SONGWRITERS GUILD OF AMERICA, INC.

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Comments of the Songwriters Guild of America, Inc.

Joined by the Society of Composers & Lyricists

Endorsed by Music Creators North America, Inc.

Senator Thom Tillis, Ranking Member

U.S. Senate Judiciary Subcommittee on Intellectual Property

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Senator Patrick Leahy, Chair

U.S. Senate Judiciary Subcommittee on Intellectual Property

437 Russell Senate Office Building

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Re: Senator Tillis' 12/18/20 Discussion Draft of The Digital Copyright Act of 2021

Dear Chairman Leahy and Ranking Member Tillis:

The Songwriters Guild of America, Inc., joined by the Society of Composers & Lyricists and endorsed by Music Creators North America, Inc., are pleased to respectfully submit these comments to the Senate Judiciary Subcommittee on Intellectual Property concerning Senator Tillis' 12/18/20 discussion draft of the Digital Copyright Act of 2021 ("DCA Discussion Draft").

I. Introduction and Statement of Interest

The Songwriters Guild of America, Inc. ("SGA") is the longest established and largest music creator advocacy and copyright administrative organization in the United States run solely by and for songwriters, composers, and their heirs. Its positions are reasoned and formulated solely in the interests of music creators, without financial influence or other undue interference from parties whose interests vary from or are in conflict with those of songwriters, composers, and other authors of creative works. Established in 1931, SGA has for 90 years successfully operated with a two-word mission statement: "Protect Songwriters," and continues to do so throughout the United States and the world.

SGA's organizational membership stands at roughly 6,500 members, and through its affiliations with both Music Creators North America, Inc. ("MCNA") (of which it is a founding member) and the International Council of Music Creators (CIAM) (of which MCNA is a key Continental Alliance Member), SGA and The Society of Composers & Lyricists (SCL) are part of a global coalition of music creators and heirs numbering in the millions. Of particular relevance to these comments, SGA and SCL are also founding members of the international organization Fair Trade Music, which is the leading US and international advocacy group for the principles of transparency, equitable treatment, and financial sustainability for all songwriters and composers.

The Society of Composers & Lyricists ("SCL") (https://thescl.com/) is the premier US organization for music creators working in all forms of visual media (including film, television, video games, and musical theatre), and a founding co-member of MCNA along with SGA. SCL joins in submitting these Comments on behalf of its more than 1900 members.

Both SGA and SCL have for many decades been deeply involved in the legislative process concerning all prospective bills impacting upon the rights and interests of its music creator members, including the Digital Millennium Copyright Act and the Hatch-Goodlatte Music Modernization Act. The proposed Digital Copyright Act of 2021 is of equal importance to those landmark legislative efforts in regard to the rights and interests of SGA's and SCL's members.

The member organizations of MCNA --Music Creators North America-- have endorsed these comments in full. Such organizations are listed at http://www.musiccreatorsna.org.

II. Comments

The following comments address those DCA Discussion Draft issues deemed most important to the members of SGA and SCL. As to those issues not addressed in these comments, the submitting parties respectfully reserve their right to comment appropriately in the future, and thank the Committee for its consideration.

A. Reform of Section 512 of the US Copyright Act

In the 2020 Report of the US Copyright Office prepared at the request of Congress concerning potential reform of section 512 of the US Copyright Act,[1] the key conclusion was as follows: "Based upon its own analysis of the present effectiveness of section 512, the Office has concluded that Congress' original intended balance has been tilted askew." As a result, the Copyright Office endorsed a "rebuilding" of Section 512 to better reflect the intentions of Congress when it enacted the DMCA:

> The Office is not recommending any wholesale changes to section 512, instead electing to point out where Congress may wish to fine-tune section 512's current operation in order to better balance the rights and responsibilities of OSPs and rightsholders in the creative industries. Should Congress choose to continue to support the balance it devised [in] the DMCA and move forward on the issues identified in this Report, then the Office harbors some optimism that a path toward rebuilding the section 512 balance could be found.

SGA, SCL and MCNA are in agreement with that careful approach, with the additional caveat that without such rebuilding and fine-tuning as the Copyright Office suggests, the American music creator community will continue to find it difficult to merely survive, let alone to thrive.

