

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

In the Matter of:

Section 512 Study: Notice and
Request for Public Comment

Docket No. 2015-7

COMMENTS OF WARNER MUSIC GROUP

Warner Music Group (“WMG”) respectfully provides these Comments in response to the Copyright Office’s Notice of Inquiry (“NOI”) concerning the impact and effectiveness of the online service provider safe harbors provided by Section 512 of the Copyright Act.¹

WMG is one of the world’s largest music content companies. While headquartered in New York, it is a global company, generating over half of its revenues in more than 50 countries outside the U.S. WMG is composed of two businesses, recorded music and music publishing, each of which is highly dependent on effective copyright protection to enable it to support the creation and dissemination of creative works. In WMG’s fiscal year ended September 30, 2015, it generated revenues of \$2.966 billion.

WMG’s recorded music business is home to some of the best-known record labels in the music industry, including Atlantic, Elektra, Parlophone, Rhino and Warner Bros. WMG’s recorded music business has one of the world’s largest and most diverse recorded music catalogs, with a global roster of acclaimed artists including Coldplay, Ed Sheeran, Enya, Aretha Franklin, Led Zeppelin and Van Halen. It derives revenues primarily through the marketing, sale

¹ *Section 512 Study: Notice and Request for Public Comment*, 80 Fed. Reg. 81,862 (Dec. 31, 2015).

and licensing of recorded music in both physical formats such as CDs, LPs and DVDs and digital formats such as streaming, downloads and ringtones.

WMG's music publishing business, Warner/Chappell Music, owns and acquires rights to musical compositions, markets and licenses these compositions, and receives royalties or fees for their use. Warner/Chappell publishes music across a broad range of musical styles. It holds copyright rights in over a million compositions by tens of thousands of songwriters, including Beyoncé, Eric Clapton, Jay Z, Katy Perry, Madonna and Stephen Sondheim.

More information about WMG can be found at www.wmg.com.

I. WMG joins in the Music Community Comments.

WMG fully supports the Music Community Comments being filed in response to the Copyright Office's NOI. As stated in those comments, the new opportunities for consumer choice in access to music that the Internet enables make this an exciting time to be in the music business. Indeed, WMG has been a leader in making those opportunities a reality. For example, in 2002, WMG was the first recorded music company to reach a deal with Apple for the distribution of downloads in the iTunes store.² In 2006, WMG was the first major music company to enter into license arrangements with YouTube.³ In 2008, Atlantic Records, a part of WMG, was the first major record label to derive more than half of its music sales from digital products.⁴ In 2013, WMG was the first major music company to reach deals with Apple for

² Nathan Ingraham, *iTunes Store at 10: How Apple Built a Digital Media Juggernaut*, *The Verge* (Apr. 26, 2013), available at <http://www.theverge.com/2013/4/26/4265172/itunes-store-at-10-how-apple-built-a-digital-media-juggernaut>.

³ Jeff Leeds, *Warner Music Makes Licensing Deal with YouTube*, *N.Y. Times* (Sept. 19, 2006), available at <http://www.nytimes.com/2006/09/19/business/media/19tube.html>.

⁴ Tim Arango, *Digital Sales Surpass CDs at Atlantic*, *N.Y. Times* (Nov. 25, 2008), available at http://www.nytimes.com/2008/11/26/business/media/26music.html?_r=0.

streaming of both recorded music and musical compositions on iTunes Radio.⁵ And in 2014, WMG was the first major music company to license its music to SoundCloud.⁶

However, as the Music Community Comments also highlight, the safe harbors provided by Section 512 of the Copyright Act undermine the opportunities presented by the Internet by enabling services that are significantly music-oriented, and that overwhelmingly rely on popular, copyrighted music owned by record companies and music publishers like WMG, to acquire their music content without licensing or authorization. This unintended consequence distorts the marketplace for authorized digital exploitation of music and creates a “value gap” between the income generated by the services from the use of music and the revenues that are being returned to record companies, music publishers, recording artists and songwriters. Section 512’s notice and takedown regime has proven inadequate, and as a result, the balance that Congress sought to achieve in Section 512 clearly has not been achieved. Section 512 should be reformed to remedy this situation, as further described in the Music Community Comments.

