%	0	0%
Original Content	57	16%	11	19%
Licensed	34	10%	0	0%
Unknown (No Longer Active)	4	1%	n/a	n/a
TOTAL	356	100%	11	3%

SME has not tried to quantify its experience with official Section 512 counter-notices, because it is not practicable to do so. However, its investigators do not believe that it likely would be materially different (except, of course, that ContentID would not be involved).

It should be clear from the foregoing that a lot of fraudulent counter-notices are provided. On just this one day last month, despite the resources SME dedicates, SME had a backlog of almost 5,000 ContentID counter-notices pending for its review, and the survey above indicates

that only about 3% of them were valid (all of those due to matching errors by YouTube's ContentID technology). This volume of false counter-notices is a fundamental problem for the Section 512 takedown system.

The statutory counter-notice provision requires copyright owners to file a copyright infringement lawsuit within 10 days after being provided with a counter notice, or the taken-down content will be reposted. Ten days would be an aggressive timetable for evaluating any one infringement issue. But requiring copyright owners to file suit in ten days to dispute thousands of invalid counter-notices is entirely unrealistic. Launching thousands of lawsuits against individuals would be economically infeasible for copyright owners, and even if that were not the case, the courts could not handle such a flood of lawsuits, and nobody would think it socially desirable.

To restore the balance originally intended by the DMCA, part of the solution to the problem of false counter-notices has to rest on service providers. Service providers certainly should (1) discourage improper counter-notices to the same extent that they discourage improper notifications of claimed infringement; (2) use clear plain English options in any menu of put-back options, rather than terms of art like "fair use" or "public domain"; and (3) include balanced educational messaging for users so they have a fair chance at understanding whether or not they have a valid basis for requesting a put-back. A further possible solution would be to impose a duty of care on service providers to deal with clearly erroneous or invalid counter-notices. Other solutions might include some form of informal or alternative dispute resolution or a longer interval for copyright owners to address clearly erroneous or invalid counter-notices. Certainly, it would not make sense to shorten or eliminate the ten-day waiting period, as CCIA suggested, which would increase the incentives for users to submit improper counter-notices.



**V. Once Infringing Material Is Removed from a Service, It Should Stay Down (NOI Question 12)**

A principal reason that Section 512 has proven ineffective is that users have posted infringing copies of the same works with such frequency and speed that efforts to detect and remove those copies cannot possibly keep up (especially given the constraints that copyright owners face, as described in Part I above). This has resulted in the absurd situation of sending thousands of notices to a single service with respect to the same piece of content.

For example, in 2016, there were many individual tracks or albums for which representatives of SME sent the popular locker service 4Shared hundreds or thousands of takedown notices, including the following:

Artist - Title	Takedowns
Justin Timberlake – Mirrors	8868
Lucas Lucco - Pra Te Fazer Lembrar	7841
Elba Ramalho – Elba	6908
P!nk feat. Nate Ruess - Just Give Me A Reason	4704

These are not situations requiring complicated copyright analyses – they are files incorporating substantial parts of popular copyrighted recordings that would readily be recognizable as such to a human observer or automated filtering technology. There is no reason that SME should need to tell 4Shared almost 9000 times that it is the copyright owner of “Mirrors” and has not authorized its use on the site. Once a service provider – at least one operating on a large scale – receives a takedown notice, it should be required to use a reasonably effective implementation of automated content identification technology to prevent copies of the same work from being uploaded in the future.

**VI. Conclusion**

As interpreted by the courts, the balance that Congress sought to achieve with Section 512 has tilted sharply in favor of immunity for service providers. This has enabled service

providers to provide the most minimal level of cooperation to avoid infringement liability, and in some cases to use Section 512 as a sword in licensing negotiations to extract agreement to royalty rates far below fair market value. To restore some of the balance Congress intended to strike in Section 512, service providers should adopt effective filtering technologies and better user messaging, and provide copyright owners the kinds of access they need to be able to protect their rights. SME stands ready to work with service providers and other copyright owners on the development and implementation of standard technical measures and voluntary measures in these regards. However, if such efforts are not fruitful, legislative solutions will be necessary to restore the balance Congress intended.

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Respectfully Submitted,

/s/ Julie Swidler

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