Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:	)	Docket No. 2015–7
Section 512 Study: Notice and Request for Public Comment	)	Submitted April 1, 2016

COMMENTS OF THE NATIONAL ACADEMY OF RECORDING ARTS & SCIENCES

Introduction

The National Academy of Recording Arts & Sciences ("The Recording Academy") appreciates the opportunity to submit these comments to the U.S. Copyright Office regarding Section 512 and the notice and takedown process created under the Digital Millennium Copyright Act (DMCA). Internationally known for the GRAMMY Awards, The Recording Academy is a trade association for music creators whose voting membership and board leadership consists of individual music professionals with creative and technical credits [e.g. songwriting, performing, producing] on commercially released recordings. There are no company or institutional members. The Academy is the only organization that advocates for all individual music creators: songwriters, performers and studio professionals.

The Internet offers new ways for creators to reach their audience and for consumers to listen to the music they want to hear. But creators have received very little financial benefit from the growing digital marketplace. The proliferation of unauthorized music continues unabated and while Internet services earn billions through the advertising that runs alongside unauthorized works, creators receive nothing. The notice and takedown process of the DMCA was supposed to provide a mechanism by which creators and Internet platforms would work cooperatively in good faith to remove infringing works online. Instead, creators are frustrated by the lack of control they have over their own work and the value of their music is compromised.

The perspective of Academy members is perhaps best embodied by Maria Schneider. On March 13, 2014, Schneider, a three-time GRAMMY-winning jazz composer and conductor, and a governor of The Recording Academy's New York Chapter, testified before the House Judiciary

Committee on this same topic on behalf of the Academy and its members. She framed the creator's dilemma by explaining that the notice and takedown process has created "an upside-down world in which people can illegally upload my music in a matter of seconds, but I, on the other hand, must spend countless hours trying to take it down, mostly unsuccessfully. It's a world where the burden is not on those breaking the law, but on those trying to enforce their rights."[1]

In its Notice of Inquiry, the Copyright Office invites input on 30 distinct subjects of inquiry to evaluate the effectiveness of the DMCA notice and takedown process. The Academy will not attempt to answer every question presented in the notice in these comments but has joined with other members of the music community in a separate filing to respond to the issues comprehensively. Instead, these comments will focus on those issues that relate directly to the experiences of Academy members – individual artists and creators like Maria Schneider who struggle with protecting their music online. The Academy surveyed its membership to collect real stories from creators and will use a selection of those anecdotes to respond to some of the questions presented.

General Effectiveness of Safe Harbors

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

From the perspective of the creator who sees his or her work disseminate online without permission and without any effective recourse to combat it, the current notice and takedown system is clearly not working. Instead of a cooperative relationship between online providers and copyright owners as Congress intended, there is an antagonistic dynamic where creators struggle and fight to protect their work. Eliza Neals, a Detroit-based Blues-Rock songwriter and performer expresses her frustration: "I always find my music available online in various websites for download that I have never approved. I have solicited Google to remove the websites and after filing numerous DMCA notices the music remains." Neals concludes that after spending a significant amount of time trying to manage the notice and takedown process on her own, she has ultimately "given in to the trend of theft."

(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?

In the current system, works are not protected. Providers do the bare minimum to secure safe harbor protection and leave creators with no effective remedy. Creators find that they spend time policing their work online stead of creating and performing their work. Gebre Waddell, a mastering engineer in Memphis who has authored a book and popular audio software, puts it succinctly: "DMCA complaints provide no effective protection from torrent site piracy, where

[1] *Section 512 of Title 17: Hearing Before the Subcomm. On Courts, Intellectual Property and the Internet of the H. Comm. On the Judiciary,* 113th Cong. 57 (2014) [hereinafter *512 Hearing*] (statement of Maria Schneider).

my content is readily available today. Without this piracy, I would estimate my income would more than double."

(5) Do the section 512 safe harbors strike the correct balance between copyright owners and online service providers?

