LAW OFFICES OF RACHEL STILWELL
23679 Calabasas Road, Suite 530
Calabasas, California 91302
Phone (818) 330-6819
rachel@rmslawoffices.com

March 14, 2016

United States Copyright Office
101 Independence Ave. S.E.
Washington, DC 20540

Re: Comments by Rachel Stilwell on 17 U.S.C. § 512.

I am an attorney who represents recording artists, songwriters, and producers of both film and music. One of my clients has won nine GRAMMY Awards and released over twenty-five albums over more than forty years. Another client is a musician who released several independently distributed albums; she is about to sign her first contract with a major record company. Other clients include a non-famous songwriter whose livelihood depends entirely on her ability to license the music that she writes. I also represent an independent filmmaker who spends his own money to create documentary films that tell compelling stories related to social injustice and race.

One thing that these creators have in common is that their livelihoods have been severely diminished by the impacts of online copyright infringement. My clients know

that many advertising-supported websites outside of the United States unlawfully provide users unlicensed copyrighted content on a massive scale. However, they are also painfully aware that even here in the United States, where we purportedly have the ability to enforce copyright laws that are intended to protect creators from the theft of their property, such enforcement efforts are largely futile when applied to online infringements on U.S.-based websites that allow their users to upload and publish copyrightable content for others' consumption. Those clients know (without my having to tell them) that these problems with online infringement in the U.S. are related to flaws in certain sections of the "Digital Millennium Copyright Act."[1] Of my twenty clients that make copyrightable works for a living, all have found their unlicensed copyrighted works published on U.S.-based websites. My clients tell me, and I have experienced firsthand, that U.S.-based websites, when asked to take down a particular unlicensed copyrighted work, usually comply. However, I have come to learn that such compliance usually has fleeting effects, since those same websites very often allow other users (or even the same user) to again re-upload that very same unlicensed copyrighted work without so much as a warning.

My clients also know (without my having told them) that "whack-a-mole" is now the accepted and customarily-used entertainment industry moniker describing the futile

[1] Challenges facing artists with respect to DMCA takedown provisions are continuously in trade publications read by music and film creators. *See, e.g.*, Ashley Cullins, "YouTube Trial: Juror Says YouTuber's Incorporation of Unlicensed Clips is Not Fair Use," *Billboard*, March 4, 2016, available at http://www.billboard.com/articles/news/6898203/youtube-trial-juror-youtuber-unlicensed-clips-not-fair-use, as of March 4, 2016; Todd Spangler, "Jukin Media, Equals Three Settle YouTube Viral-Video Copyright Lawsuit," *Variety*, March 4, 2016 (referencing court decisions prompted by takedown notices pursuant to the DMCA).

practice of demanding that websites remove infringing content, only to have those same websites allow identical infringing content to be reposted almost immediately thereafter.[2] I suggest that when a practice has an industry-wide nickname, that's a pretty good indication that the practice actually exists and is deemed worthy of attention to those who call it by the industry-wide nickname.[3] In my experience practicing copyright law the last ten years, I have come to believe that artists in the United States uniformly use the phrase "whack-a-mole," albeit with varied spellings, to describe the laborious and futile practice of sending takedown notices to offending internet service providers, only to have to repeat the process endlessly in an effort to remove the same user-generated infringing content from the Internet, over and over again.[4]

---

[2] *See, e.g.*, Don Kaplan & Christian Red, "Live Streams of Mayweather-Pacquiano Fight Latest Battle in Fight Against Online Piracy," *New York Daily News*, May 4, 2015, available at http://www.nydailynews.com/sports/online-piracy-cuts-hbo-profit-mayweather-pacquiao-article-1.2210041, last visited March 4, 2016. This article describes how "hordes of online pirates" used the US-owned Periscope App on their phones to transmit unlicensed, free live video of a welterweight championship boxing match that otherwise was available via paid license from HBO and Showtime: "Periscope is owned by Twitter, but the company does not control the content created by its users. As such, lawyers for the pay cable channels were reduced to a game of whack-a-mole as they attempted to shut down each individual stream."

[3] *See, e.g.*, Andy Lykens, "The Future of the DMCA (And How It Affects Your Copyrights)," *American Songwriter,* April 30, 2014, available at http://americansongwriter.com/2014/04/songwriter-u-the-future-of-the-dmca/, last visited March 4, 2016: "The "whack-a-mole" problem is when an infringing party's material is removed, only to be posted again by another party to the same service (the biggest violators of this are piracy sites)."

