Before the
U.S. Copyright Office
Library of Congress

In the Matter of:	)	
Section 512 Study: Notice and	)	Docket No. 2015-7
Request for Public Comment	)	

JOINT SUPPLEMENTAL COMMENTS OF

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.

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The submitting parties, described in Appendix A hereto (the "Music Community"), are associations and organizations whose members create and disseminate a wide variety of copyrighted musical compositions and sound recordings. Many of the same parties submitted comments in early 2016 in response to the Copyright Office's original December 31, 2015 Notice of Inquiry. As noted below, the comments herein address many of the questions in the Copyright Office's original Notice of Inquiry, as well as the questions in the Copyright Office's supplemental November 8, 2016 Notice of Inquiry.

I. INTRODUCTION

Many service providers readily claim in their comments that the DMCA safe harbors, as (erroneously) interpreted by the courts and certain advocates, give service providers blanket immunity from damages liability for copyright infringement—no matter how rampant the infringement and no matter how handsomely such service providers profit from it—as long as they respond to takedown notices and terminate users they deem to be repeat infringers.[1]

So interpreted, the DMCA safe harbors provide copyright owners with no meaningful protection from massive online piracy, contrary to the balance Congress intended to strike. Instead, the safe harbors, as interpreted, create a heavily skewed playing field where service providers can either comply with their minimal safe harbor obligations and thereby obtain immunity from damages liability, or use the safe harbors as a cudgel in licensing negotiations with copyright holders to extract rates far below fair market value. Whichever path service providers choose, copyright holders and creators are clearly disadvantaged because they do not receive a fair share of the value their works generate.[2]

The service provider comments make clear that those claiming safe harbor immunity think the DMCA safe harbor regime is working perfectly well, while copyright holders detail an experience with a system that is fundamentally broken. This contrast unambiguously shows that the balance Congress intended the DMCA safe harbors to achieve has become entirely one-sided, with service providers reaping all of the benefits. 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.[3,4]

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[1] Comments of Facebook, Inc. at 3; Comments of Google, Inc. at 3; Comments of Electronic Frontier Foundation at 3; Comments of Amazon.com, Inc. at 4; Consumer Technology Association Comments at 2.

[2] Comments of Sony Music Entertainment at 5-6; Comments of Warner Music Group at 3, 9-10; Comments of the Music Community at 2-3; Comments of Music Managers at 2-3; Comments of the Songwriters of North America at 2-4; Comments of the Content Creators Coalition at 3-4; *see also* Tim Ingham, *YouTube Faces New DMCA Enemy: Katy Perry and DeadMau5's Artist Supergroup*, MUSIC BUSINESS WORLDWIDE (April 1, 2016), http://www.musicbusinessworldwide.com/youtube-faces-new-enemy-in-dcma-fight-katy-perry-and-an-artist-supergroup/; Mike Snider, *Taylor Swift, 180 Artists Fight YouTube Rip-offs*, USA TODAY (June 21, 2016), http://www.usatoday.com/story/tech/news/2016/06/21/taylor-swift-180-artists-want-copyright-reform/86194520/.

[3] As noted in several of the initial comments, many individual and smaller creators and owners have given up entirely on using the DMCA because the burdens are so high and the remedy ineffective. Comments of the Music Community at 14; Comments of the National Academy of Recording Arts and Sciences at 3-5; ESL Music Letter at Appendix E to Comments of Music Community; Comments of the Copyright Alliance at 8-11; *see also* T. Bone Burnett, *Treading on Hallowed Ground – Google, the Ryman, and The Future of Nashville Music*, THE TENNESSEAN (Sept. 20, 2016), http://www.tennessean.com/story/opinion/contributors/2016/09/20/t-bone-burnett-treading-hallowed-ground-google-ryman-and-future-nashville-music/90734982/; Kurt Sutter, *Kurt Sutter Slams Google, Argues for DMCA Update*, ROLLINGSTONE (July 15, 2016), http://www.rollingstone.com/music/news/kurt-sutter-slams-google-argues-for-dmca-update-w429367; Mike Snider, *Taylor Swift, 180 Artists Fight YouTube Rip-offs*, USA TODAY (June 21, 2016), http://www.usatoday.com/story/tech/news/2016/06/21/taylor-swift-180-artists-want-copyright-reform/86194520/.

[4] Consider further that in just the past year, almost one billion instances of infringement were identified and noticed to just one service provider. *Google Transparency Report: Requests to Remove Content Due to Copyright*, https://www.google.com/transparencyreport/removals/copyright/?hl=en-GB (last visited Feb. 16, 2017). This suggests that the infringement problem is still rampant.

Service providers, including large technology companies, can and should do more to correct this imbalance by working with copyright owners and creators to identify and prevent the infringement of copyrighted works.

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. For each key failing, the Music Community attempts to identify possible solutions that could help restore the balance Congress intended. These possible solutions include a range of voluntary measures, including consumer education and increased cooperation between content owners and service providers, and legislative reform. The voluntary measures, even if adopted in full, however, may be insufficient to restore the balance Congress intended. If that is the case, legislative reform will be necessary.

The goal of all stakeholders should be to ensure a proper balancing of the burdens so that no one actor is unreasonably burdened and to ensure a vibrant ecosystem for content creation, dissemination and innovation.