II. WMG’s experience demonstrates that it is impossible for a copyright owner to withdraw its works from a major service relying on the safe harbors.

WMG provides these separate comments briefly to highlight some of its own experience relevant to the Section 512 regime, which demonstrates concretely that Section 512 is not working as intended, is ineffective, and is having a significant adverse effect on the value of music in the marketplace. In particular, WMG believes that its experience in trying to withdraw its catalog from YouTube during 2008-2009 provides a tangible illustration of how Section 512

⁵ Paul Sloan, Apple reaches iRadio deal with Warner Music, suggesting WWDC launch, CNET (June 2, 2013), *available at* <http://www.cnet.com/news/apple-reaches-iradio-deal-with-warner-music-suggesting-wwdc-launch/>.

⁶ Ben Sisario, SoundCloud Signs Licensing Deal With Warner Music, N.Y. Times (Nov. 4, 2014), *available at* http://www.nytimes.com/2014/11/05/business/media/soundcloud-signs-licensing-deal-with-warner-music.html?_r=0.

permits a service with sufficient traffic to rely upon user uploads as a comprehensive source for acquiring copyrighted content, and how copyright owners are effectively powerless to prevent that. The passage of time since 2008-2009 has only made this situation worse.

As noted above, WMG was the first major music company to enter into license arrangements with YouTube, in September 2006. WMG entered into this deal when YouTube was a small, independent company. WMG's groundbreaking deal helped facilitate YouTube's entry into license arrangements with other major copyright owners, and its sale to Google for \$1.65 billion, a few weeks later.⁷

In 2008, when WMG's license arrangements with YouTube expired, WMG and Google reached an impasse in their negotiations. WMG "simply [could] not accept terms that fail[ed] to appropriately and fairly compensate recording artists, songwriters, labels and publishers for the value they provide."⁸ As any copyright owner might do when a license to its works expires, WMG then sought to remove videos embodying its recordings from YouTube using the full range of tools at its disposal.⁹

Most importantly, YouTube provides a tool called "Content ID" that assists copyright owners in identifying and managing use of their works on YouTube.¹⁰ As YouTube explains:

Videos uploaded to YouTube are scanned against a database of files that have been submitted to us by content owners. Copyright

⁷ See Andrew Ross Sorkin & Jeremy W. Peters, Google to Acquire YouTube for \$1.65 Billion, N.Y. Times (Oct. 9, 2006), available at <http://www.nytimes.com/2006/10/09/business/09cnd-deal.html> (describing other content deals and Google acquisition); Staci D. Kramer, Someone Forgot to Tell Warner YouTube Has the Upper Hand, paidContent.org (Dec. 22, 2008) ("YouTube's music deals helped its founders achieve that \$1.65 billion price from Google"), available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/20/AR2008122001037.html>.

⁸ Brian Stelter, Warner Music Removes Its Videos from YouTube as Licensing Talks Stall, N.Y. Times (Dec. 21, 2008), available at http://www.nytimes.com/2008/12/22/business/media/22warner.html?_r=0.

⁹ *Id.*

¹⁰ How Content ID works, available at <https://support.google.com/youtube/answer/2797370?hl=en>.

owners get to decide what happens when content in a video on YouTube matches a work they own.¹¹

The options that Content ID provides include the ability to monetize a video incorporating a copyright owner's work by running ads against it (*e.g.*, where a license is in place) and to block a video from being streamed when use of the copyright owner's work is not authorized.¹² During the pendency of WMG's license arrangements with YouTube, YouTube had compiled a database of "fingerprints" of WMG recordings. When the license agreements expired, WMG sought to use Content ID to block all of its recordings on YouTube.

