

**DMCA § 512 PAIN POINTS: MUSIC AND TECHNOLOGY
INDUSTRY PERSPECTIVES IN JUXTAPOSITION**

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I. INTRODUCTION

On April 1, 2016, the U.S. Copyright Office published the comments it solicited from stakeholders for its Section 512 Study, a program with the goal of gathering opinions on whether § 512 of the Digital Millennium Copyright Act (“DMCA”) needs reform.¹ Among the commenters, the content and technology industries were not shy to tell the Copyright Office what they think is going right and what they think is going wrong, as well as what they think the systemic implications are. This Note will examine the comments of two groups of

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1. See generally Section 512 Study: Notice and Request for Public Comment, 80 Fed. Reg. 251 (Dec. 31, 2015).

stakeholders: those from the music industry,² and those from the technology industry.³ This Note will refer to each industry's arguments collectively while identifying when individual companies dissent. Both industries' comments, which answered the Copyright Office's list of questions in varying degrees of detail, tended to address two types of pain points: (1) major judicial interpretations of DMCA language, and (2) potential policy reforms that would require changing the actual structure of the DMCA system. Their proposed changes show that the two industries sometimes seem to live in entirely different worlds, and that there are serious questions as to whether the DMCA framework is suitable for the online ecosystem. The music industry decries the current system, citing the normalization of free music, the increase in infringement on popular platforms like YouTube, and the notice-and-takedown system requiring the music industry to constantly police the Internet for infringing material.⁴ In contrast, the technology industry supports the current system, pointing to rising revenues, the enormous digital economy that the system's limited liability has encouraged, and the potential burden that any change in the status quo would impose on it.⁵ Accordingly, this Note aims to critically engage with the policy proposals (or lack thereof) of both industries and place their arguments in direct juxtaposition.

Part II will provide relevant background, explaining the DMCA and the basic ways in which the music and technology industries view the state of the market. Part III will examine judicial interpretations of DMCA § 512 that the industries disagree about, while Part IV will examine their respective responses to proposed reforms.

II. BACKGROUND

A. The DMCA Safe Harbor: Notice-and-Takedown

Before DMCA § 512, providers of online services might have been liable for the content of users under a theory of secondary liability, based on them having facilitated infringement by providing the

2. Sony Music Entertainment ("Sony"), Universal Music Group ("Universal"), and the "Music Community" submitted the music industry comments discussed in this Note. The Music Community refers to a group, created for the purpose of submitting a comment in the 512 Study, that includes most of the major associations and organizations that represent music publishers, performers, and others in the music industry.

3. Technology industry stakeholders consist of companies who rely, at least in some part, on user-generated content. This Note will discuss comments submitted by Google, Inc. ("Google"), Facebook, Inc. ("Facebook"), Amazon.com, Inc. ("Amazon"), Mozilla, and SoundCloud Operations, Inc. ("SoundCloud").

4. *See infra* Section II.B.

5. *See infra* Section II.C.

platform.⁶ Section 512 establishes safe harbors for “service providers” that host, store, route, or transmit user-generated content, shielding them from liability for the copyright infringement of users as long as service providers comply with a few conditions.⁷ Those conditions impose technical requirements, including (1) that transmission or routing of content be done “through an automatic technical process,”⁸ (2) that the service provider does not choose the recipients of that content,⁹ and (3) that the service provider does not modify the content.¹⁰ Section 512 also creates and requires compliance with a legal scheme referred to as the “notice-and-takedown system.”¹¹ The notice-and-takedown system outlined in § 512(c) addresses user-generated content hosted on the service providers’ networks. Under the DMCA, if the service provider has actual knowledge of infringing content on its service or is aware of “facts or circumstances from which infringing activity is apparent,” often called red flag knowledge, it is required to “expeditiously” take that content down.¹²

One way an online service provider (“OSP”) can acquire actual knowledge of infringement is when a copyright owner submits a DMCA takedown notice, the elements of which are described in § 512(c)(3). It must include, among other things, a statement that the owner believes in good faith that the use of the content was “not authorized by the copyright owner, its agent, or the law.”¹³ When a notice is submitted, the service provider is required to take down the content and notify the uploader,¹⁴ who then has the right to submit a counter-notice attesting that the content is not infringing.¹⁵ The service provider must put the content back online within ten to fourteen days, unless the alleged copyright owner files a lawsuit in response to the counter-notice.¹⁶ This is not an exhaustive list of the conditions service providers must comply with, but it highlights the conditions relevant to the bulk of the comments discussed in this Note.

6. *See, e.g.,* Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 265 (9th Cir. 1996).

7. *See* 17 U.S.C. § 512 (2012).

8. *See id.* at § 512(a)(2).

9. *See id.* at § 512(a)(3).

10. *See id.* at § 512(b)(2)(A).

11. *See id.* at § 512(c).

12. *See id.* at § 512(c)(1).

13. *See id.* at § 512(c)(3)(A)(v).

14. *See id.* at § 512(g)(2)(A).

15. *See id.* at § 512(g)(2)(B).

16. *See id.* at § 512(g)(2)(C).

B. The State of the Market According to the Music Industry

According to the music industry's comments,¹⁷ the industry is struggling and the DMCA's structure is a major cause.¹⁸ While the amount of music being listened to is rising, industry revenue and profitability has been declining for years.¹⁹ According to the music industry, the DMCA's liberally construed safe harbors have allowed copyright infringement to run rampant on online services that host user-uploaded content. The Recording Industry Association of America ("RIAA") has sent more than 175 million DMCA notices since 2012.²⁰ Sony stated that its recordings alone have been the subjects of 5.7 million takedown notices.²¹ Empirical analysis shows music industry groups submitted at least 58.6 percent of takedowns between 2008 and 2012.²²