[4] *See, e.g.*, Sam Thielman, "Popcorn Time Helps Film Piracy to Live On – Even Though it Technically Doesn't Exist," *The Guardian*, May 31 2015, available at: http://www.theguardian.com/technology/2015/may/31/popcorn-time-movie-piracy-free-websites, last visited March 4, 2016: "Last year, Google had an average of about a million takedown requests for pirated links every day, from media companies and others. But in the whack-a-mole world of online piracy there's always an alternative."

After having studied this problem carefully for the last ten years, I suggest that the only way that the DMCA's "safe harbor" and "takedown" provisions can be effective to protect against infringement is if Congress amends or re-writes the statute such that, going forward, in order for the applicable internet service provider to retain its immunity against claims of contributory infringement, any copyrighted work that an owner has claimed under penalty of perjury is being infringed, and for which a sworn counter-notification has not been received by the applicable ISP, must not only be taken down by the ISP but also must remain down indefinitely. The way my clients often describe this same principle is intuitively much easier to grasp than the necessarily lengthy language I use immediately above. They tell me: "When it comes to online infringement in this country, we need 'Take Down Stay Down.' Not 'Whack-a-Mole.'"

I know dozens of music and film creators who lament about the substantial burdens imposed upon them to draft and send multiple cumbersome DMCA take down notices, in futile attempts to protect their works. GRAMMY-winning composer and bandleader Maria Schneider, in her 2014 testimony before the House Judiciary Committee on the subject of DMCA takedown provisions, beautifully articulated the frustrations of musicians who are trying to protect their work from online infringement in the United States.[5] The burdens on copyright owners to protect their works from repeat online infringement are far too high under the current Section 512 and the burdens on the

[5] *See, e.g.*, Statement of Maria Schneider Before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Court, Intellectual Property and the Internet, "Hearing on Section 512 of Title 17," March 13 2014, available at http://judiciary.house.gov/_cache/files/51568f49-5e38-4179-880a-77559b6b9f6e/113-86-87151.pdf, at pages 56- 57, last visited March 4, 2016.

ISPs under the current statute are far too meager. The DMCA "safe harbor" and "takedown" provisions are simply unfair to copyright owners, and do not comply with the intent of federal copyright laws, *i.e*., protection against infringement. Moreover, as Ms. Schneider ably communicated in her testimony, individual creators of copyrighted works, *i.e., small business owners*, are unduly burdened by the current version of Section 512.[6]

Many anti-copyright organizations disingenuously mischaracterize the class of people and entities that are copyright owners, referring to them exclusively as big, consolidated record labels and film studios.[7] My clients are individuals and small business owners who are simply trying to keep the fruits of their work from being stolen. It is true that major record labels and big film studios own plenty of copyrights, but

---

[6] Maria Schneider explains: "I'm now struggling against endless Internet sites offering my music illegally. After I released my most recent album, Winter Morning Walks, I soon found it on numerous file sharing websites. Please understand, I'm an independent artist, and I put $200,000 of my own savings on the line and years of work for this release, so you can imagine my devastation. Taking my music down from these sites is a frustrating and depressing process. The DMCA makes it my responsibility to police the entire Internet on a daily basis. As fast as I take my music down, it reappears again on the same site–an endless whac-a-mole game." See id.

[7] *See, e.g*., Marc Schnieder (no known relation to Maria Schneider), "EFF and Internet Services Company Say Web Firms Shouldn't Be The Major Labels' Watchdogs," citing the Electronic Freedom Foundation's statement:

> "Laws like Section 512 of the Digital Millennium Copyright Act, Section 230 of the Communications Decency Act, and court decisions on trademark law, protect Internet intermediaries from legal responsibility for the actions of their users, including the responsibility to proactively block or filter users. That protection has been vital to the growth of the Internet as a medium for communication, innovation, and learning. ***Those laws help keep Internet companies and entertainment conglomerates from becoming the gatekeepers of speech with the power to decide what we can and can't communicate.***"

(Emphasis added).

independent record labels *collectively* enjoy a substantial amount of market share.[8] My clients, none of whom are rich, are simply trying to utilize federal copyright laws to keep their own intellectual property from being stolen. They feel like the current DMCA safe harbor provisions fail to help them protect their copyrighted works. The notice and takedown provisions of Section 512 unduly burden the many independent artists and small businesses that make copyrighted works.

