15 MAJOR MUSIC ORGANIZATIONS OUTLINE "KEY FAILINGS" AND POSSIBLE SOLUTIONS TO BROKEN DMCA IN NEW COMMENTS TO FEDERAL GOVERNMENT

An extensive coalition of organizations representing virtually the entire music community have filed new comments with the U.S. Copyright Office decrying a broken and antiquated Digital Millennium Copyright Act (DMCA). The submitting organizations include the **American Federation of Musicians; American Society of Composers, Authors and Publishers; Broadcast Music, Inc.; Content Creators Coalition; Global Music Rights; Living Legends Foundation; Music Managers Forum – United States; 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**.

The official comments come as both the U.S. Copyright Office and U.S. Congress consider music licensing reform in 2017. Below are key excerpts from the organizations' filing. A copy of the full filing is available upon request.

> *In these supplemental comments, the Music Community further describes the key failings of the DMCA safe harbors that contribute to this untenable, grim reality for all content owners and creators.*
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> *[pg. 3]*

> *The DMCA safe harbors suffer from numerous key failings that have resulted in a heavily skewed playing field where service providers can either comply with their minimal safe harbor obligations—and thereby obtain immunity from damages liability and avoid obtaining licenses from rightsholders—or use the safe harbors strategically in licensing negotiations with rightsholders to extract rates far below fair market value. Service providers, including large technology companies, can help to restore much of the balance Congress intended to strike by agreeing to adopt standard technical measures and/or voluntary measures to address the DMCA safe harbors' key failings. The Music Community stands ready to work with service providers and other copyright owners on the development and implementation of standard technical measures and voluntary measures. However, to the extent such measures are not forthcoming, legislative solutions will be necessary to restore the balance Congress intended.*
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> *[pgs. 14-15]*

> *….notice and takedown cannot be considered a "remedy" for infringement in any literal sense, since it provides no compensation for past infringements made under the shelter of the safe harbor, and is essentially ineffective in preventing future infringements due to the constricted interpretations of the safe harbor. Moreover the system imposes costs on the aggrieved copyright owner, a double penalty. As noted above, the knowledge and vicarious infringement elements of the safe harbors have been rendered largely toothless by courts interpreting these provisions. The extremely burdensome—and ultimately ineffective—notice and takedown process is hardly a fair exchange for the highly valuable immunity the DMCA safe harbors give service providers, allowing them to continue profitable business operations while avoiding liability for copyright infringement and the potential for statutory damages.*
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> *[pg. 6]*

> *The notice and takedown process suffers from several flaws that need to be remedied. First, the undefined statutory term "expeditiously" leaves service providers far too much discretion to decide how quickly they will comply with a takedown notice. If service providers can post content nearly instantaneously, they can remove it just as quickly and should have no excuse for waiting hours or days to comply.*
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> *[pg. 7]*

> *As misinterpreted by several service providers and some courts, the safe harbors place all of the burden on copyright owners to police the infringement of their works across the Internet on a link-by-link or file-by-file basis and offer them little more than a frustrating, burdensome and ultimately ineffective takedown process.*
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> *[pg. 2]*

> *…as numerous copyright owners point out in their comments, the notice and takedown system as currently configured results in an endless game of whack-a-mole, with infringing content that is removed from a site one moment reposted to the same site and other sites moments later, to be repeated ad infinitem.*
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> *[pgs. 7-8]*

> *In the context of search engines and the Section 512(d) safe harbor, the whack-a-mole problem takes a different form: links to infringing content are removed in response to a takedown notice, but then other links to infringements of the same work reappear in search results on the same service. In addition, Google's search algorithm and search-term suggestion often promotes popular, infringing sites over authorized, legitimate sites for neutral searches for mp3s or downloads of music. Both of these issues are an enormous problem for copyright owner because search engines continue to be a key driver for music discovery and a significant tool that leads traffic to infringing sites.*
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> *[pg. 9]*

> *…the DMCA safe harbors have been interpreted very broadly to apply not only to passive, innocent service providers, as Congress intended, but also to entertainment providers that stream, distribute and/or otherwise provide access to user-uploaded audio and/or video content to millions of users and build their businesses on infringement. [1] In fact, the entertainment providers referenced are more akin to broadcasters and record stores than warehouses or phone companies. They generate their revenue by selling subscriptions or advertising whose value derives from the entertainment they transmit. An unbalanced DMCA, therefore, results in an unfair subsidy to active, online entertainment companies and does not merely protect passive conduits.*
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> *[pg. 3]*

> *Automated content identification technologies are one important type of standard technical measure that should be adopted across the industry, and at a minimum by service providers who give the public access to large amounts of works uploaded by users. As noted above, several service providers have already voluntarily adopted such technologies to prevent infringement to some extent, and such solutions are commercially available at a reasonable cost.*
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> *[pg. 13]*