The problem is not just the amount of infringement; the companies are also concerned about the amount of money spent on copyright enforcement. Sony spent hundreds of thousands of dollars policing SoundCloud between April 2015 and April 2016, and still claims it is able to monitor only about fifteen percent of its catalog.²³ Universal used the release of Taylor Swift's album *1989* as a case study because it pursued a particularly aggressive strategy to keep *1989* from becoming available online through unlicensed channels, with only partial success.²⁴ Employing a full-time in-house staff for four months, supplemented by twelve part-time employees at the International Federation of the Phonographic Industry ("IFPI"), Universal issued over 66,000 takedown notices to online sites hosting copies of *1989* or its tracks, on top of almost 114,000 blocks through YouTube's Content ID filtering system.²⁵ Universal also issued almost 30,000 notices to

17. *See generally* American Association of Independent Music et al., Comment Letter on U.S. Copyright Office Section 512 Study: Notice and Request for Public Comment (Apr. 1, 2016), <https://www.regulations.gov/document?D=COLC-2015-0013-89806> [<https://perma.cc/A9CE-UKN3>] [hereinafter Music Community Comments]; Sony Music Entertainment, Comment Letter on U.S. Copyright Office Section 512 Study: Notice and Request for Public Comment (Apr. 1, 2016), <https://www.regulations.gov/document?D=COLC-2015-0013-90111> [<https://perma.cc/4VF5-U7DC>] [hereinafter Sony Comments]; Universal Music Group, Comment Letter on U.S. Copyright Office Section 512 Study: Notice and Request for Public Comment (Apr. 1, 2016), <https://www.regulations.gov/document?D=COLC-2015-0013-90321> [<https://perma.cc/HB74-59UQ>] [hereinafter Universal Comments].

18. *See* Music Community Comments, *supra* note 17, at 12–13.

19. *See id.* at 12.

20. *See id.* at 4.

21. *See* Sony Comments, *supra* note 17, at 1.

22. Daniel Seng, *The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices*, 18 VA. J.L. & TECH. 369, 393 (2014).

23. *See* Sony Comments, *supra* note 17, at 7.

24. *See* Universal Comments, *supra* note 17, at 7.

25. *See id.*; *see also* *How Content ID Works*, GOOGLE SUPPORT, <https://support.google.com/youtube/answer/2797370?hl=en> [<https://perma.cc/FXN7-YSHV>]

other online services.²⁶ Despite all that effort, Universal claims that 1989 was still illegally downloaded at least 1.4 million times.²⁷

To make matters even worse, the music industry claims that DMCA-enabled infringement of this scale gives substantial leverage in negotiating licensing and other deals to OSPs who rely on § 512. Because the DMCA's safe harbor provisions allow OSPs to spend minimal effort removing infringement, and because it is difficult for copyright owners to fight that infringement, copyright owners have an incentive to agree to unfavorable licensing deals with OSPs. IFPI estimates that YouTube, a user-generated video platform, paid \$0.72 per user to record companies in 2014, while in 2013, Spotify, a licensed music streaming service, paid \$20 per user to record companies, presumably due to that leverage.²⁸ Universal claims that "[l]iterally every licensed online music service invokes YouTube's below-market rates when negotiating with [Universal]."²⁹ Lower licensing fees paid across the board means decreased revenues for the music industry. According to Universal, in 2015 vinyl generated more revenue for copyright owners than free on-demand streaming from services eligible for the safe harbor provision.³⁰ If the record labels — the primary revenue mechanism for many major artists — are not making substantial revenue from digital downloads, then money is not entering the music industry, jeopardizing future music production. By this analysis, a portion of the revenue meant to support the sustainability of the music industry is being captured by the technology companies.³¹ That narrative makes the whole system sound like a catastrophe. The music industry's pessimism is best expressed through a constitutional argument made by Universal: the Copyright Clause creates exclusive rights in order "to promote the Progress of Science and useful Arts," so a system that requires spending this much on enforcement rather than spending the money on "progress" cannot be what the framers intended.³²

C. *The State of the Market According to the Technology Industry*

Technology industry stakeholders see the impact of the DMCA safe harbors as a force for good in promoting the content industry and

(explaining that Content ID is a program that filters clips uploaded to YouTube and compares them to a database of content provided by major copyright holders, such as the large music labels, to stop infringing content from appearing).

26. See Universal Comments, *supra* note 17, at 7.

27. See *id.* at 8.

28. See Music Community Comments, *supra* note 17, at 11.

29. Universal Comments, *supra* note 17, at 12.

30. See *id.* at 11.

31. See Music Community Comments, *supra* note 17, at 12–13.

32. U.S. CONST. art I, § 8, cl. 8; see also Universal Comments, *supra* note 17, at 13.

the broader Internet industry³³ Google cites an Internet Association study to claim that the system is responsible for \$966.2 billion of real GDP in 2014 alone, a number which notably would be captured mostly by technology companies rather than content companies.³⁴ Google also notes that “81% of angel investors would prefer to invest in a digital content intermediary in a weak economy” that has the DMCA system, as opposed to “investing in a strong economy where websites were held liable” for infringing user-generated content.³⁵ According to Facebook, the predictability of the copyright system plays a key role in facilitating investment and driving growth.³⁶ Google also claims to have “sent over \$3 billion to the music industry” directly by paying licensing fees to record labels and indirectly by driving sales based on consumers discovering music on YouTube.³⁷ Technology firms frequently argue that limiting their liability and encouraging their growth has allowed the music industry to grow its audience and create new avenues for success. Google claims that other types of content producers have, in fact, flourished in recent years, with some estimating television revenues growing by 24 percent between 2012 and 2017, and book industry revenues growing by 17 percent between 2008 and 2014.³⁸ Due to the DMCA, the U.S. is capturing a significant portion of that growth, including more than 30 percent of the world’s Internet revenues in 2011.³⁹

Anecdotes are also a popular way to make this argument. SoundCloud cites the fact that Lorde self-released her first EP on SoundCloud, which could not sustainably exist without the protec-

