Statement of Mitch Glazier
Chairman and CEO
Recording Industry Association of America
Before the
Subcommittee on Intellectual Property
Committee on the Judiciary
United States Senate
On
"The Role of Private Agreements and Existing Technology in in Curbing Online Piracy"

December 15, 2020

Chairman Tillis, Ranking Member Coons, and Members of the Subcommittee:

Thank you for holding this hearing and for your ongoing review of the Digital Millennium Copyright Act (DMCA). I serve as Chairman and CEO of the Recording Industry Association of America (RIAA), the trade organization that supports and promotes the creative and financial vitality of America's major music entertainment companies. American record labels help drive the most vibrant music industry in the world, partnering with great artists to help them reach their potential and connect with fans globally. RIAA represents more than 1600 member labels which create, manufacture, or distribute sound recordings.

Your review of the DMCA could not be timelier because the need to secure the legitimate online marketplace has never been greater. The recording industry transitioned to digital faster than any other creative industry. Today, digital consumption makes up more than 90 percent of our business. Record companies enabled the growth of hundreds of legitimate digital music services and the creation of entirely new platforms for music fans. We re-worked our entire business model, overhauled our systems, and undertook innovative licensing agreements – significant and forward-looking initiatives. But we were also the canary in the digital coalmine, exposing how technology can be abused to threaten the viability of creative enterprises – depriving artists, musicians, and other creators of fair market compensation. It is a large part of why, adjusted for inflation, our revenues are 50% less than they were when the DMCA went

into law, and in contrast, the revenues of some digital platforms are 500,000% more than they were. Something is not right.

And now, especially as the pandemic is having a devastating effect on the live music sector as performance halls and arenas, bars, and coffee shops are closed – the ability of creators to enforce their rights online is more important than ever.

The DMCA, as codified in Section 512 of the Copyright Act, was established to create a balanced online system that would foster growth for both the creative and technology industries through voluntary cooperation – assigning rights and responsibilities to each, consistent with their roles and capabilities. It was intended to strike a balance: effective prevention against piracy for creators, so that they could realize the value of their work online and grow, on one hand; in exchange for limiting digital platforms' liability through "safe harbors," so they could also grow. Unfortunately, as the U.S. Copyright Office stated in its May 2020 report, "the balance Congress intended when it established the section 512 safe harbor system is askew."[1]

Widescale infringement still plagues the online marketplace. Platforms have reaped immense benefits from the DMCA safe harbors while creators have shouldered an inordinate burden in trying to enforce their rights. Recalibration would not require a tremendous effort on the part of tech platforms. They could solve the piracy problem voluntarily tomorrow if they had the will and incentive to do so. Unfortunately, the DMCA safe harbors have been interpreted to apply so broadly that platforms do not have the business incentive to participate in a balanced system. Perhaps this review of the DMCA by Congress and the Copyright Office will help in that regard.

When the Copyright Office report was released, we joined other music industry groups in identifying some things tech platforms could do voluntarily right now that would make a real difference in restoring balance to the DMCA, including:

[1] https://www.copyright.gov/policy/section512/section-512-full-report.pdf, page 197.

1) ensuring that repeat take down notices trigger a stay down of the same infringing material on the same platform; and

2) giving copyright owners the ability to effectively and efficiently monitor infringement of their own works as required by the DMCA and send notices in a consistent, scalable, and practicable way.

First, platforms should keep infringing material they know about off their sites. This is the essence of the DMCA. Trafficking in unlawful material to draw users should not be part of a business model. That means once infringing material comes down, the same infringing material should not be allowed to reappear consistently on the same service. The sheer volume of infringement online is already staggering, and it is exacerbated by the routine reappearance of the same infringing content on the same service almost immediately after removal. This produces a never-ending, largely futile effort to enforce rights that Congress intended copyright owners to have. It wastes time and resources, creates an impossible situation for creators, devalues intellectual property and licensed services, and renders the notice and takedown process a sham.

I'll give you one real-life example from this year for one track. In that case, despite sending repeat notices for the same sound recording to Twitter continuously for months, the same track kept reappearing on Twitter. As a result, over a 10-month period, RIAA had to send notices for nearly 9,000 infringements of that same track – let me repeat that. We had to send 9,000 notices over a 10-month period for the same exact track. Unfortunately, we must do this all the time for hundreds of tracks on many different services.