However, Content ID does not do a sufficient job in identifying videos incorporating recordings that are in the Content ID system, and even back in the 2009 timeframe, video creators knew how to defeat detection by Content ID.¹³ In addition, Content ID would not identify live versions of performances by WMG artists, even if WMG had exclusive rights to recordings of those performances under its recording contracts with the artists. Accordingly, WMG also deployed substantial and costly human resources to manually identify and request takedown of recordings that slipped by Content ID, as a copyright owner would need to do in a pure Section 512 context without Content ID.

These efforts proved woefully insufficient in removing all WMG recordings from YouTube. First, WMG's efforts were thwarted by user requests to put back blocked videos. As contemplated by Section 512(g), YouTube provides users the ability to request reinstatement of videos that are blocked through Content ID or a manual process. In fact, YouTube provides a

¹¹ *Id.*

¹² *Id.*

¹³ *E.g.*, Scott Smitelli, Fun with YouTube's Audio Content ID System (Apr. 19, 2009), *available at* <http://www.scottsmiteli.com/articles/youtube-audio-content-id>; Liz Gannes, Fooling YouTube Audio Fingerprints, Gigaom (Apr. 24, 2009), *available at* <https://gigaom.com/2009/04/24/fooling-youtube-audio-fingerprints-speed-works-volume-doesnt-and-all-that-matters-is-the-first-30-seconds/>.

simple online process for disputing Content ID claims, making it almost trivial for a user to request reinstatement.¹⁴ Regardless of the legal merits, a user need only click an offered option stating that a blocked video makes a fair use, and provide a perfunctory, canned recitation that fair use is involved, to have the video immediately reinstated.¹⁵ In 2008-2009, WMG's blocking efforts provoked tens of thousands of user disputes per month. When disputed videos were manually examined by WMG, the disputed and reinstated videos overwhelmingly presented no arguably legitimate defense to WMG's claims. However, this reinstatement phenomenon alone was sufficient to ensure that all popular WMG recordings remained available on YouTube at essentially all times, because having even one copy of a recording available on YouTube means that the recording is available to all users.

WMG's blocking efforts also were no match for the unceasing torrent of new videos using WMG recordings that were flooding into YouTube. In 2009, "20 hours of video [were] uploaded to YouTube every minute."¹⁶ A significant portion of those new videos used WMG recordings, and WMG's efforts to block use of its recordings using Content ID and manual searching simply could not keep up with this constant influx.

In the end, WMG estimates the total cost of its blocking efforts at approximately \$2 million over approximately a nine-month period in 2008-2009. WMG views these efforts as having been largely unsuccessful. While they limited the availability of WMG recordings on

¹⁴ Dispute a Content ID claim, *available at* <https://support.google.com/youtube/answer/2797454>. A different process applies in cases in which formal Section 512 processes are invoked. Counter Notification Basics, *available at* <https://support.google.com/youtube/answer/2807684>.

¹⁵ *E.g.*, Eladateer, (How to) Dispute Copyright Claims (Mar. 15, 2009), *available at* https://www.youtube.com/watch?v=Uvcc16r_L2E; John Gage, Dispute Copyright Claims On Youtube (Apr. 8, 2014), *available at* <https://www.youtube.com/watch?v=JboWZ6NiEDI>; Mahmoud Selim, How to bypass WMG Copyright (Jun. 26, 2009), *available at* <https://www.youtube.com/watch?v=ovdzU0BiqZ4>.

¹⁶ Zoinks! 20 Hours of Video Uploaded Every Minute! (May 20, 2009), *available at* https://youtube.googleblog.com/2009/05/zoinks-20-hours-of-video-uploaded-every_20.html.