The safe harbors as currently construed are heavily tilted in favor of online service providers. Music creators face an environment where they cannot protect their work online. Lisa Hilton, a Jazz pianist and composer in Los Angeles surveys the current situation and concludes that "[i]t is actually scary for a rights holder to release new music." She explains that the system takes her away from the work of actually creating or performing music, as she now has to "allot a certain amount of time every month to piracy issues." Hilton also illustrates why artists have completely lost confidence in the current system: "The majority of sites that offer free digital downloads of my music have no contact link on their site, so there is no way to request they take my copyrighted music off their site. If they have a contact link on their website that offers free digital downloads, that contact link normally is a non-working link."

The system is clearly broken when the average rights holder is unable to navigate the DMCA process in a way that allows them to successfully protect their work online. The net result for Hilton is that whenever she releases new music, the same music "appears free about the same time the album is released - sometimes earlier, or within [two] weeks after. It is merciless." Maria Schneider addressed the current imbalance in her congressional testimony:

> But to upload my music on most sites, one simply has to click a box saying they acknowledge the rules. On the other end of the transaction, I, the harmed party, must jump through a series of hoops, preparing a notice for each site, certifying documents under penalty of perjury, and spending hours learning the sites' unique rules for serving the notice. Owners should have a more streamlined and consistent process to take content down.[2]

Notice-and-Takedown Process

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

The process is generally ineffective. Creators find that their works are immediately available again after they are taken down and the net impact on online infringement is negligible. Matthew Myers, a composer for video games and other new media based in Austin, Texas, details how the process completely failed him after he discovered over 100,000 infringing files of his music on file sharing sties: "Often when I filed notices I got responses claiming that the

[2] *512 Hearing, supra* note 1, at 58.

site did not host the content and was merely an 'index' like Google and was therefore blameless, and there was little I could do to fight back."

Rhonda Vincent, a GRAMMY nominated Bluegrass singer, songwriter, and musician from Missouri, summarizes: "We work very hard to create a project, spending thousands of dollars; only to have someone post it for free the minute they get a copy of a song or video." To add insult to injury, the current notice and takedown process has also created an atmosphere of hostility towards creators. Vincent explains that after issuing a takedown request on YouTube, she "received extremely negative comments….[t]he last one had many taunting comments, bragging how it would take years to get it removed; followed by a threat never to listen to our music, if we didn't offer it for free." She concludes by stating that "[t]here needs to be a big change to stop all the [unauthorized] free streaming sites; and allow owners the choice on whether to offer content, and when it is offered; have a way to earn revenue." Overwhelmingly, the experience of the artist is one of helplessness and exasperation.

(7) How efficient or burdensome is section 512's notice-and-takedown process for addressing online infringement? Is it a workable solution over the long run?

(8) In what ways does the process work differently for individuals, small-scale entities, and/or large scale entities that are sending and/or receiving takedown notices?

(9) Please address the role of both "human" and automated notice-and-takedown processes under section 512, including their respective feasibility, benefits, and limitations.

The notice and takedown process is inefficient and places a tremendous burden on both small creators and those with greater resources. It is not workable or sustainable over the long run for stopping infringement.

Small-scale, independent or individual creators have to navigate the notice and takedown process entirely on their own, draining their own time and resources to no avail. Ben Allison, a Jazz bassist and composer and member of The Academy's New York Chapter Board of Governors, illustrates the unique challenge for independent artists, describing how the process "is not only hopeless, but often dangerous." He continues:

> Like many artists and record labels, I created a Google Alert which notifies me whenever phrases like "Ben Allison Free mp3" or any one of my tune titles or album titles and the words "free" or "download" hit the internet.
>
> I receive several such notices every day and have for the past 10 years or so, which speaks to the sheer volume of illegal uploads. Occasionally, I take time out of my work day to click the links to see what's been posted and where. Too often, I'm redirected to "click-through" sites, which are only intended to keep the user clicking. Windows pop up and disappear, and I'm often redirected

