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

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

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

Dear Chairman Graham, Chairman Tillis and Ranking Member Coons:

Thank you for your June 9th letter with additional questions for the record of the June 2 Hearing entitled *Is the DMCA's Notice and Takedown System Working in the 21st Century?* I appreciate the ability to add more information to the record from my perspective as an independent artist with real-life, everyday experience with the DMCA.

I have done my best to answer your questions and to share my own experiences. Some of the questions require a deeper knowledge of copyright law and the DMCA than I have, as I am a composer and not a lawyer. But I can definitely speak to the very real and practical damage done to my business and to my intellectual property as the result of a broken DMCA.

Following are my answers to questions from Senators Tillis and Coons. I look forward to remaining engaged with this Committee as these hearings proceed. And again, I thank you for allowing me to speak for independent artists whose voices are sometimes overshadowed by the record labels, music publishers, and tech companies. It was a privilege to have this opportunity.

Kindest regards,

Handwritten signature of Kerry Muzzey.

Kerry Muzzey

23 June 2020

QUESTION FROM SENATOR TILLIS

1. Congress intended for section 512 to provide strong incentives for service providers and copyright owners to “cooperate to detect and deal with copyright infringements that take place in the digital networked environment.” There have been numerous voluntary initiatives, but many have faded out over the years. What do you think have been the most successful voluntary initiatives, and what areas do you see for future improvement?

Honestly, I am not aware of any voluntary initiatives by internet platforms to help creators locate their works on the various platforms. Such efforts would be so welcome in the independent community of artists. One material thing that would make a huge difference is for YouTube to allow access to its content protection tools for all independent musicians and small music publishers and independent record labels.

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

Yes, this is a clear warning sign that the current system is severely out of balance. It is no accident that the system is tilted strongly in favor of the big tech platforms, who used the good-faith safe harbors built into the 1998 DMCA as the foundation for their business models. Companies that rely on uploaded video content such as YouTube, Vimeo, and Facebook have all taken the safe harbor provision and not only turned it into a loophole large enough to drive a truck through, but they then built their headquarters inside of it as well.

In YouTube's case, they tried to mitigate the concerns of the largest players in this game – the major record labels and major music publishers – by giving them Content ID and allowing them to monetize the otherwise unauthorized use of their music on the YouTube platform, in “partnership” (willingly or not) with YouTube. This “partnership” results in YouTube gaining a windfall, while significantly reducing its liability exposure, and labels and publishers gaining some money to mitigate the otherwise infringing activity.

It is important to understand that “monetization” on YouTube is achieved when a music label and publisher in effect issue the infringer a microlicense for that infringing music use – a use for which they likely would not have been able to issue a license simply because the volume of such licenses would be an insurmountable administrative hurdle with little financial return.

This monetization-of-small-scale-infringements has provided some upside (or at least reduced the harm) for the largest stakeholders in the music world. As for the remaining smaller entities such as individuals, independent artists or production music libraries or boutique licensing agencies, they do not have access to these same detection tools and, if they did, their market share is significantly smaller than those of the major labels and publishers. YouTube does not allow these small players access to Content ID. Vimeo and Facebook do not even have such tools.

23 June 2020

The small-to-medium-sized independent artist is generally not aware that their work is being pirated on these platforms, because most do not have access to detection technologies. (YouTube, for example, does not normally permit individuals or independent artists to have access to Content ID. I am one of three independent artists I am aware of who have access.) These small independent musicians think: “I am not famous; therefore my works must not be out there in unlicensed contexts.”

I used to think the same thing – and was proven wrong the moment I activated my music in the Content ID system. I am certain that if more artists had access to Content ID or similar technologies, there would be many more expressing alarm about the levels of infringement of their works.

Notice and takedown can only work if one can *find* their works on any given platform. To my knowledge, no platforms, other than YouTube, offer any type of detection service that allows a music owner to do that. A composer can sign up for commercial services (that are rather expensive and geared more to corporations and large media companies than to individuals) that have varying levels of success on different platforms. But they are not very robust.