With that in mind, SGA, SCL and MCNA are especially pleased by the thoughtful manner in which the DCA Discussion Draft has addressed revisions to section 512, especially regarding the "safe harbor" and "notice and take down" provisions. The proposed amendments, as drafted, include many of the changes necessary to update American copyright law for the benefit of consumers and creators alike to make it more consistent with the realities of today's music marketplace. As noted below, some potential adjustments to the DCA Discussion Draft should also be considered.

1. <u>Narrowing the Safe Harbor Provisions and Amending the Notice and Take Down System</u>

As noted in the Copyright Office Report on section 512 reform, one of the most important issues identified as urgently in need of Congressional review is the continuing scope of the "safe harbor" provisions. The Report concluded concisely that "the section 512(c) safe harbor [guidelines] are in tension with the original balance Congress sought to achieve."

The clear, original Congressional intent of the safe harbor provisions was to protect from copyright infringement exposure and liability those "start-up" digital service providers who acted as mere temporary repositories of content uploaded by the public, without curation or engagement in other proactive or commercial interactions of any kind. At that time in the late 1990s, digital service providers often referred to themselves as "dumb pipes," in order to justify the protections against liability they secured for themselves under section 512 of the DMCA.

1 https://www.copyright.gov/policy/section512/

That business model has long since been abandoned in favor of active curation and vast content monetization by service providers, which have resulted in the amassing of enormous wealth by the multi-national technology firms that comprise today's digital service provider community. These huge revenues --generated by both advertising against content and through the use of other monetization techniques including consumer data mining and sale-- have made digital service providers some of the largest and most profitable enterprises *in history*.

Meanwhile, "content creators" such as songwriters and composers (on whose creative works much of this wealth has been built) have suffered through two decades of rampant infringement and wholesale internet exploitation. The result has been the economic devastation of the professional music creator community in the United States, to the personal detriment of its members and to American culture in general. Songwriter and composer communities in the United States and throughout the world have been downsized by well over half, with anecdotal estimates ranging far higher.

Throughout this dark period for creators, the digital service provider community has continued to take grotesque commercial advantage through the safe harbor provisions, turning a perpetually blind eye toward copyright infringement problems that it could have acted voluntarily to mitigate through intelligent, technological measures. Instead, music creators have been left begging for the crumbs that fall from Big Tech's tables, while ever more massive revenues are generated through the exploitation of creative works (both licensed and unlicensed) to the nearly exclusive, overwhelming benefit of the digital service providers and their investors.

The recent Covid-19 pandemic and resulting shutdowns have further worsened the effects of this marketplace imbalance on songwriters and composers, a phenomenon known euphemistically throughout the world as the "content creator value gap." Nor have these developments prevented the digital service providers from also continuing to oppose market driven increases in the miniscule royalty rates they pay for the use of the musical content that wholly drives their businesses.[2]

At this stage in their development and under these circumstances, do the most successful and wealthiest companies in the world really need an extraordinary legal shield from liability against individual creators whose content is illegally utilized by the customers of such companies? *Even as those*

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2 As SGA stated in its comments letter to the House Judiciary Committee dated September 30, 2020 (similar comments were also submitted by SCL): "It is crucially important for the US Congress to recognize that other national and regional legislative bodies, including the European Union, have taken firm legislative steps to address the gigantic value gap that has developed between the enormous profits generated by big tech companies from the digital delivery of content, as opposed to the miniscule remuneration paid to the creators whose musical, literary, artistic and other works form the basis of wealth creation on the Internet.

The current valuations of major internet tech companies and music content delivery services as determined by top, reputable business publications are approximately as follows: Microsoft ($1.5 trillion); Apple ($1.3 trillion including Apple Music stand-alone value of $20 billion); Amazon ($1.2 trillion including media streaming services combined valuation of up to $500 million); Alphabet/Google (1.1 trillion including YouTube stand-alone valuation of $300 billion); Facebook ($765 billion); Alibaba ($654 billion); Tencent Holdings ($583 billion); and Spotify ($50 billion).

In the meanwhile, the US and global music creator community has been decimated over the past two decades even as music content was utilized as a primary driver (and in some cases such as stand-alone music streaming services the sole driver) in amassing enormous wealth for the multi-national Big Tech industry. Total annual, global music content revenues earned by music creators, artists and copyright owners, --including income produced by every recording and musical composition in existence-- does not come close to equaling the valuations of even the smaller tech companies such as digital music delivery services."

companies look away, pretending not to see the pattern of massive infringement on their way to the bank?