II. KEY FAILINGS OF THE DMCA SAFE HARBORS AND POTENTIAL SOLUTIONS

A. DMCA Safe Harbors Extended Far Beyond Passive, Innocent Service Providers (Original NOI Question 2; Supplemental NOI Questions 1, 15)

Many copyright owners noted in their comments that 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.[5] 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. Further, these various Internet business models hardly existed when Congress enacted the DMCA, and the massive scale of online infringement that has developed far outstrips the increased levels of infringement that Congress anticipated. This vast over-expansion of the safe harbors to these business models has dramatically skewed the online marketplace for copyrighted works to the detriment of copyright owners and artists.[6]

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[5] Comments of Sony Music Entertainment at 6; Comments of the MPAA at 6-8; Comments of Universal Music Group at 9-10; Comments of the Music Community at 3, 7-9. Some services, such as flipagram.com and musical.ly, even allow their users to take copyrighted content uploaded by other users to create slideshows, playlists, or videos.

[6] *Id.; see also* Tim Ingham, *YouTube Faces New DMCA Enemy: Katy Perry and DeadMau5's Artist Supergroup*, MUSIC BUSINESS WORLDWIDE, April 1, 2016, at http://www.musicbusinessworldwide.com/youtube-faces-new-enemy-in-dcma-fight-katy-perry-and-an-artist-supergroup/; T. Bone Burnett, *Treading on Hallowed Ground – Google, the Ryman, and The Future of Nashville Music*, THE TENNESSEAN, Sept. 20, 2016, at

One possible way to restore balance and proportion to the safe harbors would be to adopt an approach similar to the one recently advanced by the European Commission in its proposal for a directive "on copyright in the Digital Single Market."[7] Shortly after the DMCA safe harbors were enacted in 1998, the European Union adopted similar "exemptions from liability" for intermediary service providers that are "mere conduits" or that provide "caching" or "hosting."[8] Similar to the DMCA safe harbors, these EU exemptions from liability were intended to cover only activities "of a mere technical, automatic and passive nature."[9] However, national courts across the EU have been inconsistent in their application of the safe harbors to user-uploaded content services.

To clarify the liability of user-uploaded content services, the European Commission recently proposed a new copyright directive that confirms that services that "*store and provide access to the public to copyright protected works . . . uploaded by their users*" are liable for communicating works to the public and have an obligation to obtain the necessary licenses from copyright owners, unless they are covered by the hosting safe harbor.[10] It also clarifies, in line with case law of the Court of Justice of the European Union, that services playing an "active role" in relation to users' uploaded content, for example by optimizing the presentation of the content or promoting it, are ineligible for the hosting safe harbor.[11] This also reflects the stated intention of the EU safe harbors to apply only to "technical, automatic and passive" intermediaries. In addition, the proposed new copyright directive creates a specific obligation on services that "*store and provide to the public access to large amounts of works . . . uploaded by their users*" to take "*appropriate and proportionate*" measures, "*such as the use of effective content recognition technologies*," to "*ensure the functioning of agreements concluded with [copyright owners]*" or to "*prevent the availability on their services of works*" identified by copyright owners in cooperation with the service providers.[12] This obligation is "*aim[ed] at*

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http://www.tennessean.com/story/opinion/contributors/2016/09/20/t-bone-burnett-treading-hallowed-ground-google-ryman-and-future-nashville-music/90734982/; Kurt Sutter, *Kurt Sutter Slams Google, Argues for DMCA Update*, ROLLINGSTONE, July 15, 2016, at http://www.rollingstone.com/music/news/kurt-sutter-slams-google-argues-for-dmca-update-w429367; Mike Snider, *Taylor Swift, 180 Artists Fight YouTube Rip-offs*, USA TODAY, June 21, 2016, http://www.usatoday.com/story/tech/news/2016/06/21/taylor-swift-180-artists-want-copyright-reform/86194520/.

[7] European Commission, *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market*, Sept. 14, 2016, https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market.

[8] 2000 O.J. (Directive 2000/31/EC) 178/1 (Chapter II, Section 4: Liability of Intermediary Service Providers), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=EN.

[9] *Id.* at ¶ 42.

[10] European Commission, *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market*, Sept. 14, 2016, at 20, ¶ 38 (emphasis added), https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market.

[11] *Id.*

[12] *Id.*, at 29-30 (Art. 13) (emphasis added).

improving the position of [copyright owners] to negotiate and be remunerated for the exploitation of their content by online services giving access to user-uploaded content."[13]

The inclusion of similar obligations on service providers in the DMCA safe harbors could prove important in allowing copyright owners and creators to more effectively protect the use of their content online while also creating a more balanced playing field for licensing negotiations between copyright owners and service providers.

B. Red Flag Knowledge Interpreted Out of the Statute (Original NOI Question 19; Supplemental NOI Questions 13-14)

Although Congress intended the "red flag" knowledge provision to deter service providers from welcoming and profiting from massive copyright infringement, the provision has failed to serve this deterrent function because court interpretations have essentially read the provision out of the statute.[14] And although the recognition that willful blindness constitutes knowledge initially appeared promising, courts have for several years severely limited the willful blindness doctrine by holding that it applies only to specific instances of infringement, not to rampant infringement that a service provider willfully ignores.[15] Only recently, the United States Court of Appeals for the Second Circuit breathed some life back into "red flag" knowledge and willful blindness in holding that a service provider can have "red flag" knowledge or willful blindness regarding categories of works—such as all songs by a particular artist or band—not just specific instances of infringement, and that such knowledge can obligate the service provider to undertake a time-limited, targeted duty to find and remove all infringements of the categories of works at issue.[16] Although this is a welcome development, whether the Second Circuit's ruling is followed by courts throughout the country remains to be seen. Meanwhile, the long prevailing, very limited interpretation of "red flag" knowledge continues to harm creators every day. Given the controversy over how "red flag" knowledge should be interpreted, one possible solution would be to clarify legislatively, as suggested by some commentators, that "red flag" knowledge applies to whole categories of infringement and more generalized infringing activity, and not only to specific instances of infringement.[17]