One example of such technology is Audible Magic. One can sign up to be included in their filtering technology, but its use is dependent on the platforms’ implementation of Audible Magic. It can be used as an upload filter to block identified third party content, but some platforms that use Audible Magic let users easily bypass the block by simply clicking on a button that says: “I have a license for this use.”

There is no notification to the music rightsholder that a) Audible Magic detected their music on a platform or b) someone got past the block and continues to use the music in their video. This is useless to me because I, the copyright owner, am never notified that someone has posted a video with my music in it – so long as they click that button. And, to my knowledge there is no commercial system in existence available to all copyright owners where one can directly submit a URL or Vimeo/YouTube channel with a request to scan that channel against one’s musical fingerprints.

Regarding YouTube, a composer can access Content ID via a third-party portal like AdRev, and for free, but *only if they agree upfront to monetize the infringements that they find*. There is no Vimeo-provided system for Vimeo’s own platform. Vimeo employs Audible Magic to filter, but there is no notification component to the composer who pays for access to Audible Magic. And Vimeo makes fair use decisions on behalf of its users without notifying the copyright holder that the detection and the fair use analysis and decision have been made.

Likewise, Facebook has no Content ID-like service for its own platform, but instead relies upon Audible Magic to do very basic filtering. This leaves creators on a very tilted playing field where they cannot locate pirated uses of their works to be able to do a takedown notice. Suffice it to say that notice and takedown works quite well for the tech sector for the simple reason that most of them provide no means for an artist to efficiently locate their works on their platforms in the first place, a necessary starting point for one who wishes to do a takedown on an unlicensed music use. You cannot take down a use that you cannot find.

23 June 2020

3. Congress intended for section 512 to provide strong incentives for service providers and copyright owners to “cooperate to detect and deal with copyright infringements that take place in the digital networked environment” and to offer “greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.” If Congress were starting from scratch, should we adopt the same balance as in 1998?

Unfortunately, it appears that the tech sector considered “cooperation” to be nothing more than “processing a takedown notice if and when they receive one.” But cooperation should involve much more than that: it should consist of tech platforms providing a way for creators to locate their works on that platform in an effort to “cooperate to detect and deal with copyright infringements.” This concept was not even at issue in 1998, several years before YouTube was invented and before broadband internet service enabled the quick, almost-instantaneous worldwide distribution of audiovisual content.

The ecosystem that existed in 1998 does not exist today. The balance that existed in 1998 was a balance for a dialup-modem world in which user-generated content *did not exist yet*. The DMCA never could have contemplated several key events that would happen just a few years down the road: the dawn of iTunes, which put a music download store onto everyone’s computers; the advent of broadband internet and YouTube’s inception; and then, importantly, Google buying YouTube and turning it into a platform where users could upload any content they wanted and then co-monetize it with YouTube. It would be years, and a few lawsuits later, before YouTube would adopt a content identification system to monitor infringement. But today, 13 years after its introduction, the system is primarily accessible only to major record labels, music publishers, and movie studios.

If we were starting from scratch, one key element that the DMCA must include would be mandatory Content ID-like detection services available to all music owners for any platform that hosted video and/or audio content. **The ability for any music owner to detect the unlicensed use of their works on any platform is essential for achieving the balance that is supposed to exist in the DMCA. Without this ability, there can be no balance in the DMCA.**

The lack of a) the existence of and b) access to these tools is one of the greatest contributors to the current imbalance in this ecosystem. I cannot stress enough: one cannot issue takedowns when one cannot locate one’s works on a platform to begin with. If the DMCA were brand new legislation being proposed today, I believe that the definition of “cooperation” would – and should – include platforms being required to offer detection services to composers, musicians, and music owners. A music owner being allowed to submit a takedown notice to YouTube is not “cooperation” – that is a remedy designed to right a wrong.

