

Statement for the Record of
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Chairman and CEO, Recording Industry Association of America
on "Section 512 of Title 17"
March 13, 2014

Chairman Coble, Ranking Member Nadler, Chairman Goodlatte, Ranking Member Conyers, and members of the Subcommittee, my name is Cary Sherman and I serve as the Chairman and CEO of the Recording Industry Association of America. The 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. I greatly appreciate the opportunity to submit this written statement for the hearing record about the DMCA notice and takedown system.

To address whether the DMCA is working effectively in the current Internet environment, it is necessary to first understand the state of online piracy today. Let me provide a very brief overview:

There used to be a time, when the DMCA was first passed, when infringing copies of our music were mostly limited to specific online sites – File Transfer Protocol (FTP) sites, Internet Relay Chat (IRC) forums, etc. This was the heyday of AOL, Compuserv, and Netscape – before Napster and the peer-to-peer (P2P) revolution, before locker services, before Google was a household word. In Internet terms, it was the Stone Age.

That time is long gone. First came Napster, which provided instant access to music on the home computers of everyone on that P2P network. This made the takedown provisions of the DMCA largely obsolete just a year after enactment of the legislation, because the content was no longer hosted on commercial hosting services, as the legislation anticipated, but on the personal computers of end-users. And even though the original Napster was ultimately shut down by the courts as an illegal service, it spawned a huge number of copycat services, many of which persist to this day.

The second major development was the emergence of locker services focused on storing illegal content, so that an unlimited number of users anywhere in the world could download it at will. Megaupload is a prime example of such a service; that company actually paid uploaders if the content they put on Megaupload's servers was so popular that it was downloaded frequently. Megaupload made enormous profits from this scam until it was indicted by the U.S. Department of Justice for massive copyright infringement. But many such locker sites still exist.

The bottom line is that, instead of static sites with relative handfuls of infringements in 1998, there are now billions of infringing copies of our music on sites and servers and individuals' computers spread all around the world. In China, Ukraine, Holland, Sweden, Peru, and Canada, to name just a few. They are anywhere and everywhere.

And it doesn't matter where the illegal copies happen to be stored, because a new generation of pirate sites and services has emerged to provide links directly to these illegal copies. Pirate link sites like mp3skull provide instantaneous access to innumerable copies of recordings for download. Other pirate sites instantaneously upload the sound recordings to multiple sites, check the links to see if they are still live, and regenerate new links to the same content if the links are taken down. Still others make illegal copies of the audio contained in a video stream, and illegally distribute the audio.¹ And of course, there are mobile app versions of these types of piratical activity as well.²

These pirates do this not as a public service, but because they make money from it.³ They sell advertising on their sites, and rake in huge profits from their illicit activity.⁴ Unlike legitimate companies, these sites have no interest in actually removing infringing files or links; their incentive is exactly the opposite – to ensure that users can access as much illegal content as possible, so that advertising revenues can continue to flow.

Thus, the pirate sites ensure that their files or links are never actually taken down, or that the link taken down is just one of multiple links to the same content, or that the link taken down is promptly and automatically repopulated on the site with a slightly different universal resource locator (URL). The Pirate Bay website, for example, simply ignores takedown notices (U.S. courts do not have jurisdiction to enforce the DMCA on sites located outside of our country – and the overwhelming majority are not located in the U.S.); mp3skull, we believe, immediately repopulates, with modest changes in the address, all of its links that are contained within our takedown notices

The important takeaway is that these sites are not responsible entities who, when given notice of infringement, actually try to do something about it. These pirate sites have an economic interest in ensuring that access to pirate copies remains uninterrupted, and they use technology to make that happen, regardless of how many takedown notices they get. The

¹ For example, we have sent over 300 notices for the sound recording Roar by Katy Perry to both Google and Mp3skull.com, and yet that sound recording is still available on mp3skull.com, and still found easily via Google.

² For example, we have sent over 2,000,000 notices to Google re: infringements on the site mp3skull.com and noticed several apps that claim or suggest some association with mp3skull.com. Nonetheless, when checked on March 10, 2014, there were at least 10 apps available on play.google.com that appeared to claim or suggest some connection to mp3skull.com.

