

Music Community Unites For DMCA Reform
A “Dysfunctional” Law Being Misused to Devalue Music

The music community – ranging from recording artists to songwriters, record labels, publishers, studio professionals and others¹ – has come together in an extraordinary unified plea to the U.S. Copyright Office to reform the misused “safe harbor” provisions of the Digital Millennium Copyright Act (“DMCA”) and its failed “notice and takedown” system in order to restore the act’s original intent to promote a healthier balance in the online music market.

Background On Music Organizations’ Joint Filing

When enacted in 1998, Congress intended the DMCA to take a balanced approach that would allow nascent digital services to thrive while simultaneously protecting creators’ rights and their ability to earn a living from their work.

The “safe harbor” provisions in the DMCA’s Section 512 were supposed to limit liability for responsible Internet providers in exchange for provisions that required online services to work effectively to prevent the use of unlicensed music and other content online – such as implementing policies to stop repeat infringers and “expeditiously” responding to requests to “take down” pirated works.

But the online environment 18 years ago was very different. When the DMCA was enacted, Internet access was slow, online material hard to find, many consumers lacked widespread Internet access, online businesses largely earned income from subscription or use-based pricing and computing devices were expensive and stationary.

No one could fault Congress for failing to anticipate the Internet’s dramatic transformation. But, given all of these fundamental changes, a law that might have made sense in 1998 is now not only obsolete but actually harmful.

This year, for example, it is estimated that rights holders will have to send more than one billion takedown notices to just one service – Google. Rather than create balance, the DMCA safe harbors have placed an impossible and one-sided burden on music creators.

Courts, too, have struggled to interpret this outdated law for the present day, and the problems have been compounded by judicial rulings that have expanded safe harbors far beyond the original intent. Consequently, adequate protection has been stripped away from content owners, who are left with a Hobson’s Choice of licensing content for

¹ The united Music Community filing was submitted by: American Association of Independent Music; American Federation of Musicians; American Society of Composers, Authors and Publishers; Americana Music Association; Broadcast Music, Inc.; Christian Music Trade Association; Church Music Publishers Association; Global Music Rights; Music Managers Forum – United States; The Latin Academy of Recording Arts & Sciences, Inc.; Music Publishers Association; Nashville Songwriters Association International; National Academy of Recording Arts and Sciences; National Music Publishers’ Association; Recording Industry Association of America; Rhythm and Blues Foundation; Screen Actors Guild – American Federation of Television and Radio Artists; SESAC Holdings Inc.; and SoundExchange.

significantly less than it's worth or contend with an ineffective notice-and-takedown system as the only recourse.

At its worst, the DMCA has become a business plan for profiting off of stolen content; at best, the system is a *de facto* government subsidy enriching some digital services at the expense of creators. If music is to remain vibrant and thrive, the DMCA must be updated.

The Failure of the DMCA

The music community's filing makes three fundamental points:

I. The DMCA Is Outdated and Harmful

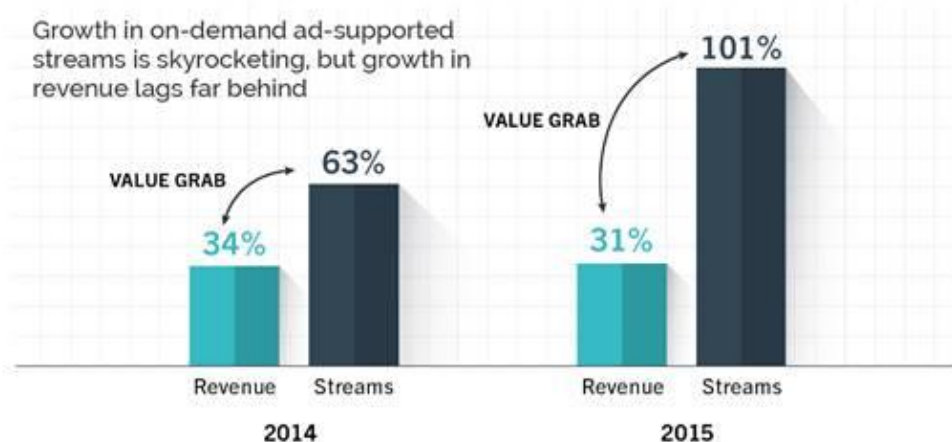
- *Designed for Another Era.* The DMCA was designed for a dial up, pre-streaming, pre-social media world in which it took much longer than a few seconds to upload a song to the web. No one contemplated today's massive global industry with billions of unlicensed works online every day. Congress simply did not anticipate such a huge volume of infringement, and trying to police it using the DMCA "is akin to bailing out an ocean with a teaspoon."
- *An Enormous Burden and Expense on Creators and Rights Holders*
 - Under the current regime, the DMCA forces "content owners to divert valuable resources away from creating content to sending minimally effective take down notices, or for content owners with limited resources, to actually refrain from sending takedown notices at all."
 - Some rights holders have given up altogether. Musician and ESL Music and Thievery Corporation co-founder Eric Hilton stated: "The drain on our financial resources sending numerous takedown notices was so apparent that we concluded it was no longer cost effective to send takedown notices. When we now release product we recognize we no longer have a remedy to stop the unauthorized use of our property."
- *Shields Companies That Wrongly Exploit Music Content* – Congress originally intended to protect website hosts and Internet providers from liability for user activities they genuinely did not control, so DMCA safe harbors were designed for passive, innocent, neutral intermediaries. Today, however, these protections have been wrongly expanded to protect businesses that actively profit off their own streaming services and operate related businesses (like data mining and advertising), immunize vast content farms that use unlicensed music to draw in visitors and profit off them.
 - In 2014, RIAA sent a quarter million takedown notices to just one site -- 4shared.com -- 97% of which were repeat notices, yet 4shared claims the protections of the DMCA safe harbors.
- *Courts are Re-working Congress' Intended Policy* – With fundamental market changes rendering the law outdated, courts have struggled to interpret the DMCA. As a result, flawed judicial rulings have further undermined Congress' intended balance and rendered the DMCA regime unworkable. Erroneous interpretations of who can claim safe harbor protection, the level of detail

required in takedown notices and “representative lists” of infringing works, and what constitutes “red flag” knowledge or willful blindness have all but eviscerated the balance intended by Congress.

II. The Value Grab

- The DMCA notice and takedown system has become a *de facto* government subsidy allowing Internet companies to unfairly distort the market and enrich themselves at creators’ expense.
 - The result is a distorted market yielding “bizarre statistics like vinyl records generating more revenue for the industry in 2015 than the billions of on-demand ad-supported music streams on YouTube and similar services.”
 - YouTube, which relies on the DMCA safe harbors, paid just \$0.72 per user in 2014 to record companies. By comparison, Spotify, which licenses music and does not rely on safe harbors, paid \$20 per user in 2013 (no equivalent 2014 data available).
 - While on-demand ad-supported streaming consumption more than doubled in 2015, revenues from that consumption grew by less than one-third.

The ‘Value Grab’ Grows Bigger



- With unlicensed copies of creators’ work already on YouTube’s system without any compensation to creators, YouTube is able to pay artists among the lowest royalty rates for music, knowing that creators are compelled to accept their terms. It’s “a Hobson’s Choice for content owners either to license content for much less than it’s worth, or have the broken notice-and-takedown system as the only recourse.”

III. Reform is Essential to a Vibrant Music Ecosystem

The music community is united in calling for a re-examination of the DMCA and to restore the originally intended balance between digital services and creators, including policies for the modern Internet ecosystem on issues such as repeat infringer policies, “red flag knowledge” of infringement and appropriate “Standard Technical Measures” to address infringement.

- The music community has identified a number of specific existing technologies that could be deployed to strengthen and restore the notice and takedown process for music. These include:
 - Audio fingerprinting technologies that bar redistribution or reposting of unlicensed copies of music that have previously been taken down;
 - Hash-matching technologies that bar redistribution or reposting of the exact music files that have previously been taken down;
 - Metadata analysis that can identify likely instances of infringement of music that has previously been taken down; and
 - Automatic removal or disabling of links to previously noticed infringement.
- Google should also correct this problem in connection with search. “If Google can develop programs to play and beat a master of the complex game Go, it can certainly develop programs to address this repeat infringement problem in its indexing function.”

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