Cooperation by its very definition involves two parties working together, not one party being at the constant mercy of the other. In the case of YouTube and Vimeo, that “other” is a commercial platform that is knowingly hosting unlicensed and pirated content on its platforms at the expense of an individual artist who has no way to know his work is being used and no way to discover the usage.

This is not cooperation, this is willful and knowing victimization of the artist, especially when the platform – like YouTube – does not give independent artists access to the one tool that would reveal that artist’s work on its platform. Again, one cannot submit a takedown when one cannot find one’s work on the platform to begin with.

23 June 2020

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

While I am not a lawyer, I think the most significant recommendations are those to (i) apply the safe harbor to only those activities that are strictly limited to “storage at the direction of the user,” and not those that promote, curate, or profit from the infringing activity, (ii) obligate service providers to take action when they know or should know generally that infringing activity is taking place on the service, and (iii) provide meaningful, accessible, and timely recourse when users knowingly misrepresent that their use is authorized or qualifies as “fair use.”

However, I think the most useful change would be to include some form of notice and staydown, so that once I have notified a platform that use of my works is not authorized on that platform, the platform is obligated to keep my content off the platform unless the user and I agree that the use has been authorized to post the work on the platform.

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

It is important to be clear as to which copyright owners and creators are reportedly spending a lot of their time monitoring the internet for infringement and conducting enforcement. They are the major labels and music publishers, or large corporations who are able to afford high-end detection technologies scaled to meet their needs. By contrast, independent artists are generally not spending a great deal of time and resources monitoring and enforcing their rights, because *those creators do not have access to the tools that do the monitoring*. I am the rare exception because I have access to a key tool, as described above.

I want this part to change. I want to see this playing field leveled, which is why I agreed to tell my story to the Judiciary Committee. I am fortunate enough to be one of the lucky few who has access to Content ID on YouTube, so I do count myself among those you cite who spend a lot of time monitoring my copyrights and enforcing them on internet platforms like YouTube, Vimeo, and Facebook.

I am now seven and a half years into using Content ID on YouTube. The first six months of use was a full-time job, 12-14 hours a day, seven days a week. The sheer volume of music detections was overwhelming. I expected to find 20 or 30 potentially infringing instances of my music, but Content ID found 20,000 just in the first month that I used it. Please understand the shock of this discovery and the resulting waves of work that were generated as a result of it. I am not a famous composer. I did not expect to find the amount of theft that I found.

23 June 2020

About one year into my Content ID use, the detections slowed down and I was only getting about 200-300 detections per day during by that time. For the past three years, the volume has lessened, and I now process between 25 and 50 detections each day. The volume has lessened not because people have stopped stealing my work, but because I have been using Content ID for so many years – and with approximately 110,000 uses already discovered – there are simply fewer old uses for the system to find, and daily new uses are peppered in with the occasional legacy discoveries.

I regularly spend my morning, seven days a week, from 8am until 12pm dealing with Content ID detections, looking for potential licenses for videos that Content ID found, doing takedowns and handling legal issues resulting from my discovery of prior music uses. The remainder of the day, I check in to the Content ID dashboard two to three times per hour which also includes looking for potential licenses in spreadsheets that I keep.

Then, starting at 9pm until midnight, I step up my Content ID check-ins, as that is when Asia wakes up and begins posting their videos – including television networks and companies in China who are frequent repeat offenders. I do this every day without a day off from it, even if I am on vacation or traveling for a wedding or a funeral. I cannot let one day get away from me, much less several days, because the backlog would be too great on the day that I returned to checking Content ID again.

I am essentially functioning as a music publisher and a business affairs department during these times, which takes away time I should be spending on writing music and pitching my work to media outlets like movie trailer editors and ad agencies. Easily 50% of my working hours, seven days a week, is spent dealing with infringements. Being a composer has actually become a *part-time* job out of necessity: becoming my own copyright police officer requires the remaining 50% of my time.