> automatically several times before actually landing on a page. I'm guessing there's some kind of revenue being generated for someone by all of these clicks and auto-forwards.
>
> Eventually, if I click through enough times I might end up on a site where there are actual download links. However, the danger comes when I check the links to see what files actually download (which I feel I must do before requesting a "take down"). Sometimes they include the actual mp3 of my music, but many times they include malware, viruses or other dangerous files.
>
> The whole system is rigged to make it dangerous for small businesses like mine to protect their property. The only way this will ever change is if the idea of "safe harbor" is updated and that the onus moves to the companies who host pirated music to get permission from rights owners prior to posting files.
>
> ISPs have a role to play as well in helping to curb this problem and should not be given a free pass. For instance, entering the phrase "Ben Allison Free mp3" into Google generates 415,000 results. I believe they could do a better job of working with the music community to make it harder for people to find illegally uploaded music.

As Allison explains, the independent artist is forced to go through great effort to police his or her own work online. But when Allison takes the time to investigate potentially infringing files – doing his due diligence in good faith to confirm that the files in question are unauthorized – he exposes himself to malware and other harmful files. He succinctly expresses the frustration of many creators that the notice and takedown system feels "rigged" against the creator and that Internet providers should shoulder more of the responsibility to block and remove infringing content.

For creators with the resources to do more, the scale of infringement is still far beyond what they are capable of responding to. Harvey Mason, Jr., a national trustee of The Recording Academy, is a seven-time GRAMMY award winning songwriter and producer who has collaborated with artists such as Whitney Houston, Jennifer Houston, and Justin Timberlake. He recently supervised the music production of *Straight Outta Compton*, *Pitch Perfect 2*, and *The Wiz Live!* Although he has earned the ability to use additional resources to protect his work online, those resources have not yielded results any different than the experience of independent artists.

Mason's legal representation at the law firm of Davis Shapiro Lewit Grabel Leven Granderson & Blake, LLP note that they "have prepared numerous DMCA takedown notices in connection with copyright infringement." However, they continue that the process of preparing the notices " is very problematic for our clients largely due to the man hours spent drafting these notices, the unsurmountable task of locating each URL that contains the infringed content

and the laborious task of ensuring that each notice meets not only the legislative requirements but also the respective URL requirements." Whether you are small independent artist or a successful creator at the top of your career, the notice and takedown process is an exercise in futility.

(10) Does the notice-and-takedown process sufficiently address the reappearance of infringing material previously removed by a service provider in response to a notice? If not, what should be done to address this concern?

The overwhelming experience of artists is that infringing works reappear online immediately upon being removed. Harvey Mason, Jr.'s legal team explains that "[i]t would not be an exaggeration to state that by the time one notice goes out, five other URLs have surfaced with similarly infringing content." Maria Schneider referred to this phenomenon in her congressional testimony as "an endless whac-a-mole game."[3] It's a comparison that has been repeated by many others. Internet providers should prevent the reappearance of infringing material once the initial notice has been given. "Takedown" should mean "staydown."

(11) Are there technologies or processes that would improve the efficiency and/or effectiveness of the notice-and-takedown process?

Google's Content ID system for YouTube shows that it's possible to protect against online infringement and block unauthorized works. But this protection is only available on one platform, YouTube, and only if you meet Google's criteria. Indie cellist Zoe Keating's frustrating struggle to use Content ID was documented in *Billboard* and numerous other media outlets.[4] Protection measures such as Content ID should be available to all creators across multiple Internet platforms. Every artist should be entitled to use this technology, and other emerging technologies like it, with no strings attached.

In addition, creators of content should be able to prevent unauthorized uploading before infringement occurs. Similar to the successful "do not call" list, creators of content should be able to preemptively tell an Internet platform or provider that they do not want their content uploaded online at all. A "Do Not Upload" process would provide individual creators with meaningful control over the use of their work. If filtering technology can be used to monetize content, it can also be used to protect it.

Legal Standards

[3] *512 Hearing*, *supra* note 1, at 57.