Further in that same regard, the 2015 Copyright Office Report also took note that the so-called "Notice and Takedown" provisions of section 512 have long been in need of revision to restore some semblance of balance and fairness to the electronic distribution system for music. Rick Carnes, president of SGA, has testified on numerous occasions before both the US Copyright Office and various Congressional panels concerning the deficiencies inherent in the tools currently provided to music creators under section 512 to protect their rights:

> As a professional songwriter myself, I recall with great dismay the day I first saw my songs being streamed on YouTube, Spotify and other digital distribution networks without my licensed consent, and realized the futility of sending take-down notices to protect my rights. When I sent the notices, another unlicensed copy appeared within minutes of the first one being taken down. And then another. And another. Faced with playing an unwinnable game of 'whack-a-mole' with infringers, I realized that my only other recourse was to file an infringement case which would, ages later, likely end up costing massively more than I could ever collect in damages.

As the Copyright Office Report points out, the time has come for implementation of carefully crafted reforms to be implemented by Congress, in order to address the basic unfairness of the current law in light of the marketplace realities that have evolved since enactment of the DMCA decades ago.

2. Specific Points of Support by SGA, SCL and MCNA Concerning the Amending of Section 512

For the foregoing reasons, SGA, SCL and MCNA applaud the following, well-reasoned approaches taken in the DCA Discussion Draft to amend section 512:

i. SGA, SCL and MCNA specifically support the proposed statutory language which clarifies that willful blindness and reasonable red flag knowledge of infringing activity will join "actual knowledge" as standards for negating the safe harbor protections of service providers. Moreover, we specifically support the other proposed provisions that require reasonable monitoring by service providers for infringements on their systems. These are crucial changes that will go a long way toward helping to level the playing field for the music creator community.

ii. SGA, SCL and MCNA specifically support the parallel, proposed statutory language directing the US Copyright Office to promulgate rules standardizing best practices that service providers must undertake to combat online piracy (including technological monitoring of network activities for detection and prevention of infringing activities).

iii. SGA, SCL and MCNA further support the proposed statutory amendments that would establish a "notice and stay-down" system to replace the thoroughly unworkable "whack-a-mole" regime that has plagued music creators for over twenty years.

iv. SGA, SCL and MCNA specifically support the proposed statutory language that would require service providers to make users click a button when they upload material that affirms that they hold the copyright, have proper authority, or are otherwise authorized by law *to a reasonable certainty* to legally do so. We suggest that specification of the *reasonable certainty* standard should be added in the final draft. We also suggest adding language specifying that reliance by service providers on such affirmations by users should be subject to a reasonability standard.

v. SGA, SCL and MCNA specifically support the proposed statutory language that changes the requirements for sending notices of infringement and counter-notices by lowering the specificity with which copyright owners must identify the location of infringing material and, when multiple works are on the same service, broadens the applicability of a representative list of infringing works.[3]

vi. SGA, SCL and MCNA specifically support the proposed statutory language that allows copyright owners to identify infringement and submit notices through standardized electronic takedown forms.

vii. SGA, SCL and MCNA specifically support the proposed statutory language that authorizes the Copyright Office to develop and maintain a model repeat infringer policy to serve as the [4]minimum baseline standard for service providers.

3. Additional Concerns of SGA, SCL and MCNA Concerning Certain Proposed Amendments of Section 512: "The Fair Use Defense" and "Small Claims Under the CASE Act"

With the aim of presenting potential opportunities to strengthen the approaches taken in the DCA Discussion Draft to amend section 512, SGA, SCL and MCNA also wish to submit the following comments for consideration concerning the issues of fair use and alternative dispute resolution.