Occasionally, Content ID will suddenly yield dozens of new detections out of the blue. When this happens, it requires even more attention, and there are entire weeks that go by when I do not even fire up my studio to compose because I need to become a full-time internet policeman protecting my works.

YouTube does offer an option to automatically block the audio (which also blocks the accompanying video) of any detections of my music, but I cannot put such a far-reaching measure in place because I do have some individuals, small companies, and videographers who are doing the right thing and licensing their uses of my music, so I do not want them to get caught in that net.

My experience with notice and takedown has been mixed. On the one hand, I have been able to locate and take down more than 100,000 unlicensed uses of my works and I have been able to successfully bring some of those copyright infringers to the negotiating table to settle those infringements. I am sometimes able to do this amicably without the aid of an attorney, but the larger corporate infringements require that I engage my lawyer or/and a litigator.

This happens at great expense to me, which often means my having to weigh whether or not it is worth it for me to pursue that illegal use of my work. Any corporation with on-staff attorneys could easily drive me into ruin with a protracted legal battle, knowing full well that I, as an individual, cannot afford to take my claim to court.

23 June 2020

The downside to my experience with notice and takedown, without a doubt, has been the countless sleepless nights and the constant feeling of defeat and helplessness that I experience as the result of the false counter-notifications that I receive so frequently through YouTube.

Uploaders constantly use that “fair use” button to avoid takedowns. In my years of experience, it has *only* ever been used in bad faith as a get-out-of-jail-free card. The abuse of that part of the notice and takedown process is widespread based on my own experience with it.

Please understand that it has taken me a lifetime of hard work – of striving and aspiring and education – to reach a point where I am finally able to make my living at my life’s dream of being a composer. The defeat and helplessness I am made to feel when someone steals my work and then falsely claims fair use is overwhelming. Multiply that feeling by the number of false counter-notifications I receive every month for the past seven and a half years and you will begin to get an idea of what helplessness feels like to me. My own government allows this. There is no law to protect me and my work.

I feel the need to clarify something here, as I have mentioned YouTube and Content ID so much during both my oral and written testimony, and now in these QFRs. YouTube is the focus of my copyright protection efforts because it is the largest video platform in the world, and because users are incentivized – via the ability to monetize anything they upload – to infringe.

Despite my huge annoyance with Content ID, it is the most important tool in my toolbox for detecting and, to the extent possible, defending my copyrights. It is the X-ray that reveals the theft of my work. And while there have been many days where I wished I had never opened that Pandora’s Box, I will say with 100% certainty and conviction that I would do it all over again. Better the devil you know.

6. You testified about your experience dealing with dubious counter-notices that incredulously claim fair use, including for use of your music on a commercial. What is the real-world impact—for you and for fellow creators—of such abusive counter-notices, and do you know how common they are?

The impact my business has been extreme – but would be even more so if I did not have access to Content ID, which unfortunately is the case for most independent musicians. In my written comments, I listed quite a few corporate infringements that I have discovered – each of those should have generated a healthy upfront license fee and not required threats of litigation and a settlement. To reach a point in your career as a composer where a car company, hotel chain, pharmaceutical or biotech company is approaching you to use your music for an ad campaign is a big deal. It is something that people in my business aspire to.

Now imagine that you find out years after the fact that that luxury car company – the one whose cars or luxury SUVs you could never afford – used your music in three different commercials that have been out there for several years already. Compound that feeling of loss with the realization that time you see a similar commercial use on your Content ID dashboard, you have lost yet more revenue you could have made. Then, add that to the growing realization of the legal bills you will incur if you choose to pursue claims against these corporations – bills you could never afford. The defeat is constant and unrelenting; the wins are occasional.