33. See Amazon.com, Inc., Comment Letter on U.S. Copyright Office Section 512 Study: Notice and Request for Public Comment, at 3 (Apr. 1, 2016), <https://www.regulations.gov/document?D=COLC-2015-0013-90706> [<https://perma.cc/LX6S-PVGU>] [hereinafter Amazon Comments]; Facebook, Inc., Comment Letter on U.S. Copyright Office Section 512 Study: Notice and Request for Public Comment, at 3 (Apr. 1, 2016), <https://www.regulations.gov/document?D=COLC-2015-0013-90724> [<https://perma.cc/XD5G-55LA>] [hereinafter Facebook Comments]; Google, Inc., Comment Letter on U.S. Copyright Office Section 512 Study: Notice and Request for Public Comment, at 1–2 (Apr. 1, 2016), <https://www.regulations.gov/document?D=COLC-2015-0013-90806> [<https://perma.cc/FAJ6-FSFR>] [hereinafter Google Comments]; Mozilla, Comment Letter on U.S. Copyright Office Section 512 Study: Notice and Request for Public Comment, at 1–3 (Apr. 1, 2016), <https://www.regulations.gov/document?D=COLC-2015-0013-90541> [<https://perma.cc/H3VT-4Q3R>] [hereinafter Mozilla Comments]; SoundCloud Operations, Inc., Comment Letter on U.S. Copyright Office Section 512 Study: Notice and Request for Public Comment, at 2–3 (Apr. 1, 2016), <https://www.regulations.gov/document?D=COLC-2015-0013-90151> [<https://perma.cc/77S7-JB3Z>] [hereinafter SoundCloud Comments].

34. See Google Comments, *supra* note 33, at 2. Note that the Internet Association study refers to the entire Internet industry, not only DMCA-reliant companies.

35. *Id.* (referring to early-stage, non-institutional investors).

36. See Facebook Comments, *supra* note 33, at 3.

37. Google Comments, *supra* note 33, at 2.

38. *Id.* at 17.

39. See *id.*

tions of the DMCA.⁴⁰ Proponents of OSPs like SoundCloud and YouTube argue that the combination of the open ecosystem, the wide variety of content, and the popularity of the platforms provide a unique opportunity to break out in an otherwise label-dominated industry.⁴¹ This system provides more than a platform to self-publish artistic work; the safe harbors have also allowed the development and growth of social media sites, which allow all types of artists to promote their music, build an audience, and increase the consumer base for their merchandise.

That narrative is part of the technology industry response to the argument that the DMCA gives them disproportionate leverage and drives down licensing prices. SoundCloud argues that the DMCA has allowed a market to thrive that actually generates more value than it erodes.⁴² Artists can use OSP tools for marketing, to help new audiences discover their content, and to better retain and build their audience.⁴³ What the music industry is concerned with is unauthorized content, which they are in the best place to identify and verify. Google and Facebook echo that argument.⁴⁴ The underlying idea is that the music industry is paying a premium, in reduced licensing fees, for the benefits of OSP platforms. While the technology industry stakeholders generally take a hard line opposition to the reforms proposed by the music industry, SoundCloud stands out as an exception. The company, in a few cases, makes some rhetorical and policy concessions to the music industry,⁴⁵ potentially because of how reliant it is on industry content and because it has less leverage than the bigger players like YouTube. It seems to be more open to potential reforms of the system, such as eliminating the lawsuit requirement after counter-notification, which will be discussed further in Part IV.

With the positions and narratives propounded by the two industries in mind, Part III will examine several key ways in which courts have interpreted the DMCA and how the industries view the validity of those interpretations. Part IV will focus on the debate surrounding two proposed reforms.

III. JUDICIAL INTERPRETATIONS OF THE DMCA

In assessing whether the DMCA is working, many of the major disagreements center on judicial interpretations of key provisions. The

40. See SoundCloud Comments, *supra* note 33, at 2–3.

41. *See id.*

42. *See id.* at 3.

43. *Id.* at 7.

44. See Facebook Comments, *supra* note 33, at 3; *see also* Google Comments, *supra* note 33, at 10.

45. See SoundCloud Comments, *supra* note 33, at 14.

music industry accuses courts of reading out particular terms and meanings while the technology industry claims those readings were necessary for internal consistency or practical reasons. The three major points of disagreement discussed here concern the interpretations of two terms of art in the DMCA and one larger issue in copyright law: red flag knowledge, the “representative list,” and at what point in the process fair use must be considered.

A. Red Flag Knowledge

Red flag knowledge refers to the requirement in the DMCA that OSPs take down content if they are aware of “facts or circumstances from which infringing activity is apparent,” meaning that if it is obvious enough to the OSP that there is infringement, it is required to take it down.⁴⁶ That clause’s interpretation has been left to courts, which stakeholders in the music industry accuse of reading red flag knowledge out of the statute entirely, which ignores the legislative history and some of the scholarship on the provision.⁴⁷ In *Viacom Int’l, Inc. v. YouTube, Inc.* (“*Viacom*”),⁴⁸ the Second Circuit ruled that to have red flag knowledge of infringing material, the OSP must be aware of “specific and identifiable” instances of infringement or of relevant facts or circumstances that make infringement obvious.⁴⁹ The music industry says that this amounts to a URL-by-URL notification requirement, because providing a URL is the only way to provide “specific and identifiable infringement,” which would essentially eliminate red flag knowledge from the statute because knowledge of a specific instance of infringement would be enough for actual knowledge, meaning the two types of knowledge now feel conflated.⁵⁰ From the music industry perspective, having to find and report each individual URL clearly constitutes a much larger burden than the alternative.

To respond to that claim, the technology industry generally echoes the response the court voices in the *Viacom* ruling.⁵¹ The court first differentiates between the subjective and objective knowledge requirements. For actual knowledge, the OSP has to subjectively know that there is a specific instance of infringement, a specific URL

46. 17 U.S.C. § 512(c)(1)(A)(ii) (2012).

47. See Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J.L. & ARTS 233, 251–56 (2009); see also *UMG Recordings Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1111 (C.D. Cal. 2009); *Perfect 10, Inc. v. CCBill LLC.*, 488 F.3d 1102, 1114 (9th Cir. 2007).