C. Very High Bar for Right and Ability to Control, Divorced From Common Law (Original NOI Question 20; Supplemental NOI Question 13-14)

Courts have interpreted the "right and ability to control" provisions of the DMCA to require a degree of control that far exceeds the common law standard for vicarious liability or what Congress intended.[18] As a consequence, the vicarious infringement elements of the Section

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[13] *Id.*, at 3 (Explanatory Memorandum) (emphasis added).
[14] Comments of the Music Community at 35-37; Comments of MPAA at 31-36.
[15] Comments of the Music Community at 35-37; Comments of MPAA at 35-36.
[16] *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 91-94 (2d Cir. 2016).
[17] Comments of the Music Community at 23; *see also* 4 Melville B. Nimmer and David Nimmer, Nimmer on Copyright § 12B.04[A][1][b] ("In short, the 'actual knowledge' prong is reasonably construed to refer to specifics, whereas the 'red flag' prong deals with generalities.").
[18] Comments of the Music Community at 38-39; Comments of MPAA at 36-39.

512(c) and 512(d) safe harbors provide no genuine protections to copyright owners.[19] One possible solution would be for Congress to clarify that the DMCA safe harbors should incorporate, and be interpreted consistently with, the common law standard for vicarious liability along the lines of the *Fonovisa* standard.[20] Alternatively, the Copyright Office could provide guidance that the vicarious liability prong of Sections 512(c) and (d) should be interpreted consistently with the *Fonovisa* standard.

D. Highly Burdensome Notice and Takedown Process (Original NOI Questions 6-15; Supplemental NOI Questions 2-5, 12-15)

In their submissions, service providers and their associations disingenuously describe notice and takedown as "an extraordinary mechanism to combat infringement,"[21] an "extraordinary power,"[22] a "rapid, *ex parte* extrajudicial remed[y],"[23] and a "rapid and efficient mechanism to address alleged infringement of copyright" without properly acknowledging the vast immunity given to service providers who might otherwise be liable for infringement.[24] They strain to put such a positive spin on the notice and takedown procedure, which has largely served to benefit service providers to the disadvantage of copyright owners.[25] Indeed, 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.[26]

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[19] 17 U.S.C. §§ 512(c)(1)(B), 512(d)(2).

[20] Comments of the Music Community at 38-39; *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263- 64 (9th Cir. 1996).

[21] Comments of Internet Association at 4.

[22] Comments of Electronic Frontier Foundation at 5.

[23] Comments of Computer & Communications Industry Association at 6.

[24] USTelecom Comments at 4-5.

[25] With respect to Supplemental Notice of Inquiry Question 2, it is essential to take into account the perspective of the millions of individual creators of original works, who form an important part of the public impacted by the notice and takedown process. These creators have no effective remedy to protect their works from unlawful exploitation online given the resources required to police the entire Internet for infringement and to request takedown of multiple, recurring infringements. Making the problem even worse, some services are subscription only, thereby requiring individual creators to pay monthly fees to access these sites and determine whether the individual creators' content is being infringed. Comments of the National Academy of Recording Arts and Sciences at 1-6; Comments of Maria Schneider; Comments of Getty Images at 4; Comments of the Directors Guild of America at 6; Comments of Kernochan Center for Law, Media & the Arts, Columbia Law School, at 7.

[26] Comments of Amazon.com, Inc. at 4 ("Copyright is a strict liability regime with a unique statutory damages component and a judicially-developed secondary liability construction.").

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. Even a very short window of infringement can be incredibly damaging for pre-release or newly-released material. One possible solution, advanced by at least one commenter, "would be to require service providers to provide an online interface that permits a copyright owner to submit takedown notices, and that processes those notices in an automated fashion. As long as the notice is completed through the electronic interface, and as long as the copyright owner specifies the location of the infringing content on the service provider's site, it should come down immediately."[27] This possible solution should be easily accessible to all copyright holders, not only those that are large and technologically sophisticated. Another possible solution that has been advanced is amending the statute to specify a maximum takedown notice response time.[28] Both potential solutions, either individually or together, would have the benefit of curtailing service provider discretion as to what constitutes "expeditious," and would result in far more rapid takedowns of infringing content. These solutions would also provide copyright owners with greater clarity as to when they can expect identified content to be removed, in contrast to the current situation, which requires that copyright owners continuously check to see whether the identified content remains available.

Second, the "representative list" provision has been interpreted out of the DMCA safe harbors entirely.[29] Although this is plainly not what Congress intended, service providers in their comments uniformly applaud the provision's nullification by the courts.[30] Copyright owners need to have restored their statutory right to furnish service providers with representative lists of copyrighted works being infringed on their services, thereby shifting the burden to the service provider to identify and remove all instances of infringement of the copyright owner's identified works. One possible solution would be to amend Section 512 to provide further guidance as to the meaning and proper application of the "representative list" language.[31] Specifically, the amendment could make clear that if multiple copyrighted works are being infringed at a single online site, the copyright owner can submit a representative list of the copyrighted works infringed, together with a representative list of the infringements of those works, which would then obligate the service provider to identify and remove or disable access to all infringements of the copyright owner's works on that site.