23 June 2020

Now imagine that one of those corporations or Fortune 500 companies, after you do a takedown, submits a false counter-notification by clicking the “This is a fair use under US Copyright Law” button. You are trapped. You have to engage a lawyer and file a lawsuit in federal court on that claim within 10 – 14 days or they get away with it. I would estimate that 50% of these false counter-notifications come from people and companies in the United States and the other 50% are from territories outside of the United States.

I only know one other artist who has experienced this same thing with false counter-notifications, and they also have Content ID access. They do not have the resources to hire attorneys for these cases, so they have to let them go. One industry friend called it “the ennui of learned helplessness.” There has never been a more accurate descriptor.

But please realize that my lack of examples of other artists experiencing the false counter-notification problem is simply further evidence of the fact that artists do not have access to the detection technologies necessary to find their work on YouTube or other platforms in the first place. If you cannot find your music on the platform, then you cannot take it down. If you cannot take it down, you cannot experience a false counter-notification. I believe that my experiences in this regard are the canary in the coalmine.

The real-world impact of the counter-notification abuse and false fair-use abuse is twofold. One is economic, in that not only am I deprived of a license fee for the use of my music in a video via a master recording and synchronization license, but once that counter-notification’s 10-day period has lapsed without me filing a lawsuit, that video goes back online and the uploader – and YouTube – get to continue to use it and to monetize it by placing ads on it. I am excluded from that equation unless I file a lawsuit. Despite my efforts to have the content taken down, I incur the economic consequences of it staying up as the result of a false counter-notification.

The second economic hit happens when I do engage a lawyer to help me resolve the infringement – an expense that would be unnecessary if that user had licensed their music upfront. But, this creates more than economic pain – it affects my mental health and general well-being. Each new legal engagement is a punch to the gut, but when they happen constantly and in constant succession – day after day for more than seven years now – the impact is devastating.

I have reached an amazing place in my life – doing my dream job, which is no small feat when your dream job is making a living as a composer. So I am doing a job that I love, but at the same time I have never felt more defeated. It is a weight that does not lift because the theft is constant. The aggregate feelings of helplessness is made worse when I realize each time again that I have no remedy in these situations.

I cannot afford to file between two and five federal lawsuits every month, so I am stuck. I want this situation to change. When I take something down for being unlicensed, I want it to stay down until that uploader presents me with a license or tells me why they believe it is a legitimate fair use. And, if it is not a true fair use, and I decline their explanation and the video stays down, then they can certainly employ an attorney to make their fair use argument on their behalf or file a lawsuit against me in federal court.

They would have the same remedies that I currently have, but it would require them to have some skin in the game – some investment in the outcome. I never invited myself into their videos. I should not have to bear the financial and emotional burdens of the results of their theft of my work.

23 June 2020

QUESTIONS FROM SENATOR COONS

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

I think that in 1998, no one could have predicted what was about to happen just a few years down the road: the advent of iTunes, the launch of YouTube, and cable companies bringing broadband service into individual homes to replace the slow dial-up modems that were in every home at the time. Our 1998 minds never would have thought that one day our homes would have internet connections as fast as the ones in corporate offices or that our phones would become supercomputers, cameras, camcorders, and televisions all in one small hand-held device.

The proliferation of audiovisual content was something no one saw coming, and it is that proliferation of content – primarily in the form of YouTube videos – that necessitated detection technologies like Content ID. “Strongly urging tech platforms to work with creative industries” is very different from “requiring tech platforms to work with creative industries.” To the extent that YouTube and Vimeo have acquiesced and allowed any type of fingerprinting technology to be deployed on their platforms, in each case, it was the end result of lawsuits filed against them. It was not cooperation; it was a settlement.

Takedowns are the only remedy available when one finds one work being pirated or used without licenses on an audiovisual platform, but doing a takedown presumes that you have been able to find your music on that platform in the first place – which is only possible if you are using detection technologies like Content ID. But YouTube does not grant independent artists Content ID, so you have to use a paid service.