48. 676 F.3d 19, 30 (2d Cir. 2012).

49. *Id.*

50. See Music Community Comments, *supra* note 17, at 36.

51. See Google Comments, *supra* note 33, at 13–14.

where infringing material exists.⁵² For red flag knowledge, the OSP must subjectively know of the existence of a specific instance where the facts and circumstances would objectively signal to someone that infringement is likely.⁵³ That shows that actual and red flag knowledge both exist as different scenarios, while maintaining a specific infringement requirement. Technology industry comments also point to the internal consistency of the statute as requiring knowledge of a specific instance, particularly based on § 512(m)(1), which says that nothing in the DMCA should be construed to require a service provider to monitor “its service or affirmatively seek[] facts indicating infringing activity.”⁵⁴ They claim that construing red flag knowledge as anything other than having knowledge of each individual URL where infringement is located would require companies to affirmatively hunt down infringing material on their service.⁵⁵ The music industry responds by contending that if the OSP receives some kind of information from an external source, even if that information is not a particular URL, that information gives the OSP enough direction that it is not affirmatively monitoring infringing activity.⁵⁶ While the music industry is right that there are degrees of burden, the DMCA does not require OSPs to do anything other than respond to notices of specific infringement. In practice, there is no difference between an email generally informing an OSP that there exists an infringing lyric video of a song that brings up thousands of search results or an email describing a specific video by a specific content creator that uses a song in a particular way. Either way, it requires a human employee to search for the allegedly infringing material manually, which is exactly what the DMCA aims to avoid.

Another reason technology companies believe the specific instance requirement to be an important part of red flag knowledge is due to burden allocation. Amazon says in its comment that the high burden of proof before showing knowledge of infringement, including the specific instance requirement for red flag knowledge, is crucial because lowering it would essentially shift the burden of policing services to the OSPs,⁵⁷ which would create a higher barrier to entry to the industry and would stifle innovation. SoundCloud elaborates that the copyright owners are better placed to bear that burden than the OSPs because only they can be aware of whether particular instances are licensed.⁵⁸ It would be incredibly difficult for the OSP to know if

52. See *Viacom*, 676 F.3d at 31.

53. See *id.*

54. 17 U.S.C. § 512(m)(1) (2012).

55. See Facebook Comments, *supra* note 33, at 9.

56. See Music Community Comments, *supra* note 17, at 36.

57. See Amazon Comments, *supra* note 33, at 9–10.

58. See SoundCloud Comments, *supra* note 33, at 8.

the uploader is actually the artist's manager or a representative of the label, who would have a license to upload the content. The OSP also might not know if the copyright owner entered into a private licensing agreement with a particular uploader. For that reason, the specific instance requirement is the only way to maintain red flag knowledge while preserving an efficient system, according to SoundCloud.⁵⁹ Facebook's comment best exemplifies that attitude: requiring action when a "service as a whole" creates risks of infringement would undermine the whole point of the safe harbor, so interpreting red flag knowledge that way would be entirely inconsistent with the purpose of the DMCA.⁶⁰

The music industry does have a real grievance, however. The URL-by-URL requirement means that to ensure infringing content is taken down, copyright holders must expend serious resources to identify each individual instance. A quick search for any modern pop song on a platform like YouTube makes clear why that is such a large expense: the volume of infringement on § 512-reliant services is truly massive.

Unfortunately, this is an area in which policy proposals were notably absent from the comments. The Music Community wanted the specific instance requirement to simply be eliminated, while the technology industry claims that is unsustainable. On this point of tension, the first round of comments seems to have resulted in a stalemate.

B. Representative List

The concept of a "representative list," a term of art mentioned but never defined in § 512(c)(3)(A)(ii), is another term that the music industry claims has been read out of the statute.⁶¹ Where a copyright owner claims infringement of multiple works at a single site, the aforementioned clause allows a DMCA notice to identify "a representative list of such works."⁶² The case in which the industry claims "representative list" was read out is *UMG Recordings, Inc., v. Veoh Networks Inc.* ("Veoh"),⁶³ which also implicates the URL-by-URL requirement. The *Veoh* court said that because there is a specific instance requirement for knowledge, a list that simply gives the name of the artists does not qualify as a valid notice list; therefore, Veoh was responsible only for taking down material where Universal provided

59. *See id.*

60. *See* Facebook Comments, *supra* note 33, at 9.

61. *See* Music Community Comments, *supra* note 17, at 27.

62. 17 U.S.C. § 512(c)(3)(A)(ii) (2012).

63. *See* *UMG Recordings, Inc., v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1110 (C.D. Cal. 2009).

information about specific infringements.⁶⁴ Combined with the ruling in *Viacom*, the *Veoh* ruling has been interpreted by both industries to mean that a representative list requires a list of each individual URL where infringement is present.⁶⁵ The music industry stakeholders contend that this reading essentially renders the word “representative” useless.⁶⁶ If they are required to submit a list of every URL with infringing material, why is that not just a list, or even a “specific” or “particularized” list?

Interestingly, the technology stakeholders do not directly respond to that textual argument. Instead, they point either to the internal consistency of the statute or to practical concerns as reasons to require URL-by-URL notification in a representative list, as the court did in *Veoh*. Section 512(c)(3)(A)(iii) requires a notice to give the OSP “information reasonably sufficient to permit the service provider to locate the material,”⁶⁷ which the court says could only mean an individual URL because services often host many, nearly indistinguishable uploads.⁶⁸ Google and Amazon both use § 512(c)(3)(A)(iii) to argue that “representative list” has been construed correctly as well.⁶⁹ Facebook responds using a more intent-based argument: anything broader than a specific instance requirement would impose a burden on OSPs not contemplated by § 512.⁷⁰ The DMCA was carefully designed to avoid requiring affirmative policing by OSPs, as is made clear in § 512(m), so anything other than a specific instance requirement would undermine the burden-sharing balance created by the statute.⁷¹ SoundCloud uses more practical reasoning, arguing that anything other than URLs would make the system practically untenable and overly expensive for OSPs, but does concede that OSPs have some responsibility to make multiple-URL DMCA notices as low-effort as possible for copyright owners.⁷² It is unclear, however, whether SoundCloud views that responsibility as a moral or a legal one. This is one of several instances where SoundCloud attempts to chart a course that maintains favorable construction of the DMCA for OSPs while also trying to pacify the copyright owners upon which its platform heavily relies. This is a relatively minor concession; the Note

64. *See id.*

65. *See* Music Community Comments, *supra* note 17, at 27; *see also* Facebook Comments, *supra* note 33, at 7.