Section 512 (i) provides that ISPs, in order to qualify for safe harbor protection (*i.e.*, immunity to claims of contributory infringement), must implement a policy to terminate the accounts of "repeat infringers" in "appropriate" circumstances.[9] As used here, the word "appropriate" is vague and subjective. Of five ISPs that I personally sent notices to alleging facts that clearly indicated that certain users were "repeat infringers" whose accounts should be terminated, in each case the applicable ISPs simply ignored my request that the accounts be terminated.

Please let me clarify that, in this comment, when I refer to "Internet Service Providers," I am using that term as it is defined in the statutory language of 17 U.S.C. § 512 (k): "a provider of online services or network access, or the operator of facilities

---

[8] *See* testimony of Rich Bengloff, then CEO of American Association of Independent Music (A2IM), at U.S. Copyright Office Music Licensing Public Roundtable in New York City, June 23, 2014, citing *Billboard* magazine as having reported in 2014 that independent record labels collectively enjoyed 34.6 percent of market share in 2013, at page 12, available at https://blog.cloudflare.com/eff-cloudflare-ask-federal-court-not-to-force-internet-companies-to-enforce-music-labels-trademarks/, last visited March 4, 2016.

[9] See 17 U.S.C. § 512 (i)(1)(A).

therefor." The addressee of this comment is the United States Copyright Office, whose executives are undoubtedly familiar with the language of 17 U.S.C. § 512. However, for any reader of this comment that is not familiar with the language of this statute, please know that courts and commentators generally agree that the statute defines the term "Internet Service Provider" broadly compared to what members of the general public usually think of when they hear the term "Internet Service Provider." Under § 512, an entity like YouTube or eBay can qualify to be an "ISP."

I have sent scores of DMCA-compliant takedown notices on behalf of the heirs of an iconic songwriter/performer who wrote prolifically during the 1970s and 1980s. Some of those takedown notices informed a particular ISP, YouTube, that a particular user had repeatedly uploaded the same recordings of musical compositions that were owned by my client, despite the fact that I had sent multiple takedown notices to the ISP with respect to that particular user. In other words, my concern wasn't just that this user repeatedly uploaded vast amounts of copyrighted works, some of which were owned by my client. My concern was that this user uploaded vast swaths of my client's catalog, without my client's permission, and I sent multiple takedown notices to the ISP about this particular user. That should have qualified the perpetrator as a "repeat infringer" whose account should have been terminated under § 512(i). Moreover, I complained to YouTube that this user *repeatedly uploaded particular individual copyrighted works* that belonged to my client, after having received several takedown notices from me. In other words, the

user kept uploading the same unlicensed works over and over again after those works had been taken down at my request.

When I brought this to YouTube's attention, I was told by YouTube that how and whether YouTube implemented (or did not implement) its policies against repeat infringement was a matter between YouTube and its users, and that they would not disclose to me anything about what they intended to do about the users that I alleged were repeat infringers. I may have found that reasonable had YouTube in fact terminated the accounts of this particular repeat infringer according to YouTube's terms of service. However, the account of that user was never terminated. I could only surmise that YouTube subjectively decided that termination of that repeat infringer's account was not "appropriate" under § 512(i). As a result, my client continued to bear its particularly heavy burden in the whack-a-mole game with that particular ISP. Of course, my client determined that the matter was too expensive to litigate. That outcome is simply not fair. As I have discovered after speaking with many of my colleagues that represent copyright owners, that outcome is not unusual. I believe that this unfair result is emblematic of the flawed language of § 512(i), which I hope Congress will replace with "Take Down Stay Down" language, so that, going forward, copyright owners will not be at the mercy of ISPs that have sole power (barring litigation) to determine when it is "appropriate" to terminate the account of a "repeat infringer." We must stop repeat infringers in their tracks.

One client of mine, a filmmaker, created the acclaimed documentary films "Dark Girls" and "Light Girls." Because films are now so routinely pirated both here in the United States and abroad, the licensing opportunities available for my client's films, which have a potentially important place in our social fabric and community discussion, are far less lucrative than they would have been when unlicensed competing films were not so routinely made available for free. Part of this problem with suppressed license valuation exists because it is hard for copyright owners to compete with, and permanently enforce against, unlicensed versions of one's own work that are readily available online. This is true even here in the Unites States where such copyright owners are supposed to have legal recourse. Virtually all a copyright owner can do is ask, again and again, for his/her work to be removed from infringing United States-based websites that claim protection under § 512. Litigation is too expensive for independent creators. If makers of thought-provoking art can't make a return on their financial investments in the copyrightable content that they create, then they will necessarily be de-incentivized from making such important works of art in the future.