You could also use a free service like AdRev (which is a third-party portal into Content ID) – but the catch there is that you have to agree to default your detection policy to “monetize.” With AdRev, you are agreeing to a default policy of monetization (which is the issuing of a microlicense for each unlicensed use) before you even see what the use is. You are agreeing in advance to accept without recourse any and all uses that you find, in exchange for being allowed to use the tech that helps you find them. If you do not want to agree to monetize, AdRev can help block or take down content, for a fee. For creative individuals like me struggling to make a living, any fee is simply too high.

Any platform that allows users to monetize their uploads or that requires a subscription fee is disincentivized from providing a musician access to technology to help that artist locate uses of their music on that platform because in the common parlance, “it causes friction with the user base.”

23 June 2020

That is tech verbiage for “customers of the platform get angry when they get caught using unlicensed music and their videos get taken down, and they direct their ire at the platform.” When Vimeo instituted Audible Magic detection several years ago as the result of a lawsuit settlement, they experienced the backlash on their own forums as users attacked them for implementing the detection service and threatened to cancel their user accounts. En masse cancellations would be devastating to a business whose platform is video, which always contains music – but does not always contain *licensed* music. When “not licensing your music” has been the way of the world for decades, it is difficult to bring those users into line with the law.

I think that a great fix would be requiring any platform that hosts video to implement its own Content ID-like system – where music owners can upload their works for fingerprinting and then have the platform scan itself against those fingerprints. This function has largely been relegated to 3rd parties (AdRev and Orfium for Content ID, Audible Magic for Facebook and Vimeo) – but always with a catch.

Audible Magic is a content identification technology. One can pay to join their service, but its use is dependent on the platforms’ implementation of Audible Magic. It can be used as an upload filter to block identified third party content, but some platforms that use Audible Magic let users easily bypass the block by simply clicking on a button that says: “I have a license for this use.”

There is no notification to the music rightsholder that a) Audible Magic detected their music on a platform or b) someone got past the block and continues to use the music in their video. This is useless to me because I, the copyright owner, am never notified that someone has posted a video with my music in it – so long as they click that button. Conversely, Content ID is a turn-key solution: as it detects my music in a video, it puts that video into a dashboard that I can access via any web browser.

You would think that if tools like these to identify content and take action on that identification are readily available, it would be easy to see the use of some standard technical measures across platforms. However, as the platforms become more concentrated and more proprietary, the possibility of adopting a universal “standard technical measure” like Content ID become even more insurmountable.

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

I am concerned that the repeat infringer condition is not applied rigorously enough. This comes into play very specifically with my interactions with YouTube, who will avoid terminating accounts that are highly monetized (that is to say, co-monetized with YouTube) or that have a large follower count. Even in cases when I have submitted as many as 120 takedowns against a single YouTube account for 120 unlicensed uses of my music, the YouTube account still stays up and is not terminated by YouTube.

23 June 2020

Regarding other OSPs and repeat offenders who download pirated content, my works are sometimes in those batches of pirated content or torrent files. I am in favor of something like a 3-strikes rule, but again, I, as an independent artist, have no way of detecting my works on those platforms or of my works being illegally downloaded by those platforms' customers.

While I am not a lawyer, I think the most significant recommendations are those to (i) apply the safe harbor to only those activities that are strictly limited to "storage at the direction of the user," and not those that promote, curate, or profit from the infringing activity, (ii) obligate service providers to take action when they know or should know generally that infringing activity is taking place on the service, and (iii) provide meaningful, accessible, and timely recourse when users knowingly misrepresent that their use is authorized or qualifies as "fair use."

However, I think the most useful change would be to include some form of notice and staydown, so that once I have notified a platform that use of my works is not authorized on that platform, the platform is obligated to keep my content off the platform unless the user and I agree that the use has been authorized to post the work on the platform.