66. *See* Universal Comments, *supra* note 17, at 27.

67. 17 U.S.C. § 512(c)(3)(A)(iii) (2012).

68. *See Veoh*, 665 F. Supp. 2d at 1110.

69. *See* Google Comments, *supra* note 33, at 12; Amazon Comments, *supra* note 33, at 8.

70. *See* Facebook Comments, *supra* note 33, at 7.

71. 17 U.S.C. § 512(m) (2012) (specifying that nothing in the statute should be construed to require a service provider to “affirmatively seek[] facts indicating infringing activities”).

72. *See* SoundCloud Comments, *supra* note 33, at 12–13.

will discuss larger ones surrounding potential points of reform in Part IV.

The music industry proposes a simple reform, which would make the submission of a list with artist names or names of works a valid DMCA takedown notice, justified by the “representative list” language in § 512(c)(3)(A)(iii).⁷³ That would allow them to expend significantly fewer resources on takedowns. The technology industry claims this is technologically and practically untenable and would essentially amount to a “notice-and-staydown” system,⁷⁴ the merits and flaws of which will be discussed in detail in Part IV. Again, we arrive at a stalemate with no obvious opportunity for compromise. Each industry believes the other’s favored system is flawed, so the comments on this pain point illuminate no real potential for mutually acceptable policy change.

C. Fair Use and Its Implications for Human Versus Automated Notices

One of the most hotly contested pain points in DMCA policy is when fair use needs to be considered during the notice-and-takedown process. Fair use is an exception to the exclusive rights granted by copyright. If a use of content is “fair” as measured by four factors laid out by statute, then the use is not infringing.⁷⁵ There is no clear ex ante method to determine whether a use is fair — a judge has the final say. In *Lenz v. Universal Music Corp.*, a litigation that has been ongoing for almost a decade, the Ninth Circuit has held that copyright owners must consider fair use before submitting a takedown notice based on the requirement in § 512(c)(3)(A)(v) that the owner have a good faith belief that the material’s use was infringing.⁷⁶ That holding was also premised on the idea that a fair use is one authorized by the law⁷⁷ and that § 512(c)(3)(A)(v) requires a good faith belief that the use was “not authorized by the copyright owner, its agent, or the law.”⁷⁸ That means that, if you believe *Lenz* was correctly decided, any decision to submit a notice is about more than just whether the work is used; it is also about the way in which it is used.

Content is “not ‘licensed’ or ‘infringing’ *per se*,” meaning that determining infringement is all about context, relationships, and juris-

73. See Universal Comments, *supra* note 17, at 27.

74. See Facebook Comments, *supra* note 33, at 7.

75. See 17 U.S.C. § 107 (2012). The factors are the “purpose and character of the use,” including whether the use is transformative; the “nature” of the work; the “amount and substantiality of the portion” used; and the “effect of the use upon the potential market” for the work. *Id.*

76. See *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1151–53 (9th Cir. 2016).

77. Specifically, a use authorized by 17 U.S.C. § 107 (2012).

78. *Lenz*, 815 F.3d at 1151–52 (emphasis added).

diction, as Mozilla's comment discusses at length.⁷⁹ That reality, according to Mozilla, makes it critically important that fair use be considered before issuing a takedown notice because otherwise content will be taken down that is not necessarily infringing, which will have chilling effects on the online content ecosystem. By that logic, automated notification systems that ignore context are particularly dangerous.⁸⁰

The music industry is understandably unhappy with that attitude. Universal claims that the decision in *Lenz* could be construed to entirely eliminate the possibility of issuing automated takedowns, requiring them to watch every minute of video uploaded to YouTube before submitting takedown notices.⁸¹ In reality, the decision more likely requires human review of any video flagged by an automated system before clicking the button to send a pre-drafted takedown notice, but that still does require an owner of a large number of copyrights to review huge swaths of content. The requirement of considering fair use before submitting a notice creates another practical and legal problem for copyright owners: they are forced to make some kind of judgment about fair use — a largely vague and undefined legal concept — on their own, rather than adhering to a hard line or clearly defined rule. Legally, a use only truly becomes fair once a judge says so.

Thus, the *Lenz* ruling effectively requires copyright owners to make a non-final decision that is arguably almost impossible for anyone other than a legal department (and quite difficult even for them) to make. The back-and-forth proposals about burden shifting in deciding who should make a fair use determination cuts right to the core of why the industries disagree so vehemently on reforming § 512: each side wants the other to bear the cost burden. Requiring a copyright owner to consider fair use before submitting a notice imposes a massive expense burden on those copyright owners because the lawyers would have to review every piece of content flagged as potentially infringing.

The copyright owners argue that their average employee cannot be expected to be an expert on copyright, the same way the OSPs do when copyright owners claim OSPs have red flag knowledge after an employee of that OSP sees an infringing video. In order for the music industry to comply with the *Lenz* decision, every employee who sends takedown notices would have to be able to make a good-faith fair use determination. In the red flag knowledge context, the OSPs argued that requiring rank-and-file employees to make copyright determina-

79. See Mozilla Comments, *supra* note 33, at 1.

80. See *id.* at 3–4.

81. See Universal Comments, *supra* note 17, at 18.

tions is unrealistic, an argument which the music industry is happy to agree with in the fair use context.