Third, 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

[27] Comments of Sony Music Entertainment at 12; *see also* Comments of Universal Music Group at 15.
[28] Comments of Universal Music Group at 15-16.
[29] Comments of the Music Community at 26-28.
[30] Comments of the Internet Association at 18-20; Comments of Facebook, Inc. at 7; Comments of Google Inc. at 12; Comments of Computer & Communications Industry Association at 19.
[31] Comments of Universal Music Group at 28.

sites moments later, to be repeated *ad infinitem*.[32] One possible solution to this problem would be to require that, once a service provider receives a takedown notice with respect to a given work, the service provider use automated content identification technology to prevent the same work from being uploaded in the future.[33] Another option would be to require the use of such technology to identify and take action with respect to known third party copyrighted works at the time of upload or sharing.[34] Several service providers already do so, but on a voluntary basis, and thus could presumably cease doing so at any moment.[35] Although several service providers and their associations claim that automated content identification technologies would be too difficult or expensive for some service providers to implement, those claims ring hollow. For example, several commenters point to the large sums of money that YouTube spent to develop its ContentID system.[36] That is a red herring, however, because YouTube chose to develop its own technology from scratch in house—at great expense and delay—instead of contracting with a lower-cost, third party provider of already-existing content identification technology, such as Audible Magic.[37]

Several service providers and their associations also claim that automated content identification technologies would result in censorship of non-infringing works erroneously caught by the technology, such as fair use works.[38] That concern is greatly exaggerated in an attempt to avoid any obligation to employ content identification technologies.[39] As the Consumer Technology Association readily admits, modern automated systems can be calibrated to protect likely fair uses.[40]

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[32] Comments of Music Community at 4-5, 14-21; Comments of the MPAA at 13-16; Comments of Universal Music Group at 14-17; Comments of Janice T. Pilch at 6-7.

[33] *See* Comments of Paul Vixie at 1-2 (proposing an amendment to Section 512 that would impose an obligation on service providers to prevent repeat infringements of the same work).

[34] *See* ESL Music Letter at Appendix E to Comments of Music Community; Comments of Audible Magic at 4.

[35] Comments of Facebook, Inc. at 8 ("for many years Facebook has used Audible Magic, which is a third party service that maintains a database of copyrighted audio and audiovisual content, including songs, movies, and television programs."); Comments of Audible Magic at 4 ("Online services that use our Audible Magic copyright compliance services include Facebook, Dailymotion, SoundCloud, and Twitch.").

[36] Comments of Computer & Communications Industry Association at 13.

[37] Comments of Audible Magic (pointing out that they offer solutions for as low as $1,000 per month). While such technologies have proven useful, automated content identification technologies are not complete solutions to the whack-a-mole problem, particularly for music publishers and songwriters that have to police for cover versions of songs, which tools like ContentID and Audible Magic are not fully equipped to identify. Comments of Universal Music Group at 20.

[38] Comments of Computer & Communications Industry Association at 13; Comments of Electronic Frontier Foundation at 13-16; Comments of Mozilla at 5.

[39] In fact, some service providers go so far as to allow users to post content that instructs other users on how to avoid detection by automated systems and facing consequences for uploading infringing content. For example, see the following YouTube videos: "How to Avoid Copyright on Your Videos [EASY]," at https://www.youtube.com/watch?v=9SKB2GEjaLc; "How To AVOID copyright strikes and use music in your video: Tutorial avoid copyright," https://www.youtube.com/watch?v=Hi-hKkWJaJY. Rather than resulting in "censorship" on "non-infringing works", these videos promote circumvention technologies to avoid detection of clearly infringing activity.

[40] Comments of Consumer Technology Association, at 3 n.13. The Ninth Circuit acknowledged as much in its original decision in *Lenz v. Universal Music Corp.,* 801 F.3d 1126, 1135 (9th Cir. 2015) ("We note, without passing

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.[41] Both of these issues are an enormous problem for copyright owners, because search engines continue to be a key driver for music discovery and a significant tool that leads traffic to infringing sites.[42] One possible solution would be to require search engines to de-index structurally infringing sites that are the subject of a large number of takedown notices.[43] Another possible solution would be to require search engines to demote the ranking of such sites in search results,[44] even where such sites engage in domain hopping.[45] Google has voluntarily implemented demotion of sites that receive a high volume of takedown notices, although Google's implementation of demotion has generally been ineffective in curbing infringement, in part because Google does not appear to maintain the demotion if the known infringing site engages in domain hopping after being demoted and because other infringing sites often rise in certain search rankings after a site has been demoted.[46] A third possible solution would be for search engines to either promote authorized sites over infringing sites and/or to proactively take into account authenticity over popularity in search rankings.[47]

Fourth, a recent court ruling suggests that copyright holders may be required to consider fair use before issuing a takedown notice, even when the infringing content is a verbatim copy of the copyright owner's work. As noted in our initial comments, this is inconsistent with Supreme

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judgment, that the implementation of computer algorithms appears to be a valid and good faith middle ground for processing a plethora of content while still meeting the DMCA's requirements to somehow consider fair use."), *amended and superseded on denial of reh'g*, 815 F.3d 1145 (9th Cir. 2016).

[41] Comments of the Music Community, Appendix C at 18.

[42] *Id.* at 11.

[43] Comments of the Music Community at 25-26; Comments of Universal Music Group at 26; *see also* Hugh Stephens, *Google thinks it can ignore Canadian law because it lives in 'the cloud'*, Financial Post, Dec. 15, 2016, at http://business.financialpost.com/fp-comment/google-thinks-it-can-ignore-canadian-law-because-it-lives-in-the-cloud.