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

When the DMCA was written in 1998, independent artists were not on Congress' radar, by the very nature of what the internet and the music ecosystem were at the time. It was a world full of major-label-only artists because labels were the distributors. When iTunes launched a few years later, it removed the labels as gatekeepers and democratized music distribution. Suddenly, any independent artist could have their work available for sale in the same store as well-known composers and pop stars.

The film scores that I released for my small independent projects were sandwiched in between film scores created by my idols and presented to an iTunes user as equals. We were all next to each other on the same virtual shelf. This did lead to more piracy as more music found its way to pirate filelocker sites and filesharing services, and it also led to more unlicensed use of music in videos because at the same time, broadband was replacing dial-up modems and was introducing download speeds that were previously unheard-of.

It is important that any 21st-century solution include, specifically, independent musicians' stake in this ecosystem. The democratization of music distribution helped to create a new musical middle class in America, but the platforms did not give this class of artist access to the same detection technologies that the majors had. Today, in 2020, we now know better.

Musicians need the ability to locate unlicensed uses of their music on any platform that could be hosting them, and that functionality must be built into each hosting platform like YouTube, Vimeo, or Facebook. A takedown is useless if one cannot find their works on a platform to begin with, or if one has to spend hundreds or even thousands of dollars a month on a third-party detection service that can monitor these platforms independently.

23 June 2020

One of the most frustrating aspects of this specific part of the conversation about solutions is that it tends to be reductive – it presumes the major record labels and publishers are the “bad guys” and the tech platforms are the “digital saviors” who want to defend the internet against them. It is important to clarify in this conversation that the economies of an independent artist and a major label are not just wildly different, but their incentives to look the other way where piracy is concerned are also quite different – and financially incentivized.

A major label or publisher is an aggregate of every artist and writer they represent, and they have the negotiating power apropos of such a behemoth. They make tens of millions of dollars a month by monetizing small unlicensed uses of their music in YouTube videos because a) they control the music of the world’s most popular and most-used music so they have volume of usage and market share and b) they do not have the manpower to police every single one of the millions of videos that exist that contain their music. So, for them, monetization (the issuing of a microlicense in exchange for YouTube’s ability to place ads on the video) is a huge moneymaker.

This equation is exactly the opposite for an independent artist. That one license for the small mom-and-pop company might get them \$500. That car company that used their music in a web commercial without licensing it? They would have paid a \$15,000 master and synchronization license for that music.

These sums are huge amounts of money to an independent composer. They are to us what the million dollars is to the major label and major publisher. In 1998, independent artists were localized and had no means of distribution or of connecting to anyone outside of their immediate geographic region. When iTunes launched, those same independent artists instantly had a worldwide stage – but their access to the technologies and privileges that the majors had was non-existent.

I believe that if the system does not work for the smallest among us – the ones least likely to be able to access their remedy when their rights are infringed – then the system does not work at all. What I believe this boils down to is this: Are tech companies willing to actually *cooperate*, as the 1998 DMCA stated intention, to help independent artists protect their copyrights on those platforms by allowing them access to the platform’s own proprietary detection technology?

And, when a user tries to get around the notice and takedown system by falsely filing counter-notifications claiming fair use of a piece of music, will the tech platform give the benefit of the doubt to the artist whose music was stolen when they say: “This is not a fair use”?

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

The notice and takedown system as it exists is functional for me, with one major exception: the get-out-of-jail-free card that uploaders often play – by pushing the “this is fair use” button when they falsely counter-notify against legitimate takedowns, knowing full well that I will not be able to litigate against them, which is my only possible response to a false counter-notification. That said, the system is only functional for me on YouTube where I have direct access to Content ID which reveals to me the use of my music.