The more reasonable alternative is that the copyright owners could write a set of guidelines for employees to use when evaluating whether a use is fair before issuing a takedown notice. That task might one day be done by software, though it is still unclear whether the law will consider a fair use calculation made by software to be sufficient.⁸² Even before the software solution is explored, guidelines might eliminate the need for lawyers to be involved in reviewing every piece of content, though a very large burden would remain for the employees. Whether that burden is justified is an open question.

The technology industry does not even attempt to answer that question. While the music industry employs dramatic rhetoric in laying out the burden shifting that occurs depending on the timing of the fair use consideration, the technology industry simply does not engage with this issue substantively. Google, Facebook, and Amazon do not cite the *Lenz* case even once. SoundCloud cites it only once, and simply to support the proposition that fair use needs to be considered before issuing a takedown notice as part of a larger list of the pros and cons of automated takedowns.⁸³ Google only ever mentions fair use in the context of repeat infringer policies and to refute notice-and-staydown,⁸⁴ while Facebook only quickly mentions fair use as a reason that purely automated notices might be problematic.⁸⁵

There are several reasons technology companies might not prioritize arguing about when to consider fair use. Perhaps they do not feel any pressure to fight that battle, either because they believe they have won or because they do not believe fighting it in these comments will have an impact on the judicial decision. Neither of those seems particularly likely because the technology players engage in a spirited debate on other issues of judicial construction, as discussed above, and their victory on the timing of fair use consideration is certainly not a given, as evidenced by the almost decade-long *Lenz* case. Another potential reason for their non-engagement is that they are picking their battles, and this one is simply not that important to their business model. If the music industry stakeholders get their way and fair use is available only as an affirmative defense, the only difference

82. In an earlier version of the *Lenz* ruling, before the court issued their revised decision, the court acknowledged that an algorithm might be able to consider fair use. See Universal Comments, *supra* note 17, at 19; see also *Lenz*, 815 F.3d at 1151–53.

83. See SoundCloud Comments, *supra* note 33, at 10. Notice-and-staydown refers to a policy proposal made by the music industry in which after a copyright owner has issued a takedown notice for a particular work, the OSP is required to make sure no other infringing instances of that work appear on its service. This proposal will be discussed further in Part IV.

84. See Google Comments, *supra* note 33, at 10.

85. See Facebook Comments, *supra* note 33, at 5.

for the OSPs is that they potentially have to honor a larger number of takedown notices, which they mostly do through automated processes already.

The stakeholders that are most injured by a legislative reversal of *Lenz* are the users who upload content, because their potentially fair uses can be taken down immediately, forcing them to fight back against copyright owners to get their content back online. For the technology companies, who purportedly pride themselves on protecting the interests of their users, not properly addressing this major DMCA pain point may be an exercise in picking their battles to the detriment of those users. They care more about avoiding liability by keeping the URL-by-URL notification requirement and avoiding major burdens such as those that would be imposed by the notice-and-staydown proposed by the music industry.

The policy solution according to Universal is to make fair use available only as an affirmative defense to be used when the uploader is sending a counter-notice.⁸⁶ That way, the copyright owners are not forced to commit a large amount of resources to making judgments based on a vague legal standard and can instead engage in a fair use calculation after the counter-notice, when they are deciding whether to file a lawsuit. While it might reduce the burden on copyright owners, that solution has a critical consequence. OSPs may take down non-infringing content, at least temporarily, and they may do so during the first week after it has been posted, when the content is most valuable to the uploader if it is current or time-sensitive.⁸⁷ Because uploaders are often smaller players than copyright owners, they might feel unable to fight back. The result is that authorized content might stay down forever, or there might be other chilling effects.

As previously mentioned, the technology stakeholders do not propose any substantive reform regarding fair use, aside from Mozilla, which suggests more explicitly considering the context in which the work is used in the DMCA notice-and-takedown system.⁸⁸ In the same vein, some scholars have suggested including in takedown notices a statement certifying that the copyright owner has considered fair use.⁸⁹ Making this consideration more explicit in the takedown notice process would attempt to eliminate the vagueness that led to the drawn-out litigation in the *Lenz* case and would make clear that the burden lies with the copyright owner.

86. See Universal Comments, *supra* note 17, at 20.

87. Imagine an uploader who posts a commentary on a newly released popular song and includes short clips of the song in the review. That is likely to be considered a fair use, and that content is at its most valuable by far while the song is still new. Taking down that content for the first ten days would destroy a significant portion of its value.

88. See Mozilla Comments, *supra* note 33, at 1.

89. Rebecca Alderfer Rock, *Fair Use Analysis in DMCA Takedown Notices: Necessary or Noxious?*, 86 TEMP. L. REV. 691, 707 (2014).

IV. POTENTIAL REFORMS TO THE DMCA

The second category of issues the two industries argue about is potential reform to the actual structure of the DMCA system. Once again, the music industry shows its dissatisfaction with the existing system by proposing relatively radical changes that it claims are necessary to make the system viable, while the technology stakeholders base their critique on existing case law and arguments about what is practically feasible. The two major reform areas addressed below are a potential “notice-and-staydown” system and proposals for altering the relationship between counter-notifications and the lawsuit requirement.

