Testimony of

Future of Music Coalition

On
"Section 512 of Title 17"
Hearing

House Subcommittee on the Courts, Intellectual Property and the Internet

March 13, 2014

House Subcommittee on the Courts,
Intellectual Property and the Internet
2138 Rayburn Office Building
Washington, DC 20515

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Dear Chairman Goodlatte, subcommittee Chairmen Coble and Marino and members of the committee:

We are pleased to submit the following testimony for the record in this hearing on Section 512 of Title 17.

Future of Music Coalition (FMC) is a national nonprofit education, research and advocacy organization for musicians. Our work over the past thirteen years centers on the ability for musicians and composers to reach potential audiences and be compensated for their work. As artist advocates, musicians, composers, label owners and technologists, we understand the delicate balance Congress struck with this portion of the Digital Millennium Copyright Act. Musicians and other creators directly benefit from the many innovations made possible by the safe harbors outlined in Section 512. The statute has also created some frustrations for smaller artists and rightsholders who may not have the resources to keep up with the scale and scope of potential infringements under the notice-and-takedown provisions enumerated in this part of the Act. We do feel, however, that the balance struck by Congress between innovation and expression and the protections afforded to authors and rightsholders was necessary and astute. We likewise believe that the courts, in their interpretation of this statute, have by and large made the right calls with regard to Congress' intent.

Our testimony will focus on the independent community, which includes individual performing artists, composers, labels and publishers. We will also address the importance of safe harbors to startup technology companies, who are often the ones to develop the next powerful platforms for creative expression and commerce.

I. Online services and the DMCA

Future of Music Coalition is familiar with a range of stakeholder perspectives on the notice-and-takedown and safe harbor provisions of section 512. As is not uncommon for our organization, we find ourselves occupying a middle-ground position. On one hand, we see clearly the benefits of safe harbors that allow Internet companies to deliver useful online services to millions of people, including musicians and other creators. On the other, we understand the frustration expressed by many rightsholders—including individual artists and independent labels and publishers—that the scale and scope of potential infringement can be an impediment to exercising their rights under law.

Major rightsholders and large-scale Internet companies have an obvious stake in how the provisions within Section 512 are applied, but their experiences aren't the only ones to be considered. The independent creator community and technology startups—whose interests often converge but are not always perfectly aligned—are also crucial contributors. Innovation benefits artists and smaller rightsholders who otherwise would have limited means to compete alongside the bigger companies. Tech startups are often the source of these innovations, which could be stymied without safe harbors that limit liability contingent upon certain statutory obligations. Of course, independent artists and rightsholders must be able to protect their copyrights and exploit them in the way that makes the most sense for their business models, which are as varied as the works they create and administer. As we see it, the intent of the statute is to encourage innovation while offering copyright owners a means to protect their interests. This is an incredibly valuable dynamic, and one that should be preserved even as new efficiencies and practices within the existing notice-and-takedown system are explored.

Some would assert that the system is "broken," but the data used to make such a case can also be used to illustrate Section 512's functionality in practice. Google's most recent Transparency Report from September 2013 claims 21.5 million takedown requests, the majority of which are fulfilled.[1] This can be taken as evidence of one company's

[1] *Copyright Removal Requests – Google Transparency Report*. N.p., n.d. Web. 13 Nov. 2013.

compliance in the face of an immense number of notices. On the other hand, it is illustrative of the scale of potential infringement. For its part, trade industry groups like the RIAA point to such numbers as evidence that the underlying premise of the DMCA is flawed. "We are using a bucket to deal with an ocean of illegal downloading," says RIAA Executive Vice President, Anti-Piracy Brad Buckles.[2] RIAA often points to the fact that, while their organization and its major label members utilize automated systems to sniff out potential instances of infringement and send notices to the appropriate service providers, smaller operators—such as independent labels—may not have the necessary resources at their disposal to take a similar tack.

Putting aside for a moment the authenticity of the RIAA's concern for independent sector, the underlying point is valid. Many independent labels or artists may feel that they are better served directing their limited resources towards promoting and marketing their music rather than looking for instances of infringement and firing off takedown notices. The law makes no distinction between large and small rightsholders; neither does it distinguish between superstars and developing artists. This is as it should be. However, it is important that the systems that assist copyright owners and creators in protecting their rights not disadvantage actors operating at a smaller scale. This argument can be extended to the startup community who may not be able to bring a new breakthrough to the marketplace if they are liable for the alleged infringements of their users, or if they must retain specialized legal counsel that might act as a disincentive to innovation and investment. We are not currently in a position to describe how to improve conditions for smaller operators, but we do believe strongly that any solutions should include the perspectives of parties whose businesses operate at a more modest scope.