[4] *See* Glenn Peoples, *Cellist Zoe Keating Opens Up on Her YouTube Battle: 'There's a Lot of Fear Out There'*, Billboard, Jan. 28, 2015, http://www.billboard.com/articles/business/6451152/qa-zoe-keating-youtube-battle-theres-a-lot-of-fear; *See also* Ben Sisario, *Music Artists Take On the Business, Calling for Change*, N.Y. Times, July 31, 2015, http://www.nytimes.com/2015/08/01/business/media/music-artists-take-on-the-business-calling-for-change.html?_r=0 ("Ms. Keating…has also reported on private negotiations with YouTube in which that company appeared to pressure her into signing a contract for its new music-subscription service.").

(21) Describe any other judicial interpretations of section 512 that impact its effectiveness, and why.

The recent ruling in *Lenz v. Universal Music Corp.* is a particular cause of concern for the Academy's independent creator community. The ruling places a burden on all rights holders — not just large entertainment corporations — by requiring them to make a good faith determination of whether offending posts fit the parameters of fair use before issuing a takedown notice, or else face a court action themselves. This has profound negative implications for smaller, independent rights holders. The burden of the notice and takedown process will only increase on the creator that is simply trying to enforce his or her rights. An artist should not feel like a criminal under attack for attempting to protect his or her own work.

Large music publishers, record companies and movie studios employ legal teams to scour the Internet for infringing content. Yet, individual music creators and independent artists, without comparable finances or staffing, suffer the most from online infringement given the loss of both revenue and valuable time in which to create. These rights holders simply do not have the capacity to abuse the system with frivolous takedown notices.

Now independent creators not only bear the burden of policing the Internet to stop infringement, but the *Lenz* decision forces them to become psychics able to assess the intent of the infringer, and legal experts able to parse the broadest interpretation of fair use. The threat of facing actionable judgment for misrepresenting an unauthorized post as infringement is chilling — many creators may be afraid to pursue a notice and takedown for fear of being sued. The last thing that rights holders need is another subjective hurdle in the already cumbersome notice and takedown process.

Conclusion

On March 20, 2013, Register of Copyrights Maria Pallante testified before the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet at the very beginning of the House Judiciary Committee's comprehensive review of copyright reform. In her testimony, Register Maria Pallante stated: "Congress has a duty to keep authors in its mind's eye, including songwriters, book authors, filmmakers, photographers, and visual artists. A law that does not provide for authors would be illogical — hardly a copyright law at all."[5] This same principle should drive the Copyright Office's review of Section 512. If the current notice and takedown system does not work for creators who are trying to protect their work online, then it does not work. Maria Schneider closed here testimony before the committee with this lament:

[5] *The Register's Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. On Courts, Intellectual Property and the Internet of the H. Comm. On the Judiciary,* 113th Cong. 12 (2013) (prepared statement of Maria A. Pallante, Register of Copyrights, United States Copyright Office).

> Our founders had the foresight to give us the exclusive rights to our works in order to "promote the progress of science and useful arts." Authors were given the right to copy and distribute their own work in order to incentivize creation. But I must tell you that the current environment does not fulfill that constitutional mandate. The majority of my time is now spent on activities that allow me some chance of protecting my work online. Only a fraction of my time is now available for the creation of music. So instead of the Copyright Act providing an incentive to create, it provides a disincentive.[6]

If the notice and takedown process of the DMCA actively disincentives authors from creating new works, then we have clearly reached a place where the law is "hardly a copyright law at all." The Academy urges the Copyright Office to put forth bold reforms to fix the DMCA so that it works the way it was intended.

Technological innovation and the Internet have created tremendous opportunity for creators to share their work and connect with fans in ways never before imagined. But it has also created an environment where the fundamental rights of authors enshrined in the Constitution have been rendered meaningless. Creators need the intervention of the Copyright Office and Congress to restore needed balance so that artists, fans, and tech innovators can all benefit from the promise of the new digital marketplace. Thank you for your consideration.

Respectfully submitted,

The Recording Academy
529 14th Street NW, Suite 840
Washington, DC 20045

Todd Dupler
Senior Director of Advocacy & Public Policy

[6] *512 Hearing, supra* note 1, at 58.