A. From Takedown to Staydown (or Somewhere in Between)

Replacing the notice-and-takedown system with a notice-and-staydown system is a reform proposal commonly touted by the music industry and patently rejected by the technology industry. Notice-and-staydown would mean that once a copyright owner has issued a takedown notice for a particular work, the OSP would be responsible for making sure that the work does not reappear on its service. Presumably, the OSP would be liable for infringement, because it would lose its § 512 safe harbor if it failed to make the work stay down. Both the Music Community and Universal actively campaign for notice-and-staydown in their comments, citing the amount of repeat infringement and the so-called “whack-a-mole” nature of takedowns as the reason.⁹⁰ For example, the song “Uptown Funk” appeared three thousand times on SoundCloud following the first notice.⁹¹

Technology stakeholders claim that this proposal is practically unsustainable, is an inefficient allocation of burden, and is inconsistent with the law. Google argues that it would create a massive burden on OSPs, which would price many emerging services out of the market and make many existing services unsustainable.⁹² Notice-and-staydown would, according to Google, require OSPs to first actively check whether there is any matching material and then determine whether that content is infringing.⁹³ That would require OSPs to make fair use decisions, a burden that both sides are clearly trying to push onto each other. Copyright owners claim it is a reasonable burden to shift to the OSPs here, even though they claim it is too large of a burden when arguing that they should not have to bear it in other con-

90. See Universal Comments, *supra* note 17, at 35; see also Music Community Comments, *supra* note 17, at 14.

91. See Music Community Comments, *supra* note 17, at 17.

92. See Google Comments, *supra* note 33, at 10.

93. See *id.*

texts. Google is also concerned that users will inevitably use encryption and find other workarounds, which would almost certainly create liability for the OSPs.⁹⁴ Mozilla focuses on the fact that a staydown system necessarily ignores context, and therefore fair use and speech concerns.⁹⁵ Amazon argues that the burden allocation would be inefficient because copyright owners are more suited to evaluate whether something is infringing: they can better evaluate fair use because they are more familiar with the works and they track when they give out licenses.⁹⁶ Facebook argues that notice-and-staydown is not only harmful, but also that it is “inconsistent with settled legal principles.”⁹⁷ According to Facebook it would be inconsistent with fair use from the outset to require OSPs to make sure no instances of a given work are allowed to appear on their service because it would mean nobody does a fair use evaluation on each instance.⁹⁸ It would also stifle free expression, not only through actual takedowns of authorized uses but also through chilling effects.⁹⁹

In light of those counter-arguments, Sony proposes a more moderate solution than the rest of the music community, imposing a duty of care on OSPs to keep down infringing content about which they have already received a notice.¹⁰⁰ That would give OSPs some responsibility to patrol their services, but could allow them to avoid liability for content where users find clever workarounds or where only a tiny portion of the work is used. OSPs would argue that Sony’s proposal violates § 512(m), the clause stating that they need not affirmatively police violations. But Sony is not suggesting that courts need to read a duty of care into the existing statute; they are proposing a legislative change, potentially including a revision to § 512(m). That obviously still triggers all of the OSP concerns about extra cost, edging out new entrants, and burden allocation, but Sony does present a more novel substantive policy proposal. The technology stakeholders will never be happy about any reform that requires them to police their services, but the fact that at some point they might be able to meet a duty of care by implementing filtering, like future versions of YouTube’s Content ID or of Audible Magic,¹⁰¹ may make a more moderate proposal like this plausible.¹⁰²

94. *See id.*

95. *See* Mozilla Comments, *supra* note 33, at 5.

96. *See* Amazon Comments, *supra* note 33, at 10.

97. Facebook Comments, *supra* note 33, at 6.

98. *See id.*

99. *See id.*

100. *See* Sony Comments, *supra* note 17, at 12.

101. Audible Magic is a third party software product used to filter out audio based on a database of content provided by major copyright owners, similar to Content ID.

102. The use of filtering technologies to keep down more repeat infringement might be able to be addressed through § 512(i)(2) — which allows for the adoption of “standard

The fears of the technology industry are far from irrational. A notice-and-staydown regime would cripple not only their leverage in negotiating favorable licensing deals, but also their ability to rely on § 512 in any way. Short of technical measures that could perfectly identify even altered versions of works, liability seems massively likely. Sony's proposal does seem more reasonable, though what they would propose as the correct standard of care risks being overly burdensome. A third approach, such as creating a legal incentive for services to implement technical measures could be a moderate path to a better status quo.¹⁰³ Filtering technologies, such as Content ID, accomplish a significant portion of the goal of the proposed notice-and-staydown regime. Under the existing framework of § 512 and the standard technical measures clause, OSPs could be required to implement technologies that would reduce infringement if they were developed through an open standards process and "do not impose substantial costs" to implement.¹⁰⁴ Filtering technology used by the entire industry would allow copyright owners to establish a regime in which content does stay down most of the time, without imposing the extra burden of liability on OSPs. This solution, though, would require a standards body to take ownership of and proliferate a filtering technology.

B. Counter-Notices and the Lawsuit Requirement

The ease of sending a counter-notice, the lack of disincentives for sending them, and the fact that the only way to refute a counter-notice is by filing a lawsuit has led the music industry to suggest moving away from the current counter-notice system. Their claim is that content uploaders know about the lawsuit requirement and know that copyright owners cannot possibly file a lawsuit for every infringement, so they have a clear incentive to send baseless counter-notices to get their content back online.¹⁰⁵ The IFPI claims that 80 percent of counter-notices have no good faith basis for refuting the takedown, based on a sample of over 653 of them.¹⁰⁶ Universal reviewed 710 counter-notices and determined that 581, or 82 percent, were baseless.¹⁰⁷ In order to fight back, Universal would have to undertake the cost of filing over 500 lawsuits, which is evidence that the lawsuit

technical measures" — rather than by adding a duty of care into the system. *See* 17 U.S.C. § 512(i)(2) (2012).

103. § 512 does contemplate requiring OSPs to comply with "standard technical measures" but those measures were never adequately defined and have rarely, if ever, been used as a means to disqualify an OSP from the safe harbors. *See id.*

104. *See* 17 U.S.C. § 512(i)(2) (2012).

105. *See* Universal Comments, *supra* note 17, at 36–37.

106. *See* Music Community Comments, *supra* note 17, at 34.