³ See e.g., Digital Citizens Alliance, "Good Money Gone Bad: Digital Thieves and the Hijacking of the Online Ad Business; A Report on the Profitability of Ad-Supported Content Theft", February 19, 2014, available at <https://media.gractions.com/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/4af7db7f-03e7-49cb-aeb8-ad0671a4e1c7.pdf>. ("The web sites MediaLink examined accounted for an estimated \$227 million in annual ad revenue, which is a huge figure, but nowhere close to the harm done to the creative economy and creative workers. The 30 largest sites studied that are supported only by ads average \$4.4 million annually, with the largest BitTorrent portal sites topping \$6 million. Even small sites can make more than \$100,000 a year from advertising.) See also Jelveh, Zuben et al., "Profiting from Filesharing Services: A measurement Study of Economic Incentives in Cyberlockers", P2P '12 IEEE Sept., 2012, available at <http://cis.poly.edu/~ross/papers/Cyberlockers.pdf>.

⁴ Id.

underlying assumption of the DMCA takedown process – that responsible entities will do the right thing and remove infringing files and do not control nor profit from the infringing activity – is simply not accurate with respect to these pirate sites.

There are thousands of these sites, each offering thousands, if not millions, of illegal copies of our music. We harbor no illusion that these sites will stop their infringing activity just because we send them a takedown notice. So we must instead look to those service providers who do represent the responsible parties envisioned by the DMCA and who provide visibility and viability to these bad online actors – namely, search engines.

Users who want to find pirate sites, or specific music they want to download, may go directly to a pirate site if they know the web address, but many simply use traditional search engines to do so, like Google, Bing and Yahoo!. These search engines comprehensively index sites like mp3skull, conveniently listing every copy of every music file in response to search requests. Indeed, depending upon the source, Google is the source of anywhere from 30% to nearly 60% of the traffic to mp3skull.⁵

Because search has become such a significant factor in leading users to online piracy, and making money from doing so, we began a program of sending notices to Google in 2012, asking for the takedown of links to infringing music files. Since then, we and our sister organization in the U.K., BPI, have together sent Google notices requesting the takedown of 100 million URLs. And, to its credit, Google has taken down virtually every link we have identified, usually within hours. But Google places a numerical limit on the number of search queries we can make to find the infringing content and, as a result, we can only take down a tiny fraction of the number of infringing files on each pirate site, let alone on the Internet generally. A recent Hill flyer by Google claims that they “receive notices for far less than 1% of everything hosted and indexed by Google.” Well, that’s largely because their search query limitations provide us with a bucket to address an ever-replenishing ocean of infringement. Only Google can see a whole site it indexes. Only Google has the tool to allow us to see the whole site as well, and to easily transmit notices to them for a quick takedown of infringing files to prevent damage. But Google places limitations on the tools we can use and limits us to delivering notices for a relatively minor number of infringing files on a site compared with the total number of potential infringing files. It then states that since the number of notices it receives is small related to the total number of files, there isn’t much of a problem. You can imagine the frustration. Google has no duty under the DMCA to monitor sites for infringing files. We have that responsibility. But they don’t allow us the tools to bear that duty, either.

Moreover, each specific URL containing or linking to a copy of an infringing recording has to be separately identified for takedown. That’s because all service providers take the position that

⁵ See <http://www.similarweb.com/website/mp3skull.com>, last checked March 10, 2014, indicating that 64.89% of total Mp3skull.com traffic in the last 3 months came from search, and of that 89.33% came from Google (indicating 58% came from Google). See also <http://www.alexa.com/siteinfo/mp3skull.com>, Last checked March 10, 2014. Per Alexa, Google search properties accounted for at least 30% of the traffic to mp3skull.com (google.com – 16.7%, google.co.in – 9.3%, google.com.pk – 2.8%, google.com.eg – 1% and google.com.bd – 1%).

they only need to take down the specific URL or copy identified, rather than all copies of the same unlicensed recording even though it may be exactly the same recording at an altered location on the same site.

Finally, regardless of what Google takes down today, its search engine will spider the same pirate sites tomorrow and index anew all the illegal content on the pirate sites. All those links to infringing music files that were automatically repopulated by each pirate site after today's takedown will be re-indexed and appear in search results tomorrow. Every day we have to send new notices to take down the very same links to illegal content we took down the day before. It's like "Groundhog Day" for takedowns.