Creative entrepreneurs and innovators aren't mutually exclusive: some of the most exciting music and media is being created and disseminated by rightsholders with an abiding interest in and understanding of technology; many technologists are music fans as

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[2] Buckles, Brad. "Music Notes Blog." *Http://www.riaa.com*. Recording Industry Association of America, n.d. Web. 13 Nov. 2013.

well as creators. Encouraging innovation—creative and technological—at an incipient stage is perhaps as important, if not more so, than preserving the business models of established players at the expense of new ideas and expression.

II. Automated systems and content identification technologies

Uniform technology standards, interoperable rights ownership databases and novel systems to identify music and other content can help alleviate some of the tensions experienced by parties subject to Section 512. YouTube's Content ID, for example, is an efficient and broadly utilized system that affords flexibility to rightsholders with regard to whether a potentially infringing use is blocked, monetized or harnessed for demographic and other useful data. Content ID, however, is proprietary, and only applies to the YouTube ecosystem. Still, it represents a powerful tool for those in a position to benefit from its ability to recognize content, whether for the purposes of remuneration or refusal of use. It is important to note, however, that some uses are resistant to automated interpretation. For example, judges employ a flexible and sometimes idiosyncratic test to determine the "fairness" of an infringing use; there is not yet a machine on the planet earth that can reliably make such calls. It may be that expanded systems for content identification will serve as a useful tool for rightsholders and services, but it is unlikely that these technologies will solve every stakeholder concern with regard to Section 512. Other parts of statute—as well as court rulings—do and must play a part in informing the purpose and scope of Section 512.

III. Pitfalls of overbroad approaches

One clear takeaway from recent legislative attempts to address infringement is that an "obligation to monitor" is not in the interests of innovation and expression—creative or otherwise. The Stop Online Piracy Act (SOPA), for example, had the stated goal of expanding the ability of the United States to respond to large-scale, commercial infringement of American intellectual property abroad. This is a worthwhile objective, and certainly something within the authority of Congress to address, even in the wake of public protests against SOPA. A clear concern with that bill, however, was that the initial draft appeared to include language that may have compelled Internet service providers to

police their networks for potential infringement committed by their users. Given the difficulty courts sometimes have in issuing rulings based on evidence presented under highly specific circumstances, it seems unwise to leave decisions about what is and isn't an infringement up to technology companies who may lack the requisite expertise to make such calls. It is hardly a matter of consensus that the DMCA's safe harbors and notice-and-takedown requirements require amendment. Even if they did, such an update must be narrowly focused and not a part of legislation with so many moving pieces that even the best-trained lawyers have difficulty comprehending how these provisions square with a bill's stated goal. A better approach would be for stakeholders to work together to minimize the instances of an infringing link being reposted, or coming up with collaborative ways to utilize data to discourage repeat infringement.

Given the complexities of addressing the needs of a broad array of stakeholders, FMC acknowledges that the DMCA does a fair job of establishing a balance between the interests of the technology and rightsholder communities. We also feel that the courts have, thus far, made the correct determinations with regard to their interpretation of section 512, which is to say that Congress established safe harbors for the very reasons brought to light in the many cases upholding them. There are, of course, some riddles within the subsections of this part of the Act, including the infamous 512(c). We have no unique insight as to whether the contemporary construal of these provisions is aligned with the intent of Congress at the time of the statute's drafting. We will say, however, that any effort to assemble stakeholders in dialog around these issues may go some way towards mitigating tension and distrust among the various parties, and perhaps illuminate a way forward on shared concerns. We look forward to ongoing stakeholder dialog around these and other matters, such as the upcoming DMCA forum hosted by the United States Patent and Trademark Office.

IV. Conclusion

It has been said that Congress is not always best arbiter of technology issues, and that top-down mandates in the form of federal statute can place caps on innovation and hinder the growth of new markets. However, in the case of Section 512, Title 17, it appears that

lawmakers got a lot right. Without the safe harbors established for Internet service providers, there is a strong likelihood that today's engines of creativity and commerce simply would not exist. It is also important to view these provisions through a broader lens than just the marketplace; speech and civic participation are also beneficiaries of Section 512's allowances and restrictions. What is currently being debated is the scrupulousness of the statute as corresponds to the needs and desires of various stakeholders with sometimes competing agendas. While it is true that the law sets the parameters for all players in a marketplace, it also establishes the space for breakthroughs to occur. On balance, the Section 512 achieves its aims in limiting liability for those who would create platforms for expression and commerce in the networked realm while affording rightsholders with a means to address infringement. No system is perfect, and it is well within Congress' right to reexamine the effectiveness of frameworks enacted two decades ago. But legislators should also be commended for having the foresight to devise statute that has served numerous productive ends since the time of its drafting—were that we could say that for every bill passed in Congress. As the subcommittee considers how (or whether) to optimize existing copyright law to reflect contemporary realities, it would do well to consider what Congress got right with the enactment of Section 512 of Title 17.

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