YouTube, even with Content ID and an investment of resources by WMG that probably could not be sustained in the long term by any copyright owner, or be justified under any other circumstances, most popular WMG recordings were available, albeit in diminished numbers of instances, at essentially all relevant times during WMG's blocking effort. In addition, WMG's blocking effort ultimately did not put WMG at any discernible advantage in its negotiations with YouTube: although the company put on a brave face at the time, the terms of the arrangement reached by WMG with YouTube in September 2009 were only slightly better than the terms that WMG declined in December 2008.

While WMG's blocking effort was not strictly a Section 512-based process, and a number of years have passed since this episode, this experience illustrates that an effort to do the same today, particularly if limited to the statutory Section 512 process, would be even less successful at blocking a major catalog of content. YouTube's content management tools were essential to the minimally effective blocking that WMG achieved in 2008-2009. If a copyright owner had to rely only on manual searching capabilities and the statutory takedown process, WMG would have been even less effective in removing infringing content from YouTube. However, while YouTube's content management tools were essential, and have improved to a certain extent today, they still are not sufficient. That is why there is a market for third-party tools, such as ZEFR, to identify and manage content on YouTube.¹⁷

Moreover, since 2009, the rate of uploads to YouTube has increased at least twenty-fold, to more than 400 hours of video per minute.¹⁸ One would expect the manual effort required to

¹⁷ See generally Eric Blattberg, Zefr Gets \$30M to Unlock the Power of YouTube for Brands, Venture Beat (Feb. 26, 2014); <http://zefr.com/technology/>; https://www.youtube.com/playlist?list=PLlIK8KwAe38slydrEenbyVjOqJdx_1E-5.

¹⁸ Geoff Weiss, YouTube CEO Unveils Redesigned App, Additional Creator Spaces, Entrepreneur (July 24, 2015), available at <http://www.entrepreneur.com/article/248789>.

address disputes and live versions to have increased proportionately regardless of any improvements in the effectiveness of Content ID. In addition, in December 2010, YouTube lifted the 15 minute length limit that had previously been imposed on all uploaded videos.¹⁹ This change meant that users could upload videos containing an entire album as the audio track, and increased the supply of videos using WMG recordings. Accordingly, the best WMG could ever hope to do in controlling use of its recordings and musical compositions on YouTube would be to keep a relatively small set of titles somewhat unavailable for a limited time.

This result has been borne out by WMG's subsequent efforts at content removal from YouTube. For example, for three weeks in 2010, WMG devoted multiple full-time equivalent staff members to pulling from YouTube unlicensed versions of B.o.B.'s "Nothin' On You." Even with these efforts, WMG was not able meaningfully to control the unauthorized activity. In late 2015, a more limited effort involving the Coldplay recording "A Head Full of Dreams" resulted in the initial removal of a significant number of videos, but did not completely prevent users from accessing the track on YouTube. Based on its experience, WMG estimates that, currently, it would take at least 20-30 people, at a fully-loaded cost in excess of \$2 million per year, and probably the use of an outside content monitoring contractor at additional expense, to meaningfully affect (but not entirely block) just WMG's top 25 album releases on YouTube.

III. WMG's experience with YouTube is relevant to various of the NOI's specific inquiries.

Because the Office asked commenters to relate their responses specifically to the NOI's various inquiries, WMG briefly comments on the significance of the foregoing as it relates to several of the inquiries.

¹⁹ Claire Cain Miller, YouTube Lifts Time Limit for Some Videos, N.Y. Times Bits Blog (Dec. 9, 2010), available at http://bits.blogs.nytimes.com/2010/12/09/youtube-lifts-time-limit-for-some-videos/?_r=0.

1. Are the section 512 safe harbors working as Congress intended?

Plainly they are not. Whatever one thinks Congress might have envisioned when it enacted Section 512, it could not have expected that Section 512 would provide a sufficient vehicle for content acquisition by what has been described as “the world’s largest streaming music service.”²⁰ It also could not have envisioned that it would, for all practical purposes, be impossible, even with a substantial investment of resources, for a music copyright owner to entirely remove its music from a service that is significantly music-oriented, and that meaningfully relies on popular, copyrighted music.

