Perspectives from FSF Scholars
June 23, 2016
Vol. 11, No. 20

Music MegaStars Sing the Right Note on Copyright Reform

by

Randolph J. May * and Seth L. Cooper **

The Hill
June 23, 2016

It's not everyday that Congress gets an Open Letter from the likes of Taylor Swift, Paul McCartney, Pearl Jam, Garth Brooks, Billy Joel, U2, and Lionel Richie. This week, along with several dozen other popular music stars, they called on Congress to adopt measures to reduce copyright-infringing content on the Internet.

If music star-power prompts Congress to take action to update federal law to match the realities of today's Internet and music market, so much the better. As we contended in an earlier column, the Digital Millennium Copyright Act of 1998 (DMCA) needs fixing to better secure copyright protections for music and other creative content.

Nearly 20 years of developments with regard to Internet technology and online user habits have rendered the DMCA ineffective in protecting copyrighted works from online infringement. The DMCA's "notice and takedown" process for removing infringing music and other media content from the Internet has become unduly burdensome and frustratingly slow. Massive online infringement activity is diminishing the ability of songwriters and recording artists to reap the financial rewards from their creative works.

DMCA's notice and takedown process was intended to result in prompt removal of content from the Internet that infringes copyrights. Under DCMA, copyright holders can send takedown notices to online service providers whose users post music or other media content without permission. The law gives immunity, or "safe harbor," to online service providers that expeditiously remove infringing content.

In the late 1990s there were far fewer Internet users and far fewer online platforms for posting copyrighted content. Today, however, YouTube, Vimeo, Dailymotion, and SoundCloud generate tremendous ad revenues from user-uploaded music as well as other media content. These sites do provide payments to copyright holders. But according to Recording Industry Association of America ("RIAA") CEO Cary Sherman, despite "hundreds of billions of audio and video music streams through on-demand ad-supported digital services like YouTube… revenues from such services have been meager." Streaming music services generate considerable value while providing copyright holders only small returns. For example, last year's revenues from the sale of 17 million vinyl albums totaled $416 million, *exceeding* the $385 million received from ad-supported services that streamed hundreds of billions of songs.

During the past five years, RIAA has issued over 175 million takedown notices to various online service providers. But, thus far, courts have narrowly interpreted DMCA's notice and takedown provision, resulting in a more irksome and time-consuming process for copyright holders than Congress probably intended. For instance, if an online service impermissibly is hosting a copyrighted sound recording on four-dozen different web pages, a takedown notice must identify each individual web link. New notices must be issued if the infringing user reposts the copyrighted music using new web addresses. Courts have also taken a hands-off approach to DMCA's safe harbor requirement that online services have repeat infringer policies. Except where online service providers willfully disregard repeat infringers, in the current regime, enforcement of copyright protection is difficult to achieve.

While Open Letter signers like Britney Spears, Pharell, and Slash might suffer the most harm in total dollars lost from infringement, DCMA's inadequacies and compliance costs also jeopardize the livelihoods of smaller songwriters and music artists. They are less able to expend time or money patrolling websites for infringement and issuing numerous notices. Under DMCA, if an online user objects to the removal of the infringing content, online service providers must repost the content and copyright holders must hire a lawyer and file a lawsuit in federal court within 10 days. For smaller artists, the economics of such litigation are forbidding.

Calls for reform of DMCA have intensified. Over the last few years, more attention has been focused on the low payment rates from YouTube and the lackluster policing of infringement. YouTube has pointed out that content interests agreed to those rates, while the creative community has replied that the only alternative to a bad deal involves no revenues at all – along with inadequate recourse to DMCA's notice and takedown procedure.

Reform of the DMCA shouldn't be about taking sides in the disputes. Real reform should be about bringing the law up to date with the realities of today's Internet ecosystem and then letting the music market work. Online service providers should retain a safe harbor for good faith efforts

to remove infringing content. But songwriters and recording artists deserve an easier and more efficient means for curtailing online posting of copyrighted music. And reforms should include simpler ways to combat multiple postings of by repeat infringers.

History reveals the important role played by prominent authors, ranging from Washington Irving to Mark Twain, in prompting Congress to secure international protection for the copyrights of America's creative artists. Perhaps the Open Letter from the all-star music lineup will retrace that history by drawing needed attention to the DMCA's shortcomings and prompting its reform. Now nearing 20 years old, the DMCA, a certifiable relic in terms of "digital years," is due for an update to better secure the rights to copyrighted music.

* Randolph J. May is President of the Free State Foundation, an independent**,** nonpartisan free market-oriented think tank located in Rockville, Maryland. *Music MegaStars Sing the Right Note on Copyright Reform* was published in The Hill on June 23, 2016.

** Seth L. Cooper is a Senior Fellow of the Free State Foundation.