[44] Comments of Universal Music Group at 26; *see also* Executive Office of the President of the United States, Office of Intellectual Property Enforcement Coordinator, *U.S. Joint Strategic Plan on Intellectual Property Enforcement FY 2017 – 2019* ("IPEC Joint Strategic Plan FY 2017 – 2019"), at 69-70 (noting that "[s]earch companies have recently reported a number of innovations . . . including . . . implementing updates to search algorithms in order to 'downrank' sites that have received a large number of valid DMCA take down notices, and otherwise refining search results to visibly affect the rankings of some of the sites with the most notorious illegal uses"; and "identif[ying] the need for research and further development of best practices, through a multistakeholder process, on . . . down-ranking/demotion, and other targeted treatment of websites used to promote illegal content in Internet search as a means of diverting traffic away from infringing content"), *available at* https://www.whitehouse.gov/sites/default/files/omb/IPEC/spotlight/eop_ipec_jointstrategicplan_hi-res.pdf.

[45] Comments of the Music Community, Appendix C at 10, 26-27.

[46] Comments of the Music Community at 30-33. *See also* Appendix B thereto for continuing issues with domain hopping and search result rankings.

[47] Taking this approach would be analogous to combatting the problem of fake news, which has gained recent prominence. *See, e.g., Hannah Roberts*, *Google made changes to its search algorithm that unintentionally made it vulnerable to the spread of fake news, sources say*, BUSINESS INSIDER, Dec. 10, 2016, at http://www.businessinsider.com/google-algorithm-change-fake-news-rankbrain-2016-12.

Court precedent on where the burden of proving fair use lies generally,[48] and is also inconsistent with rulings in districts outside of the Ninth Circuit.[49] In addition, some commenters have noted that such a requirement would make an already highly burdensome notice and takedown system even more inefficient and unworkable for individual or small-scale copyright holders.[50] One possible solution would be for Congress to clarify that content owners are not required to evaluate fair use before sending a takedown notice, that automated notice-and-takedown processes without human review are appropriate, and that, consistent with the Supreme Court's description, fair use should be treated as an affirmative defense and considered by the copyright owner in connection with a valid counter-notice raising such a defense.[51]

E. Burdensome Counter-Notice Provision That Invites Abuse (Original NOI Questions 5-7; Supplemental NOI Questions 5-7)

The DMCA safe harbor counter-notice provision is problematic given the high percentage of invalid counter-notices. The counter-notice provision requires copyright owners to file a copyright infringement lawsuit within 10 days of being provided with a counter notice, or the taken-down content will be reposted. Given that at least 80 percent of counter-notices are invalid,[52] the 10-day time limit is simply insufficient to allow copyright owners to determine whether a copyright infringement lawsuit is warranted, particularly given the expenses necessarily incurred when filing such a suit.[53] Furthermore, requiring copyright owners to file suit in order to dispute each invalid counter-notice is an unrealistic solution given the proliferation of copyrighted works on the countless platforms hosted by service providers and the sheer volume of illegitimate counter-notices.[54] As some commenters have suggested, one solution to problems with the counter-notice provision may be to allow disputing parties to participate in mediation or other alternative dispute resolution.[55] Another possible way to alleviate problems with the counter-notice provision would be to lengthen the time that copyright owners have to address clearly erroneous or invalid counter-notices.[56] A further possible

[48] Comments of the Music Community at 39-40; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).
[49] *See Tuteur v. Crosley-Corcoran*, 961 F. Supp. 2d 333, 344 (D. Mass. 2013) (rejected view that fair use had to be considered prior to sending a DMCA notice, observing that "To have required [that] would have put the takedown procedure at odds with Congress's express intent of creating an 'expeditious[],' 'rapid response' to 'potential infringement' on the Internet" and that "[i]t is also reasonable to assume that Congress was aware well prior to the passage of the DMCA that the Supreme Court had made clear that the burden of proof for a fair use defense rests on the accused infringer.").
[50] Comments of Janice T. Pilch at 8; Comments of the National Academy of Recording Arts and Sciences at 7.
[51] Comments of Universal Music Group at 20-21, 38; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).
[52] Comments of Music Community at 33.
[53] Comments of Warner Music Group at 11.
[54] Comments of Sony Music Entertainment at 15-16.
[55] Comments of Engine, GitHub, Kickstarter, Medium, and Redbubble, at 13-14; see also Comments of Universal Music Group at 38; Comments of Janice T. Pilch at 9-10 (suggesting "a system for small copyright claims adjudication established by the Copyright Office").
[56] Comments of Universal Music Group at 38; Comments of Janice T. Pilch at 9.

solution would be to impose a duty of care on service providers to deal with clearly erroneous or invalid counter-notices.[57]

Whatever the solution, all jurisdictions nationwide should apply a uniform rule that filing an application for a copyright registration is sufficient to file suit on the work in question. Currently, federal courts of appeals are split as to whether an infringement suit can be filed once the copyright holder's application is filed with the Copyright Office, or whether filing suit must wait until the Copyright Office acts on the application.[58]

Numerous service providers and their associations contend that the counter-notice provision is an inadequate way to address "errant" or "fraudulent" takedown notices, which service providers and their associations grossly exaggerate.[59] The CCIA pointed to a takedown notice for a political campaign advertisement, and argued that the 10-day period a service provider has to comply with a counter-notice can "result in the suppression of lawful, socially significant speech for a long period of time."[60] As a potential solution, CCIA suggested doing away with the 10-day period altogether and allowing for the immediate reposting of content upon receipt of a valid counter-notice.[61] That drastic approach is unwarranted and would incentivize fraudulent counter-notifications by allowing infringing content to be immediately reposted. Alternatively, CCIA suggests providing statutory damages remedies for willful misuse of the DMCA process.[62] That suggestion, too, is unwarranted. Section 512(f) already provides an adequate deterrent against abuse of the notice and takedown system, and there has been no data provided to show it is an insufficient remedy.

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[57] Comments of Sony Music Entertainment at 17.