SGA, SCL and MCNA have serious concerns over the sections of the DCA Discussion Draft that would impose penalties on notice and counter-notice senders for sending bad-faith notices or notices "that do not account for exceptions in federal copyright law like fair use." Similarly, we are chilled by the statement in the Committees' "Section by Section" analysis dated December 20, 2020 that "[t]hese

3 As SGA stated in its comments letter to the House Judiciary Committee dated September 30, 2020 (similar comments were also submitted by SCL), it "strongly agrees with the Copyright Office Report findings that the burdens being placed on creators and copyright owners to provide various detailed identifiers for the purposes of complying with the notice and takedown provision are way too stringent. For example, the Report notes that *Congress may wish to consider whether the 'information reasonably sufficient . . . to locate* provision is appropriately interpreted as requiring that a rightsholder must submit a unique, file-specific URL for every instance of infringing material on an OSP's service.*'* In this regard, SGA strongly supports the idea of shifting to the Copyright Office the rulemaking authority to specify and limit the information required to be provided in notice and takedown complaints. The game of "whack-a-mole" that music creators are forced to play is hard enough without having to jump needlessly through superfluous informational hoops. Moreover, Congress needs understand the urgent necessity of addressing the problem that 'notice and takedown' rarely translates to 'notice and stay down.' The process of protecting musical compositions from unlicensed and uncompensated use is made infinitely more difficult by a system that requires endlessly repetitive notices to be sent to repeat infringers. As the Copyright Office Report points out, specific legal guidelines that delineate when a service must block a repeat infringer would have both immediate benefits and long-lasting deterrent effects on infringing activities, just as Congress intended when it enacted the DMCA. "

heightened penalties can be pursued in a copyright small claims tribunal, such as the one envisioned by the CASE Act."

First, as the Committee's members well know, the fair use doctrine is one of the most difficult and controversial areas of American jurisprudence, and has been complicated significantly in regard to its relation to the notice provisions of section 512 by recent judicial decisions such as the *Lenz* case.[5] We suggest that further discussion of the proper scope of obligations that would be codified by the DCA for both copyright owners and users as to application of the fair use doctrine in notice and take-down/stay-down situations is called for, with the purpose of gaining important input from the US Copyright Office and the music creator community prior to the finalization of statutory language. Our deep concern is that a new system could be inadvertently created by the DCA in which the exception of the fair use defense swallows the rule of copyright protection in the context of section 512.[6]

Second, we ask that the Committee take note of the fact that the music creator community is extremely grateful to Congress for its enactment earlier this year of the alternative dispute resolution-oriented CASE Act for small copyright claims. After well over a decade of support, it was a tremendous step forward for our community to finally achieve establishment of a small claims adjudication system that it is hoped will make rights enforcement for music creators in the US economically feasible again. It would thus be a very unfortunate turn of events if that system were to be immediately overwhelmed by cases concerning complex questions of fair use under section 512, creating inefficiencies that would clog the system for years absent proper statutory guidance to adjudicators. Once again, we suggest that further discussion of the proper and specific scope of obligations created for both copyright owners and users as to application of the fair use doctrine in notice and take-down/stay-down situations is called for, with important input from the US Copyright Office in its capacity as overseer of CASE Act implementation.

B. Orphan Works

SGA, SCL and MCNA are generally opposed in concept to legislatively designating certain works as "orphans" and excluding them from the full scope of statutory protections under the US Copyright Act. We believe that such a legal regime would run contrary to the spirit of Article I Section 8 of the US Constitution, and to the international standards of copyright protection set forth in the Berne Convention (to which the US is a leading signatory). We therefore decline to support Section 3 of the DCA Discussion Draft, which would adopt the legislative text recommended by the Copyright Office in its 2015 Report on Orphan Works.[7] As drafted, section 3 would provide a broad limitation on liability for users who, following a "diligent search," are unable to locate a copyright owner but decide to still use the work, anyway.

In the event that the Committee does include section 3 in the proposed DCA, there are two important points that we wish to stress. First, the term "diligent search" should be defined in the statute with as much specificity as

5 *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015)

6 For example, as SGA stated in its comments letter to the House Judiciary Committee dated September 30, 2020 (similar comments were also submitted by SCL), "Requiring a full, unrestricted fair use analysis by complaining creators and copyright owners each time a notice and takedown demand is sent would be so onerous and expensive a standard to satisfy as to convert the entire system into a bar against rights enforcement. And that is certainly not what Congress [should intend or facilitate].