Last year, the same week that my client released his film, "Light Girls," I sent multiple DMCA-compliant takedown notices to U.S.-based websites that infringed that film. Because the process was new and daunting to my client, my client felt forced to pay me, his attorney, to try to get the infringing works removed, on more than one occasion. This client thus suffered a financial burden, as well as the stress associated with having unlicensed infringing versions of his own work, available on demand, on

websites that had no right to make his work available, but that claimed immunity for contributory infringements under the DMCA.

I want my daughter to be able to watch films like "Dark Girls" and "Light Girls." I want to be able to listen to new jazz recordings in the future. If creators of copyrightable works can't fight infringement more easily than they can now, they are going to face steep hurdles when deciding whether to invest time and money into making such works of art. Re-writing or amending Section § 512 of the DMCA is certainly a good place for Congress to start.

No user has a "right" to distribute copyrighted works they don't own without the permission of the copyright owner. The right to exploit a copyrighted work is vested exclusively in the owner of that copyrighted work, by virtue of Article I, Section 8, Clause 8 of the United States Constitution. Making DMCA "Safe Harbor" and "Takedown" provisions less burdensome for copyright owners would not, as some claim, constitute a violation of ISP users' right to free speech. This is because the speech (*e.g.*, a song) that is being uploaded *does not belong to users of the ISP*. Rather, the speech (*e.g.*, a song) being uploaded *belongs exclusively to the owner of the copyright in that song*.

It is, of course, true that the First Amendment grants to all in the U.S. the right to exercise free speech. But the right granted by the First Amendment is to individuals to

exercise *one's own* free speech, not speech stolen from another person.[10] The rights granted by the First Amendment to the Constitution of the United States do not trump Article I Section 8 of the Constitution; the First Amendment does not imply a right to steal and distribute another person's valuable expression of his or her ideas. To the extent there is a free speech problem here, it is not because there are loads of people who want to upload their own work and are chilled from doing so by evil copyright owners trolling ISPs with abusive takedown notices. Google's 2013 amicus brief in *Lenz v. Universal Music Corp*. is educational:

> "Google receives hundreds of notices that suffer from similar defects, often repeatedly from the same vexatious submitters, and devotes substantial human and machine resources in an attempt to identify these abusive notices among the tens of millions of DMCA notices that Google processes each month."[11]

[10] "The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." *Estate of Hemingway v. Random House, Inc.*, 23 N. Y. 2d 341, 348, 244 N. E. 2d 250, 255 (1968) (emphasis in original).

[11] Brief of Amici Curia Automattic Inc., Google Inc.; Twitter Inc.; and Tumblr Inc. Supporting Plaintiff-Appellee-Cross-Appellant Lenz, Lenz v. Universal Music Corp., Universal Music Publishing, Inc., and Universal Music Publishing Group, Dec. 13, 2013. at page 10. available at https://www.eff.org/files/2013/12/13/osp_lenz_amicus_brief.pdf, last visited March 5, 2016.

According to Google's so-called "Transparency Report," provided on Google's website, as of March 5, 2016, Google received DMCA requests to remove over 75 million URLs in the last *month*.[12] Let's generously assume, for the sake of argument, that all of the "hundreds" of defective takedown notices received by Google monthly request the removal of multiple URLs. Even assuming that none of the allegedly abusive takedown notices were for single URLs, the percentage of allegedly abusive DMCA takedown notices received by Google is, by Google's own admission, unequivocally infinitesimal.

It's not like Google lacks the resources to handle the infinitesimal percentage of DMCA claims that Google claims are abusive. A recent *Washington Post* article published a report that indicates that Google refuses to bring $58 billion in cumulatively earned profits overseas back to their headquarters in the Unites States, in order to avoid having to pay U.S. taxes on those profits.[13] *Reuters*, on the other hand, reports that Google moved $12 billion in U.S. dollars (11 billion Euros) through the Netherlands to Bermuda in 2014, "as part of a structure which allows it to earn most of its foreign income tax free."[14] According to a 2015 article in *The Guardian*, Google has spent more

---

[12] Google: Transparency Report, available at: https://www.google.com/transparencyreport/removals/copyright/, last visited March 5, 2016.

[13] *See* Renae Merla, "How U.S. Companies Are Avoiding $695 Billion in Taxes, Washington Post, March 4, 2016, available at https://www.washingtonpost.com/news/business/wp/2016/03/04/why-u-s-companies-wont-bring-2-4-trillion-in-foreign-profits-back-home/, last visited March 5. 2016.