23 June 2020

On platforms like Vimeo, Facebook or Twitter, where I do not have a way to detect and discover uses of my music, I cannot find my music on those platforms so I cannot issue takedowns on the unlicensed use of it. **Notice and takedown is secondary to detection: without detection there can be no notice and takedown. An entire class of musicians and creative artists – independents – do not have access to the first part of that equation, which is detection. This must change.**

If tech platforms are being granted safe harbor then they should have the obligation and the duty to provide detection technology to musicians who want to locate their works on that platform. I will take this one step further and advocate for a system where, if someone wants to make a fair-use claim on their use of my work, the platform itself must remain agnostic and tell the user: “We are leaving the material offline and you or your legal representative must take up this case with the music owner.”

Let that uploader put some skin into this game. As it stands now, any random anonymous individual can upload videos to YouTube containing unlicensed music, elect to monetize the videos with advertising, then make money on views of the video. But there are no consequences for using material that they do not own. I, as the music owner, am pulled into that fight without wanting to be there, and if I want to assert any protection over my copyright with a takedown, I alone must bear the cost of an attorney to defend my work and challenge a false fair-use claim.

I alone must bear the sleepless nights and the feelings of anger and helplessness that are part-and-parcel of being a victim of that system, when I never sought to have my content on the platform or incorporated in the video to begin with. An uploader has zero risk and enjoys all of the financial rewards. I am simply a victim of the process, through no willingness of my own. And, I cannot afford to use the remedy provided by the law and take this uploader to court.

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

When asked: “What is one thing that would make an immediate difference to you if one thing could change tomorrow?” – my answer is what you have just asked about above. I am strongly in favor of what is commonly called “takedown and stay down.” I believe that when I take something down it should stay down until the user actually licenses my music or presents proof that they actually do have a license that I somehow overlooked. And, if that user wants to make a fair use defense for his use of my music, then he certainly can.

If I or my attorney disagree with his fair use argument then he can certainly take advantage of his legal remedies: he can take me to federal court and make his fair use claim there. Please understand that in these situations, I am not dealing with someone who is operating under any pretense of good faith. This is someone who has already stolen my work and now wants a strike removed from their YouTube channel because it is interfering with their ability to make money via advertising on their other videos – which may or may not also contain other unlicensed music.

23 June 2020

The alternative you suggest in your question makes sense as far as it goes. Certainly, someone who has posted content on one platform and had that content removed as a result of an infringement claim should not be able to repost that same content there or on any other platform controlled by the same company. But, unfortunately, that is a very limited remedy. It is, in the current environment, too easy for the same user to evade such limitations. And, of course, even when one user is prevented from re-uploading the same content, there can be many others uploading the same content to that platform. If I have notified a platform that my copyrighted work is not authorized for upload, then, as a default, it should stay down regardless of who is trying to upload it.

Takedown and staydown would force an uploader to come to the negotiating table in a non-anonymous way to make good for their theft of my work by entering into a license agreement or refraining from using my work.

As this system exists now, specifically with YouTube, an uploader can (and often does) admit in the body of their counter-notification that their use is unlicensed, but they are using the counter-notification system and wrongly asserting “fair use” expressly to get the copyright strike removed from their account. Even with that kind of admission in writing, if I submit it to YouTube with my appeal to leave the material offline – showing YouTube the uploader’s admission of unlicensed use *in YouTube’s own counter-notification form* which they have emailed to me directly – YouTube will continue to process the false counter-notification. YouTube’s standard response is: “In accordance with the DMCA, you must show us evidence that a lawsuit has been filed...” I have then lost that battle, regardless of the uploader’s own admission. Uploaders outside of the United States feel further emboldened to use the false counter-notification because they feel insulated by their geography.

I also believe that one legitimate takedown should equal “red flag knowledge” because that is not just a red flag, that is actual knowledge of an infringement. How many thefts of one’s music is too many? Perhaps to a major label, it might be one million unlicensed uses. But for an independent artist like me, for whom every license fee is a vital source of income, one or two is too many. That is money I have lost, while someone else has gained by having my music underscore their video.