107. *See* Universal Comments, *supra* note 17, at 36.

requirement is too burdensome. It is worth noting, however, that the IFPI received those 653 counter-notices from a sample of 98,753 infringements on YouTube, meaning that IFPI only received counter-notices on 0.6 percent of all infringements reported.¹⁰⁸ As Sony puts it, OSPs and content uploaders rely on the fact that copyright owners cannot sue in all cases.¹⁰⁹

Copyright owners claim that the lack of strong repercussions for sending baseless counter-notices also causes problems. OSPs make filing a counter-notice as easy as filling out a simple form in order to be helpful to their users, which results in a massive amount of frivolous counter-notices, according to Sony.¹¹⁰ Users know they can get away with sending baseless counter-notices and do so blatantly and frequently, according to the Music Industry.¹¹¹ Universal quotes a particular one as saying “you wile-e-coyotes are wasting your time and money with dwarf roadrunners like me. I dare you to sue someone like me.”¹¹² They focus on the massive number of apparently baseless counter-notices, suggesting that large numbers of users are aware of how untenable the system is and are taking advantage of it.¹¹³

The technology industry response is that this issue should not be solved by giving OSPs a larger burden to review counter-notices or by allowing copyright owners to just force content to stay down in the interim. They prefer negotiated solutions, such as the deal that YouTube and Universal have struck in which YouTube will keep content down as long as Universal does a good faith review of the meritless nature of counter-notices.¹¹⁴ Universal, however, is upset that this is an exception to the rule that they had to bargain for, rather than the norm. SoundCloud again takes a more moderate position here, breaking ranks from the other technology stakeholders, perhaps as an effort to appease an industry on which they rely. They agree that the current version, including the lawsuit requirement, may be overly burdensome, but make clear that they believe in maintaining a counter-notification system in which their users can fight back, though they propose no substantive middle-ground.¹¹⁵

On this issue, Universal proposes a substantive policy reform: they would increase the time given to evaluate the counter-notice from 10 to 60 days and replace the lawsuit requirement with a dispute resolution system similar to the Uniform Domain Name Dispute

108. See Music Community Comments, *supra* note 17, at 34.

109. See Sony Comments, *supra* note 17, at 15.

110. See *id.* at 16.

111. See Universal Comments, *supra* note 17, at 36.

112. See *id.*

113. See *id.* at 37.

114. See *id.*

115. See SoundCloud Comments, *supra* note 33, at 14.

Resolution Policy.¹¹⁶ While this would lessen the burden for copyright owners, it ignores legitimate grievances of users and potential legal inconsistencies. Under this system, content would stay down for two months, potentially at the height of when it is valuable. It also keeps the content down for those 60 days even if the use will turn out to be authorized, while ignoring that a court must make final determinations about fair use, not alternate dispute resolution systems or an administrative board. Waiting for a judicial determination, which Universal would presumably want to see happen after the dispute resolution, would mean an even longer period during which content is down even if it will turn out to be authorized by law. In addition, it makes the process potentially even more difficult to navigate for content uploaders, often the smaller and less sophisticated party, because dispute resolutions can be particularly complex.

This issue too ends with the two industries having totally incompatible positions. The music industry wants to reduce the admittedly large burden it faces by asking OSPs to make sure material stays down, while the OSPs point out that this will be nearly impossible in practice and will result in intermediary liability in a way that would be against the spirit of the DMCA. Unfortunately, there is no middle-ground substantive solution proposed here. Again, technical measures such as YouTube's implemented Content ID might be the best path towards achieving the relevant goals without imposing an overly large burden. Implementing technical measures that reduce the amount of infringing content that ever appears on online services could serve to reduce the amount of potential lawsuits that would have to be filed in order for the major copyright owners to enforce their rights.

V. CONCLUSION

Juxtaposing the music and technology industry arguments about § 512 reform leads to several major takeaways. First, there is little agreement and no clear middle ground in the first round comments. Neither side seems willing to compromise on their principles and proposed interpretations or changes. Luckily, they are not being asked to negotiate how to change the DMCA; that is a job for the legislature and the Copyright Office. Second, the technology industry is clearly satisfied with the system as it exists and is playing regulatory defense, a rare position for an industry accustomed to fighting with regulators and trying to chart new paths. Third, individual users generally get the short end of the stick in the few instances where compromise seems

116. See Universal Comments, *supra* note 17, at 38. The Uniform Domain Name Dispute Resolution Policy is the procedure by which briefs are exchanged and an administrative panel manages the back-and-forth when parties argue over domain name ownership.

possible. The technology stakeholders only half-heartedly fight back on when fair use should be considered, while Universal proposes a dispute resolution system that might add little to no burden for OSPs but hurts users. Perhaps it is because they are a more disparate, less corporate, and harder-to-organize stakeholder group, but their voice seems to be missing in the debate. While as many as 85,000 of the 92,000 submitted comments came from individuals, they were submitted through a campaign that provided a template comment that did not address any of the pain points or risks flagged above.¹¹⁷

Based on a reading of the arguments made by the two industries, the reform conversation would seem to be at an impasse. However, there are signs of concessions at the margins. SoundCloud might be willing to give up on the lawsuit requirement, and Sony concedes that notice-and-staydown might be too extreme to ever reach adoption. Short-term compromise at the market level still seems unlikely; any substantive reform in favor of the music industry would have to come from new legislative action. At the same time, the issue of massive infringement is likely to decline rather than increase. More OSPs are adopting technologies like Content ID in order to seem more legitimate and to be able to negotiate licensing deals with the major content owners. This market solution has appeared without any legislative requirement; OSPs have been willing to undertake voluntary measures to reduce infringement in order to improve their opportunities to make deals with major copyright owners, all to get an edge over their competitors. A glimmer of hope in a landscape of stark disagreement is that market forces may push towards convergence.

This was only the first round of comments in this process initiated by the Copyright Office, and we are still nowhere near the conclusion of this long debate. Neither side has come up with a silver bullet, a reform proposal that both can agree on. The debate will rage on, with more rounds of comments forthcoming and potentially a legislative fight over reform in the future, but this argument between stakeholders sets the stage for what is likely to be a difficult process, if it ever concludes at all.

117. *See, e.g.*, Thomas Jisa, Comments in the Matter of Section 512 Study (Apr. 6, 2016), <https://www.regulations.gov/document?D=COLC-2015-0013-26065> [<https://perma.cc/3JF9-Np8S>].