And it's worth remembering that these are the problems we have, as an organization with some resources. The DMCA has oddly – and unintentionally – become an industry unto itself, requiring us (and many other companies and organizations) to employ entire teams of people solely dedicated to engaging in notice and takedown. Imagine the difficulty – the impossibility – for individual creators as one-person operations to track down and respond to the millions of repopulating infringements. The basis of copyright, as established in the Constitution, is to incentivize creators. The notice and takedown provisions of the DMCA were intended to further this cause in the digital world by providing a practical alternative to protracted and expensive litigation, establishing a fair and expedited system for copyright owners to protect their works online without improperly disrupting the operations of responsible service providers or unfairly implicating users of those services. Instead, the ineffectiveness (and gaming) of the system today hinders – and, in the case of individuals, supplants – the productivity of creators – the exact opposite of what the law intended.⁶

Is it any wonder that the process envisioned by the DMCA is not working? When you think about it, how could it? Sites with a vested interest in keeping infringing files up, not taking them down, have developed work-arounds to notice and takedown to maintain an abundant inventory of popular songs available and in some cases, incentivize uploaders to further exploit creators. These sites and services further claim DMCA protection while not complying with its conditions. Then search engines compound the problem by continually indexing and highlighting these pirate sites in searches for music acquisition. Other intermediaries exacerbate this issue by providing services to such sites to help them profit from their illegal activities, and in some cases, providing road blocks to their identification. And as we noted, the problem has moved to mobile, with thousands of apps published that are dedicated to infringing activity. It imposes huge resource burdens on everyone without making much of a dent in the problem.

So what should be done?

⁶ See, e.g., Boyden, Bruce, "The Failure of the DMCA Notice and Takedown System: A Twentieth Century Solution to a Twenty-First Century Problem", Center for the Protection of Intellectual Property, George Mason University School of Law, December 5, 2013. Available at <http://cpip.gmu.edu/wp-content/uploads/2013/08/Bruce-Boyden-The-Failure-of-the-DMCA-Notice-and-Takedown-System1.pdf>.

First, we understand that we need to do our part. That's why the major record companies we represent have partnered with Google Play and dozens of other technology companies to offer fans millions of digital songs in almost every conceivable model. In fact, the legitimate digital marketplace has become so vibrant and competitive that we felt the need to develop a one-stop website – whymusicmatters.com – to help consumers understand and navigate the full range of legal service options. In fact, in the U.S. today, there are hundreds of sites and digital services available for fans to listen and/or download the music they love.

We also seek and take action directly against these pirate sites and services when we can.⁷ Self-help is a good policy when it is available. But these bad actors reside mostly outside the jurisdiction of U.S. courts, placing them safely out of our – or even the government's – reach. And that is why we look to our responsible online partners to engage in addressing this problem. But to paraphrase Benjamin Franklin, we should never confuse motion with action. Saying you're taking action or doing the least bit necessary to show motion is not the same as taking effective steps and having meaningful results to show for it.

We remain champions of voluntary initiatives and agree with the Department of Commerce's recommendation that relevant parties should develop and implement voluntary best practices to address the problems with the notice and takedown system. Voluntary initiatives are more flexible, and less threatening, than legislation, and are therefore more achievable. In fact, to date, we have implemented successful initiatives with payment processors, ISPs, and advertising intermediaries. The logical next partner is search engines.

There can be no doubt that search engines play a considerable role in leading users to illicit services and can play a key role in addressing infringing activity online. We hope they will join with the growing list of intermediary partners who have sat down with stakeholders and worked collaboratively to find solutions to the problems outlined above.

We have some thoughts on voluntary steps that can be taken that will make a real difference, that we hope will be discussed by the Members of this Committee and by the Department of Commerce in its roundtables:

1. **Let us monitor effectively.** Provide tools to allow us to search in a manner commensurate with the size of the problem, and then allow the number of takedown notices we submit to reflect ALL the infringing files on a site, rather than a tiny fraction of them;
2. **Help end "whack-a-mole."** Ensure that when links to content are taken down, the same content on the same site is not continuously re-indexed when repopulated by the pirate site, rendering the takedown process useless;
3. **Push down pirate sites in search results.** Demote pirate sites in search rankings, using objective criteria such as the number of legitimate takedown notices submitted about the site;

⁷ We believe we use better than "good faith" efforts to identify infringing activity. While no system is bullet proof, we perform significant due diligence and take great care to avoid sending "false positive" DMCA notices.

4. **Help the consumer know what's legitimate.** Promote authorized sites and services to consumers in search rankings, through a "badge" or some other consumer-friendly information;
5. **Stop "finishing the sentence" to lead to a pirate site.** Modify the "autocomplete" function so it does not lead users to sites or apps based on the number of legitimate takedown notices submitted about the site;
6. **Don't give pirate sites a continuous "do-over."** Develop a common sense approach to implementing a repeat infringer policy.

We look forward to constructive and productive dialogue to remedy the DMCA's shortcomings.

Thank you for the opportunity to submit these comments.