[58] The Fifth, Seventh, and Ninth Circuits take the former approach. *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 386–87 (5th Cir.1984); *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 631 (7th Cir. 2003); *Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612, 621 (9th Cir. 2010). The Tenth and Eleventh Circuits take the latter approach, requiring registration before suit can be brought. *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1202–04 (10th Cir .2005), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1489 (11th Cir. 1990), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010).

[59] Comments of the Electronic Frontier Foundation at 16-17; Comments of Automattic Inc. at 3-6; Comments of the Internet Association at 22-23. Several of these commenters cite a recent report by Jennifer Urban et al. ("Urban Study") in claiming that takedown notices using automated processes are often erroneous or fraudulent. *E.g.*, Comments of the Electronic Frontier Foundation at 7 (relying on Jennifer Urban, Joe Karaganis and Brianna L. Schofield, Notice and Takedown in Everyday Practice ("Urban Study"), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628). However, the Urban Study has been heavily criticized. Kevin Madigan & Devlin Hartline, Separating Fact from Fiction in the Notice and Takedown Debate, CENTER FOR THE PROTECTION OF INTELLECTUAL PROPERTY (April 25, 2016), http://cpip.gmu.edu/2016/04/25/separating-fact-from-fiction-in-the-notice-and-takedown-debate/; Stephen Carlisle, *Google Funded Study Concludes Google Needs More Legal Protection From Small Copyright Owners!*, NOVA SOUTHERN UNIVERSITY (April 14, 2016), http://copyright.nova.edu/google-funded-takedown-study/.

[60] Comments of the Computer & Communications Industry Association at 26.

[61] *Id.*

[62] *Id.*

F. Ineffective Repeat Infringer Provision (Supplemental NOI Questions 8, 14)

As copyright owners and service providers alike acknowledge, the DMCA safe harbor repeat infringer provision provides too little guidance as to its meaning and scope.[63] For example, the statute does not define the term "repeat infringer," or provide any guidance regarding what it means to "reasonably implement[] . . . a policy for the termination in appropriate circumstances of . . . repeat infringers."[64] Instead of interpreting those terms by their common sense meanings in light of the intent and purpose behind the DMCA, some service providers have chosen to take extreme interpretations in order to continue to profit from the use of their services for infringing activity, and do so entirely "behind the scenes" with little transparency about how they implement their policies.[65] Only in rare cases, such as where a service provider utterly fails to implement a policy or terminate any repeat infringers, has a service provider lost the safe harbor under this requirement.[66] Recently, the U.S. Court of Appeals for the Second Circuit correctly rejected a lower court's exceedingly narrow interpretation of the term "repeat infringer"—an interpretation that would have further undermined this safe harbor requirement.[67]

Several service providers and their associations advocate either abolishing the repeat infringer provision entirely, or redefining it to mean only those users whom courts have adjudicated to be infringers, rather than users who have uploaded works subject to valid takedown notices.[68] Neither one of these proposals makes any sense in an Internet ecosystem that is rampant with infringement and with users who repeatedly infringe copyright. To abolish the repeat infringer provision or to limit it to adjudicated infringers would further skew the DMCA safe harbors in favor of service providers, to the detriment of copyright owners and creators.[69]

One possible solution to address the problems with the repeat infringer provision would be to amend the statute to define the term "repeat infringer" to mean a user who has uploaded or posted links to, or otherwise uploaded, distributed, or downloaded content concerning, some threshold number of infringements of work(s) that have been subject to valid takedown notices, or at a minimum to make clear that "repeat infringer" does not mean only an adjudicated infringer but also includes users who are the subject of repeated, valid takedown notices.[70] The

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[63] Comments of Engine, GitHub, Kickstarter, Medium, and Redbubble at 13-15; Comments of the Music Community at 40-42; Comments of Universal Music Group 41-43.
[64] 17 U.S.C. § 512(i).
[65] *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 149 F.Supp.3d 634, 655-62 (E.D. Va. 2015).
[66] *E.g., Disney Enters., Inc. v. Hotfile Corp.*, Case No. 1:11-cv-20427, 2013 WL 6336286, at *20-24 (S.D. Fla. Sept. 20, 2013); *Cox Commc'ns, Inc.*, 149 F. Supp. 3d at 655-62; *Capitol Records, LLC v. Escape Media Grp., Inc.*, No. 12–CV–6646 (AJN), 2015 WL 1402049, at *5-13 (S.D.N.Y., March 25, 2015).
[67] *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 88-91 (2d Cir. 2016).
[68] Comments of Electronic Frontier Foundation at 17-22; USTelecom Comments at 8-9.
[69] For a further discussion of the problems with the "adjudicated infringer" approach, please see the amicus briefs filed on January 6, 2017 by the RIAA and the NMPA respectively in *BMG Rights Management (US) LLC v. Cox Communications, Inc.,* No. 16-1972 (4th Cir.), Doc. 50-1 at 7-19 (RIAA amicus brief), Doc. 52-1 at 6-22 (NMPA amicus brief).
[70] With respect to the application of the repeat infringer provision to ISPs claiming to act as conduits under section 512(a) – Supplemental NOI Question 8 – please see the amicus briefs referenced in the prior footnote.

statute could also require service providers to disclose to the public annually the specific terms of their repeat infringer policies as well as details of their implementation and application of their repeat infringer policies.[71] Only through such disclosures can copyright owners determine whether a service provider's policy is reasonable and is being reasonably implemented.

