SONGWRITERS GUILD OF AMERICA, INC.

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Statement of Rick Carnes
President of the Songwriters Guild of America
before the HOUSE COMMITTEE ON THE JUDICIARY

Re: "Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades."

Good afternoon, Chairman Nadler, Ranking Member Jordan, Chairman Johnson, Ranking Member Roby and members of the House Judiciary Committee, and thank you for the invitation to submit testimony at today's hearing titled, "Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades."

These Comments are respectfully submitted for inclusion in the Hearing Record by the Songwriters Guild of America, Inc. ("SGA"), 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 89 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 is part of a global coalition of music creators and heirs numbering in the millions. Of particular relevance to these comments, SGA is also a founding member 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.

Comments

In the 2020 Report of the US Copyright Office prepared at the request of Congress concerning potential Section 512 reform, 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 has 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 is in agreement with that approach, with the caveat that without such rebuilding and fine-tuning as the Copyright Office suggests, the American creative community will continue to find it challenging to merely survive, let alone to thrive. SGA therefore respectfully comments and urgently recommends as follows:

I A Need to Narrow the Safe Harbor Provisions

One of the most important issues identified in the Copyright Office Report as urgently in need of Congressional review is the scope and intent of the "safe harbor" provisions. As noted in the Report, "the section 512(c) safe harbor [guidelines] are in tension with the original balance Congress sought to achieve."

The clear, original Congressional intent was to protect from copyright infringement exposure and liability those "start-up" companies who acted as mere temporary repositories of content posted by the public, without curation or engagement in other proactive commercial interactions. That business model has long since been abandoned by such companies in favor of active curation and content monetization. Those changes in circumstances and business models have resulted in the amassing of enormous wealth by the safe-harbor protected tech firms through their generation of huge advertising revenues --and their use of other monetization techniques including consumer data mining and sale-- that have made them some of the largest and most profitable enterprises *in history*.

Concurrently, creators such as songwriters and composers on whose content this wealth has been built, go begging for the crumbs that fall from Big Tech's tables. The recent Covid-19 pandemic has further worsened this brutally unbalanced playing field.

As the Copyright Office Report points out, there are several reforms that should be considered and potentially implemented by Congress to address the basic unfairness of this "new" reality. These include revising the statutory standards that companies must meet in order to maintain safe harbor protections, including expansion of the definition of "red flag" knowledge of infringing activity by a company on its system. The engagement by a company in acts of "willful blindness," as an example, should result in automatic disqualification for safe harbor protections. Moreover, as the Report states, "[o]ther eligibility questions have arisen that Congress may want to clarify, including the amount of time that qualifies as 'temporary' [storage] for the section 512(b) safe harbor, and whether technology services beyond providing internet infrastructure— such and peer-to-peer ("P2P") systems and payment processors should appropriately be included under section 512(a)."

And then there is the issue of just plain "fairness." At this stage in their development, 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 companies look away, pretending not to see the pattern of massive infringement on their way to the bank?*

II A Need to Amend the Cumbersome and Ineffective Notice & Takedown Provisions

SGA 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.

SGA also agrees that in the wake of the controversial Lenz case[1] (regarding application of the fair use doctrine in notice and takedown situations), it makes great sense for Congress to specifically enumerate the specific fair use considerations that need to be taken into account by creators and copyright owners prior to sending notice and takedown demands. 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 intended.

3 A Need to Address the "Value Gap" As Has Been Done Elsewhere

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.

As the Copyright Office Report points out,

> many rightsholders and academics argue that…a rebalancing is called for, noting that the internet is no longer the infant industry of 1998 and that, with maturity, the OSPs are now better positioned to accept some of the responsibility for the negative externalities of their services (particularly given the economic and cultural success of the internet services sector during the last twenty-plus years). This argument largely relies on an implicit (and often explicit) comparison between the resources available to the large OSPs as opposed to those available to small authors and creatives, supporting a conclusion that the OSPs are better situated to shoulder the burden of policing infringement by their users. The comparisons on which the argument relies include the economic success of the internet services industry with the economic precariousness of many small authors and creatives, as well as the technologies available to large OSPs versus the largely manual process used by small creators to search for and send notices regarding instances of infringement. In one rightsholder's view, it is particularly unfair for large OSPs whose 'business model is predicated on monetizing user-generated content (not vetted for copyright),' to place the burden of identifying infringements on the rightsholder, arguing instead that such 'OSP[s] should be required, by law, to implement some form of digital fingerprinting to prevent infringing material from being uploaded in the first place.'

The European Union Digital Single Market (DSM) Copyright Directive, which was heavily supported by American music creator groups including SGA, The Society of Composers & Lyricists ("SCL"), MCNA and their international affiliates CIAM and the European Composers and Songwriters Alliance ("ECSA"), is currently the prime example of utilizing a legislative approach to address this fair trade/value gap-based music issue. Again, according to the Copyright Office Report:

> Article 17 of the DSM Copyright Directive addresses the 'value gap' concept that online content sharing platforms obtain unreasonable value from enabling their users to make available copyrighted content, without guaranteeing that rightsholders receive their share of the value or remuneration from such exploitation of their works. In order to 'bridge the gap,' the DSM Copyright Directive seeks to ensure that rightsholders receive appropriate remuneration for the use of their works online by promoting a 'licensing market between rightsholders and online content-sharing service providers' which preserves a 'reasonable balance between both parties.' These provisions, however, do not affect the contractual freedom of rightsholders who are not obliged to give an authorization or to enter into licensing agreements.

It is SGA's view that the philosophical approach adopted by the EU, in attempting to level the playing field at least enough to permit the economic survival of creators and the encouragement of the continued cultural contributions, must be an essential consideration for the US Congress. The gross inequities being perpetuated under the current system must be addressed, before a further and even more profound deterioration of creative product becomes inevitable. And that degradation is an end result that would be damaging not only to the American economy, but to US creators, consumers, and culture.

9 **A Need to Evaluate the Potential Effects of the Music Modernization Act (MMA) on Section 512**

Finally, the US and global music creator communities are studying the potential effects that implementation of the MMA and the availability of a blanket mechanical rights license for Internet use may or should have on the safe harbor provisions of Section 512. The question of whether the safe

harbor protections given to music distributors should be scaled back due to accommodations made under the MMA, including limitations on liability, is an issue that requires far greater scrutiny in the immediate future.

SGA thanks the Subcommittee for its careful concern regarding protection of the rights and interests of songwriters and composers under the US Copyright Act, and for the opportunity to submit these Comments.

Respectfully submitted,

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CC:
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