4. How have section 512’s limitations on liability for online service providers impacted the protection and value of copyrighted works, including licensing markets for such works?

Section 512 has significantly eroded the protection of copyrighted works, as illustrated by the discussion above. In addition, Section 512 has created a perverse situation where copyrighted music has value realizable by creators only when a copyright owner is prepared to make the kinds of investment WMG made as described above – and continues to make on a limited basis – to attempt to deprive services of the ability to rely on Section 512 as an avenue for free content acquisition.

Section 512 also has significantly eroded the value of copyrighted works in the marketplace. Because Section 512 makes it possible for even a music-oriented service that has demonstrated its ability to acquire music content through license negotiations to instead acquire that content for free without a license, as described above, Section 512 has an economic

²⁰ Ben Popper, YouTube Music Is Here, and It’s a Game Changer, *The Verge* (Nov. 12, 2015) (noting that YouTube is “used by more people than well-known names like Spotify or Apple when it comes to consuming songs and albums”), *available at* <http://www.theverge.com/2015/11/12/9723496/youtube-music-app-offline-background>; *see also* Lucy Blair, STOP Making Viral Videos. START Making a YouTube Content Strategy..., *Digital Music News* (Mar. 26, 2014) (“It’s an inescapable fact that YouTube is now the world’s largest music streaming site”), *available at* <https://www.digitalmusicnews.com/2014/03/26/stopstart/>.

dampening effect on many (if not all) of WMG's digital license negotiations. In some cases, that is because WMG's counterparties that do not rely on Section 512 are constrained in the price they can pay because of the need to compete with services that rely on Section 512, or have a sense of "market" rates that include deals with services that have the option of relying on Section 512. In other cases, WMG finds itself in an unfair negotiating situation, because services that rely on Section 512 clearly expect that royalty rates must be discounted because of the possibility of that service's relying on Section 512 for its content acquisition as an alternative to a license. In both of these ways, Section 512 distorts the marketplace for digital music streaming services, and creates a "value gap" between the income generated by the services from the use of music and the revenues that are being returned to record companies, music publishers, recording artists and songwriters. This is by no means an immaterial or theoretical concern. The amounts that WMG receives per play from services that avail themselves of Section 512 are far less than the amounts WMG receives from comparable services that do not rely on Section 512.

6. How effective is section 512's notice-and-takedown process for addressing online infringement?

Not very. As described above, even aided by Content ID and making a very large investment of resources, WMG could not effectively remove its recordings from a single service using procedures analogous to those contemplated by Section 512. It would have been even more difficult, and less effective, if WMG had tried to remove videos incorporating Warner/Chappell musical compositions embodied in sound recordings owned by record companies other than WMG. A copyright owner relying on Section 512 could not expect to make nearly as much progress at ridding YouTube of infringement as WMG did in 2008-2009, let alone tackling the rest of the Internet.

17. How efficient or burdensome is the counter-notification process for users and service providers? Is it a workable solution over the long run?

WMG's experience described above raises serious doubts about operation of a counter-notification process at a large scale. While the user disputes WMG encountered in 2008-2009 were not, strictly speaking, Section 512 counter-notifications, WMG received tens of thousands of analogous disputes per month that were overwhelmingly without merit. That compares to some 4,200 copyright cases per year in the U.S. district courts.²¹ Plainly it cannot be the answer to have U.S. federal judges adjudicate every individual copyright claim on the Internet, and users have demonstrated that when it is easy to have their infringing files restored, they will do so with little hesitation.

IV. Conclusion.

WMG appreciates this opportunity to participate in the Office's study of Section 512. For the reasons set forth above and in the Music Community Comments being filed in this proceeding, WMG urges the Office to advise Congress to reform Section 512.

²¹ Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics, Table C-4 (Mar. 31, 2015), available at <http://www.uscourts.gov/file/18501/download>.

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