7 https://www.copyright.gov/orphan/reports/orphan-works2015.pdf

possible, emphasizing that anything less than an exhaustive inquiry utilizing all available search engines, databases and human resources will not satisfy the standard for liability exemption. Second, the Committee must confront the reality that certain works, such as photographs, are not generally listed in accessible databases with author credit and contact information. It would be manifestly unfair not to provide a significant phase-in period prior to the effective date of orphan works legislation to enable authors and other copyright owners to establish searchable databases that would allow them to avoid the loss of rights and remedies.

C. Copyright Office Relocation to Executive Branch

Section 4 of the DCA Discussion Draft would establish the Copyright Office as an executive branch agency within the Department of Commerce. This section also makes the Register of Copyrights a presidential appointee, subject to the advice and consent of the Senate, for a five-year term. SGA, SCL and MCNA believe that this issue is one that requires further public input from Constitutional scholars as to its potential effects, and that consideration of other potential alternatives (such as the establishment of the USCO as an independent agency) is also warranted. Moreover, we have serious concerns that the politicization of the office of Copyright Register --by making the office a presidential appointment-- could have severe, negative ramifications on the tradition of intellectual excellence and sensitivity to the Arts that has always marked Copyright Office leadership. We therefore withhold our support for section 4 pending further public discussion and debate.

D. Promoting Attribution

SGA, SCL and MCNA strongly support section 6 of the DCA Discussion Draft, which would require a copyright owner who is not the author to affix copyright management information (CMI) to digital copies and to provide the author of the copyrighted work with a right of action when someone removes or alters CMI on digital or analog copies with the intent to conceal an author's attribution information. Accurate metadata is one of the most important prerequisites for establishing a system that fairly compensates music creators for the uses of their works. This section is an extremely helpful step in that regard.

E. Study on Ancillary Copyright for Press Publishers

SGA, SCL and MCNA have no objection to a study by the Register of Copyrights of the costs, benefits, and viability of adding ancillary copyright protections for press publishers as set forth in proposed section 8 of the DCA Discussion Draft.

F. Good Faith Error in Application for Registration

SGA, SCL and MCNA have no objection to section 9, which would amend the Copyright Act to stipulate that the Register of Copyrights may not refuse to register a work whose application contains only a good faith error, and to increase penalties for fraud against the Copyright Office.

G. Deposit Copy Deposit and Retention Requirements

SGA, SCL and MCNA do *not* support section 10 of the DCA Discussion Draft, as they believe it is not a sound idea to destroy physical copies of copyrighted works whether or not they have been

transferred to digital storage or represent a duplicate, physical copy. The future historical value of such physical copies of copyrighted works cannot be determined in the present, and to err on the side of ensuring cultural preservation is the safest policy. Moreover, we suggest that the Copyright Office Report mandated under section 14 concerning future deposit copy requirements be received and reviewed prior to acting on these issues. The goal of ensuring, by the most effective means possible, preservation of the archive of American culture should be given paramount consideration in all such matters.

H. Copyright Office Authority to Set Alternative Fee Structures

SGA, SCL and MCNA have no objection to section 12 of the DCA Discussion Draft, which would make it clear that the Copyright Office has the authority to implement tiered fees.

I. Copyright Office Studies on Publication and Deferred Examination

SGA, SCL and MCNA have no objection to the Copyright Office studies that would be mandated by sections 16 and 17 of the DCA Discussion Draft.

J. Establishment of a Copyright Office Public Advisory Board

SGA, SCL and MCNA have no objection to section 19 of the DCA Discussion Draft that would establish an advisory board at the Copyright Office to advise on information technology operations (but not policy). We would feel more confident if there were a guarantee that at least some of the 12 anticipated advisory members were actual copyright creators with substantial background or experience in copyright and copyright registration practice.

K. Group Registration of Works

SGA, SCL and MCNA support section 20 of the DCA Discussion Draft, which would allow for the group registration of both published and unpublished works.

III. Conclusion

SGA and SCL thank the Committee for its careful concern regarding protection of the rights and interests of songwriters and composers, and for the opportunity to submit these Comments.

Respectfully,

Rick Carnes	Ashley Irwin
President, Songwriters Guild of America, Inc.	President, Society of Composers & Lyricists
Officer, Music Creators North America	Co-Chair, Music Creators North America

cc: Charles J. Sanders, SGA Outside Counsel
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