G. Failure to Develop Standard Technical Measures and Importance of Consumer Education (Original NOI Questions 11, 24-25; Supplemental NOI Questions 9-11)

As many commenters noted, the DMCA safe harbors' requirement that a service provider "accommodates and does not interfere with standard technical measures" has thus far provided copyright owners with no protection, because no "standard technical measures," as defined by the statute, have been adopted.[72] This is due in large measure to the restrictive statutory definition of "standard technical measures," and the disincentive that many if not all service providers have to engage in "an open, fair, voluntary, multi-industry standards process."[73]

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. While certain implementations of such technologies have significant problems and/or can certainly benefit from improvement, [74] they can help stem the flood of rampant infringement. These technologies should be discussed further as part of an open, fair, voluntary, multi-industry standards process to form the basis of a standard technical measure under the DMCA, which then becomes a pre-requisite for claiming safe harbor protection.

The government has an essential role to play in encouraging the adoption of standard technical measures, such as automated content identification technologies. The government should strongly encourage and further incentivize stakeholders to engage in the "open, fair, voluntary, multi-industry standards process" called for by the statute.[75] As the past 18 years have shown, without government encouragement and a well-balanced law that promotes proper incentives, it is unlikely that this multi-industry standards process will ever occur.

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[71] Comments of Universal Music Group at 41-42.
[72] Comments of the Music Community at 28, 43-44; Comments of the MPAA at 43-44; Comments of the Association of American Publishers at 24-25.
[73] *Id.*; 17 U.S.C. 512(i)(2)(a).
[74] The actual implementation of such technologies is critical to their success in achieving the balance Congress intended with the DMCA. For example, see the following articles for criticisms of ContentID: Maria Schneider, *Content ID is Still Just Piracy in Disguise: An Open Letter to Rightsholders and a Music Industry Ready to Renegotiate with a Monster* (July 31, 2016), https://musictechpolicy.com/2016/07/31/guest-post-by-schneidermaria-content-id-is-still-just-piracy-in-disguise-an-open-letter-to-rightsholders-and-a-music-industry-ready-to-renegotiate-with-a-monster/; Ellen Seidler, *YouTube's Content ID Easily Fooled*, VOX INDIE (June 30, 2016), http://voxindie.org/youtubes-content-id-easily-fooled/.
[75] 17 U.S.C. 512(i)(2)(a).

Even aside from initiating the process to adopt standard technical measures, the government has an important role to play in encouraging and incentivizing the continued development and adoption of voluntary measures to combat infringement and promote legitimate alternatives to experiencing and engaging with copyrighted material online.[76] This could include measures to increase the effectiveness of the notice-and-takedown process of the DMCA, use of content identification technologies by those that host content to deter repeated infringement of the same copyrighted work on the service or prohibit such infringement in the first instance or to prominently identify and promote legitimate, authentic sources for music in search results over infringing services. However, as noted in the Music Community's initial comments, "while voluntary measures should be encouraged and services should be incentivized to implement them, the effect of such measures will not be adequate to combat copyright infringement, as long as such voluntary measures exist in a legal environment that does not more closely align the interests of service providers and rights holders."[77]

Another approach to help address online infringement and improve the functioning of Section 512 is consumer education that informs the public about lawful online sources of content and discourages them from engaging in infringing activity or sending invalid counter-notices. One possible form that such education could take is through targeted educational alerts that a service provider can send to users when they are about to upload content, click on a link to a pirate site, engage in potentially infringing activity, or submit a counter-notice.[78] The Intellectual Property Enforcement Coordinator has encouraged the use of such alerts, noting that such programs "enable consumers to make better informed and safer online transactions."[79]

The government has a role to play in facilitating the development of targeted educational campaigns to combat infringement. As in the case of standard technical measures and voluntary measures, the government can help bring the relevant stakeholders together and encourage constructive outcomes.

III. CONCLUSION

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 copyright owners—or use the safe harbors strategically in licensing negotiations with copyright owners to extract rates far below fair market value. Service providers, including

[76] We note that several governmental agencies have approved and encouraged stakeholders to engage in voluntary initiatives to deter infringement as a method to seek practical, marketplace solutions without the need for further legislation. It is surprising that now certain detractors are calling such voluntary initiatives "shadow regulation" and essential de facto law. These claims should be dismissed for what they are—baseless red herrings intended to obstruct progress and not as constructive comments to promote a healthy, innovative ecosystem.

[77] Comments of the Music Community at 33.

[78] This approach has already been adopted in some cases. For example, a voluntary program under the Center for Copyright Information used such alerts to address peer-to-peer infringement.

[79] Office of the Intellectual Property Enforcement Coordinator, *U.S. Joint Strategic Plan on Intellectual Property Enforcement FY 2017 – 2019* at 74, https://www.whitehouse.gov/sites/default/files/omb/IPEC/spotlight/eop_ipec_jointstrategicplan_hi-res.pdf.

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.

Respectfully submitted on behalf of the Music Community

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February 21, 2017

Appendix A

Music Community Members

American Federation of Musicians

American Federation of Musicians (AFM) is the largest organization in the world representing the interests of professional musicians. Whether negotiating fair agreements, protecting ownership of recorded music, securing benefits such as health care and pension, or lobbying our legislators, the AFM is committed to raising industry standards and placing the professional musician in the foreground of the cultural landscape.

American Society of Composers, Authors and Publishers

The American Society of Composers, Authors and Publishers (ASCAP) is a membership association of more than 565,000 US composers, songwriters, lyricists and music publishers of every kind of music. Through agreements with affiliated international societies, ASCAP also represent hundreds of thousands of music creators worldwide. ASCAP is the only U.S. performing rights organization created and controlled by composers, songwriters and music publishers, with a Board of Directors elected by and from its membership.