[14] *See* Toby Sterling and Tom Bergin, "Google Accounts Show 11 Billion Euros Moved Via Low Tax 'Dutch Sandwich' in 2014," Reuters, Feb. 19, 2016, available at http://www.reuters.com/article/us-google-tax-idUSKCN0VS1GP, last visited March 5, 2016.

money on federal lobbying than any other company since 2012.[15] Google disclosed that in 2014 it paid lobbyists in Washington, D.C. $17.4 million and spent another $4.5 million trying to influence EU policy making.[16] So how much are ISPs like Google unduly burdened by abusive DMCA-compliant takedown notices? I assert: not much.

The speech that is actually being chilled under the current DMCA takedown scheme is the speech of the artists that can't get paid fairly for their work because it's so easy for people to steal the work without paying for it, and because the problems associated with § 512 make it incredibly difficult for artists to keep their unlicensed works off the websites whose owners seek safe harbor protections under § 512. Several of my clients that create music and film for a living tell me that they now use their artistic talents to express themselves less than they used to, because they can't get compensated for the use of their artistic works in today's world in which music and film are so often consumed for free without a license*, i.e.*, stolen. Their speech has been chilled. While most of such web-based infringements have occurred via file sharing websites that do not qualify for safe harbor protections under the DMCA, a substantial amount of such infringements take place, *on a repeated basis*, via websites owned by companies that routinely seek DMCA safe harbor protections under 17 U.S.C. § 512.

---

[15] David Smith, "Google Under Scrutiny Over Lobbying Influence in Congress and White House," *The Guardian*, December 18, 2015, available at http://www.theguardian.com/us-news/2015/dec/18/google-political-donations-congress, last visited Match 5, 2016.

[16] *See* Ivana Kottasova, "Google is Spending Millions More to Lobby Europe," CNN Money, September 29, 2015, available at http://money.cnn.com/2015/09/29/technology/google-europe-lobbying/, last visited March 5, 2016.

The Ninth Circuit's recent decision parsing Section 512, *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1131-1132 (9th Cir. Cal. 2015) held that 17 U.S.C. § 512(c)(3)(A)(v) requires copyright holders to consider whether a potentially infringing material is a fair use of a copyright prior to issuing a takedown notification. See id. Since courts have long held that "fair use" is an affirmative defense[17] for which the infringer bears the burden of proof, the Ninth Circuit's interpretation of § 512 in *Lenz* suddenly puts an even heavier burden on already unduly burdened copyright owners. The Ninth Circuit decision in *Lenz*, shifting even more burden to copyright owners as a result of its interpretation of provisions within § 512, provides all the more reason why Congress should entirely reconfigure the hugely flawed §512 to reduce current burdens on copyright holders trying to protect their work.

Creators of copyrightable works should be working on their respective crafts and trying to get gigs,[18] rather than spending their time filing cumbersome DMCA-compliant

---

[17] *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

[18] *See, e.g.*, Amy Wallace, "Quincy Jones Turns 83 today. He Gives Us a Glimpse Into the Life of Musical Legend." Los Angeles Magazine, March 14, 2016, available at: http://www.lamag.com/l-a-icon/quincy-jones-gives-us-a-glimpse-into-the-life-of-a-musical-legend/, last visited March 14, 2016: 27-time GRAMMY winner and the producer of the best-selling album of all time, Quincy Jones, explains: "I try to tell all these young cats now: You've got to know music, man. You have to learn the science of your craft. Someone will say, 'Yeah, I used to read music, but I forgot.' Bullshit. That's not the way it works. You've got to love it enough to work for it, you know, and get your tools."

See also, e.g., Marshall Terill, "Spike Lee Frames Dialogue on Education and Film at ASU Gammage," March 4, 2016: "[Academy Award nominated film director Spike] Lee told aspiring filmmakers that a life in cinema is not for the weak or faint of heart. 'This business is tough. It's tough,' said the director whose latest film 'Chi-Raq' was produced by Amazon Studios. 'There is no such thing as an overnight success. Don't believe it. Whatever you do, you have to learn your craft. You gotta work, work, work.'"

takedown notices to ISPs that have already been asked to take down identical infringing material. I recommend that 17 U.S.C. §512 be re-written by Congress to ease the present and persistent burdens on copyright holders. I recommend that Congress pass legislation that would create a "Take Down Stay Down" framework for copyright protection online, in substitution for the current "Whack-a-Mole" framework that makes copyright owners' utilization of the current Section 512 largely futile.

Respectfully submitted

Rachel Stilwell