Standard technical measures (STMs) already exist in the marketplace. These are technologies such as PEX, Audible Magic, and YouTube's Content ID that identify and protect copyrighted works to prevent the reappearance of infringing content on sites. They just have not been implemented uniformly or, in many cases, meaningfully. Establishing uniform and meaningful implementation of STMs was one of the original goals of the DMCA, which calls for the

voluntary development of these standards "pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process." That's right – current law already provides for a voluntary process to make the DMCA effective. But this process has never occurred in the 22 years since the enactment of the DMCA, because Congress's intended balance of incentives that would have achieved this, as indicated by the Copyright Office, is "askew."

Working together, we can establish a broad and flexible STM model that works for everyone. We know tech companies have ideas – finding digital solutions to challenges in the online world is what they are all about. We know that this Subcommittee and the Copyright Office are committed to bringing stakeholders together to establish these standards and we hope that your continued encouragement will help resolve this longstanding impasse. But while voluntary agreements to keep the same infringing material from reappearing on tech platforms would be ideal, Congress may have to adjust the incentives under the DMCA if tech platforms refuse to fix the problem.

Second, platforms should work to reduce friction in the notice and takedown process. The DMCA charges creators with monitoring for infringements of their own works, which has become a Sisyphean task given the volume of infringement that takes place online each day. But platforms fail to offer copyright owners the capability to find those infringements effectively and efficiently, and some make it particularly challenging to do so at a scale comparable to that of the infringement occurring on the platform. Some platforms that do offer such access, albeit on a limited basis, even want to charge content owners for access to do what the DMCA charges creators with doing – identifying infringements at scale. Every platform could and should voluntarily let creators search their platforms for infringement at scale. The question is, will they do so?

Further, even after creators have overcome the hurdles associated with identifying infringements, some sites make submitting notices needlessly difficult. This includes limiting or

outright prohibiting bulk submission of notices of multiple infringements; requiring inconvenient, and sometimes hidden, webforms and other purposely tedious processes; and restricting the webforms themselves, such as imposing character limits, capping content, and prohibiting attachments, sometimes requiring a new form for every infringement. In other words, they make it as hard as possible for creators to utilize tools given to them in the DMCA to prevent piracy. Some sites even predicate the acceptance of notices on the inclusion of unnecessary and statutorily unrequired information. Mandating proof of ownership or registration of an infringed work is not only absent from, and antithetical to, the streamlined requirements of section 512(c)(3), it smacks of efforts to further impede or outright stifle the notice and takedown process. Many sites also randomly change their webforms, which serves merely to confuse and complicate the process for creators. The Copyright Office itself recognized this untenable burden by noting in its report that:

> "the proliferation of new web-based submission forms and OSP-imposed requirements for substantiation of takedown notices in order to ensure the efficiency of the process has had the effect of increasing the time and effort that smaller rightsholders must expend to send takedown notices."[2]

Ultimately, we are asked to overcome artificial hurdles at both ends of the notice process – first when searching for and identifying infringements and then when submitting notices. Instead of throwing sand in the gears, platforms should help us make the DMCA work better. They could, today, voluntarily provide free access to available tools to all creators to search for infringements on their platforms at scale, which should be considered one of the most fundamental of standard technical measures, the failure of which should disqualify a service provider from the safe harbor. They could also, today, voluntarily make it easy to submit notices generally and at a scale consistent with the volume of infringements. The tools these

[2] https://www.copyright.gov/policy/section512/section-512-full-report.pdf, page 5.

platforms need to vastly improve the system are already available and we are eager to engage with them on solutions.

For the digital music ecosystem to function properly and to everyone's benefit, we all must do our part. Congress intended the DMCA to promote this cooperation and we are hopeful that we will make progress in the near-term toward the implementation of these fixes. But we are cognizant of the challenges we have faced in the past and the lack of incentives for platforms to come to the table may be impossible to overcome. While we know through experience that mutually agreed upon policies often produce the most effective – and most lasting – results, legal and regulatory changes may be necessary if digital platforms refuse to restore the balance of the DMCA voluntarily. The online marketplace exists through our mutual participation, and it will only thrive with a level playing field. We hope that shared interest in a system that works better for everyone suffices to incentivize efforts to restore the DMCA to its intended functionality, and are confident that many of the most pressing problems could be resolved tomorrow if the platforms were truly committed to the task.

Thank you for your leadership on this important issue. We look forward to working with you and our digital partners to establish a thriving online marketplace for both creators and services by restoring the balance Congress intended when it enacted the DMCA.