ASCAP protects the rights of ASCAP members by licensing and distributing royalties for the non-dramatic public performances of their copyrighted works. ASCAP's licensees encompass all who want to perform copyrighted music publicly.

Broadcast Music, Inc.

BMI was founded in 1939 by forward-thinkers who wanted to represent songwriters in emerging genres, like jazz, blues and country, and protect the public performances of their music. Operating on a non-profit-making basis, BMI is now the largest music rights organization in the U.S. and is still nurturing new talent and new music.

BMI is the bridge between songwriters and the businesses and organizations that want to play their music publicly. As a global leader in music rights management, BMI serves as an advocate for the value of music, representing more than 12 million musical works created and owned by more than 750,000 songwriters, composers and music publishers.

Content Creators Coalition

The Content Creators Coalition (c3) is an artist-run non-profit advocacy group representing creators in the digital landscape. c3's objectives are two-fold: First, economic justice for musicians and music creators in the digital domain. Second, ensuring that the current and future generations of creators retain the rights needed to create and benefit from the use of their work and efforts. c3 has grown into a national organization based on representation, advocacy, and mobilization for sustainable careers in the digital age.

Global Music Rights

Global Music Rights, the first U.S. Performing Rights Organization (PRO) in nearly 75 years, was founded in 2013 by industry veteran Irving Azoff as an alternative to the traditional performance rights model. Our senior music industry executives have a wide range of legal, technical and operational history and bring with them more than 35 years of collective music publishing and performing rights experience.

Living Legends Foundation

The Living Legends Foundation (LLF) is dedicated to preserving the rich legacy of those who shape America's broadcast and recording industries. The LLF honors those unsung heroes whose efforts might otherwise go unnoticed. The LLF exists because of a need to recognize and promote the achievements of those members of the radio, music and entertainment industries and to help secure their place in history.

Music Managers Forum – United States

The Music Managers Forum (MMF-US) provides a platform to connect, enhance, and reinforce the expertise and professionalism of music managers. MMF-US's goal is to further the interests of managers and their artists in all fields of the music industry, including live performance, recording and music publishing matters.

While many up and coming managers cannot easily have their voices heard or their views recognized, the MMF-US has a vital role to play in ensuring that the industry evolves fairly and profitably for all who work in the management industry and their clients. It is the goal of the MMF-US to make sure managers voices are heard. As the industry continues to evolve, the MMF-US endeavors to help its members to stay ahead of the curve.

Nashville Songwriters Association International

The Nashville Songwriters Association International (NSAI) is the world's largest not-for-profit songwriters trade association. Established in 1967, the membership of more than 5,000 active and professional members spans the United States and seven other countries. NSAI is dedicated to protecting the rights of and serving aspiring and professional songwriters in all genres of music.

National Academy of Recording Arts and Sciences

Established in 1957, The Recording Academy is an organization of musicians, songwriters, producers, engineers and recording professionals that is dedicated to improving the cultural condition and quality of life for music and its makers. Internationally known for the GRAMMY Awards® — the preeminent peer-recognized award for musical excellence and the most credible brand in music — The Recording Academy is responsible for groundbreaking professional development, cultural enrichment, advocacy, education and human services programs. The Academy continues to focus on its mission of recognizing musical excellence,

advocating for the well-being of music makers and ensuring music remains an indelible part of our culture.

National Music Publishers' Association

Founded in 1917, the National Music Publishers' Association (NMPA) is the largest music publishing trade association in the United States and the voice of music publishers and their songwriter partners. Its mission is to protect, promote, and advance the interests of music's creators on the legislative, judicial, and regulatory fronts.

Recording Industry Association of America

The Recording Industry Association of America (RIAA) is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members are the music labels that comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States.

Rhythm and Blues Foundation

The Rhythm & Blues Foundation is the pre-eminent non-profit organization dedicated to the historical and cultural preservation of Rhythm & Blues music. It provides financial and medical assistance, educational outreach, performance opportunities and archival activities to Rhythm & Blues artists and their fans.

Screen Actors Guild – American Federation of Television and Radio Artists

Screen Actors Guild – American Federation of Television and Radio Artists (SAG-AFTRA) represents more than 160,000 actors, announcers, broadcast journalists, dancers, DJs, news writers, news editors, program hosts, puppeteers, recording artists, singers, stunt performers, voiceover artists and other media professionals. SAG-AFTRA members are the faces and voices that entertain and inform America and the world. With national offices in Los Angeles and New York, and local offices nationwide, SAG-AFTRA members work together to secure the strongest protections for media artists into the 21st century and beyond.

SESAC Holdings, Inc.

SESAC is a music rights organization that administers public performance, mechanical and other rights. The combination of SESAC's performing rights business with The Harry Fox Agency's mechanical rights business and SESAC's micro-licensing and network monetization affiliate, Rumblefish, allows SESAC to make licensing simpler, more efficient and more transparent. As SESAC implements this transformation, SESAC's performing rights business will continue to represent a renowned roster of affiliates including Bob Dylan, Mumford & Sons, Neil Diamond, Green Day, Mariah Carey, Lady Antebellum, Alt-J among many others.

SoundExchange

SoundExchange is the independent non-profit collective management organization representing the entire recorded music industry. The organization collects statutory royalties on behalf of over 110,000 recording artists and master rights owners accounts for the use of their content on satellite radio, Internet radio, cable TV music channels and other services that perform sound recordings over noninteractive digital music services. The Copyright Royalty Board, created by Congress, has entrusted SoundExchange as the sole entity in the United States to collect and distribute statutory digital performance royalties from more than 2,500 services. Since 2003, SoundExchange has paid out over $3 billion in royalties.