

IN THE MATTER OF THE DEVELOPMENT OF THE JOINT STRATEGIC PLAN ON INTELLECTUAL PROPERTY ENFORCEMENT

COMMENTS OF THE FUTURE OF MUSIC COALITION

August 10, 2012

The Future of Music Coalition (FMC) is pleased to submit these comments to the Office of the Intellectual Property Enforcement Coordinator (IPEC) in its efforts to achieve a Joint Strategic Plan for Intellectual Property Enforcement.

FMC is a not-for-profit collaboration between members of the music, technology, public policy and intellectual property law communities. FMC seeks to educate the media, policymakers and the public about issues at the intersection of music, technology, policy and law while bringing together diverse voices in an effort to identify creative solutions to challenges in this space. FMC also aims to document historic trends in the music industry, while highlighting innovative and potentially rewarding business models that will empower artists and establish a healthier music ecosystem.

These comments will naturally focus on the music community, which is our area of greatest expertise. However, we do believe there are commonalities between our industries and others that implicate the digital distribution and access of creative content. Fundamentally, FMC is concerned with creator compensation and the continued ability for artists to reach potential audiences. Despite the many liberating aspects of technology, there remain tremendous challenges to achieving a legitimate digital marketplace that rewards creators and satisfies consumers. As such, we support any and all good-faith efforts to improve conditions in today's cultural economies.

Our work in documenting artist revenue streams and the ways in which musicians from a broad array of disciplines earn a living has established an important base point for further analysis of reform in the creative landscape. At present, the compensation picture for musicians and composers is incredibly complex, with a range of revenue streams comprising a variable tapestry of revenue generation.¹ As recorded music continues its shift from physical good to digital access item, there is a need to identify what structures make the most sense in terms of artist compensation and consumer access to lawful, licensed products and services. Clearly, the enforcement of rights in a digital environment is crucial. We posit, however, that the safeguarding of these rights could be made more effective through tailored adjustments to the current licensing regime. Below, we outline four areas in which reform could alleviate some of the friction in today's marketplace and create a condition where more artists and rightsholders are paid more often.

¹ See generally *42 Revenue Streams* FUTURE OF MUSIC COALITION (June 2012) <http://money.futureofmusic.org/40-revenue-streams/> (naming 42 different ways in which musicians and/or composers can be compensated).

International Rights Database(s): Our associates have been working diligently to bring stakeholders together to establish global databases for music.² This would make it much easier to know who owns which piece of music, thereby streamlining licensing and putting more money in more coffers (including those of artists). We recognize that compulsory registries are not in step with our international treaty obligations. However, we maintain that the establishment of *voluntary* rights databases is an important prerequisite to an efficient, global licensing system. We believe that the US policymakers — IPEC, Congress, the Copyright Office, USTR, and beyond — should examine current registry efforts and push US rightsholders towards bringing them to fruition.

Tailored Solutions for Digital Services: We often hear complaints from artists and independent labels about the lack of transparency regarding payments on emerging digital services such as Spotify. Some of this could be because the market for streaming on-demand is not yet mature. Regardless, there is likely more to be done to ensure transparent, equitable compensation for creators. Due to the contours of current copyright law, and depending on the platform or use, there are roadblocks to direct and transparent artist compensation. A thorough review of §§ 114 and 115 of the Copyright Act should be undertaken to ensure that the statutory language enables, not inhibits, artist compensation and the promulgation of more legal, licensed services. Congress can and should play a role in advancing the legitimate digital marketplace. One model that provides for streamlined licensing, efficient enforcement and clear creator splits is the public performance right for digital broadcasts, as managed by SoundExchange. We suggest that such a license be considered as a potential framework for other categories of digital music use.

Orphan Works: One of the more persistent issues in the recorded music industry is in knowing what material can legally be used for new purposes. While we see functional rights databases as necessary to solving many issues of assignment, there is still the problem of how to treat works whose copyright owners cannot be located. We believe in the ability of the public and other parties to access and build upon works that are essentially abandoned, but have the strong preference that authors can be eligible for some limited remedies in the instance that they are locatable but the owner of the copyright is not. By aligning the interests of creators and new users, this “low hanging fruit” of copyright reform could finally be reachable. We encourage the respective agencies and Congress to work with stakeholders to implement a mutually-beneficial solution.

Sampling and Remix Culture: Technological advancement has unleashed a massive and global “remix culture,” placing strain on domestic and international copyright structures, as well as previous norms of creativity and information exchange. Meanwhile, long-recognized collage forms, such as sampling in hip-hop³, have been curtailed by court rulings that have stated that samples need a license. As a result, new creators struggle to

² See Global Repertoire Database, <http://www.globalrepertoiredatabase.com/> (last visited August 6, 2012); *Copyright and Related Rights*, WIPO, <http://www.wipo.int/copyright/en/> (last visited August 6, 2012).

³ KEMBREW MCLEOD & PETER DICOLA, *CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING* 127—147 (2011).

navigate the sample licensing process, which takes time, money and connections, and rightsholders miss possible opportunities for generating income from the range of ways in which their copyrights can be sliced, diced, recombined, globally performed, and distributed. Rather than simply accept an untenable status quo, we encourage policymakers to undertake a serious inquiry into sampling and remix culture, as well as current structures for enforcement and compensation, such as YouTube's Content ID. It would be useful to consider the statutory framework in which current case law rests to determine if there are legislative adjustments that would strike a more appropriate balance between ever-expanding creative uses and rightsholder protections.

Next, we will describe recent voluntary and legislative attempts around IP enforcement, with an eye towards broader stakeholder engagement and safeguards to preserve an accessible and competitive internet.

Measuring Effectiveness in IP Enforcement

Like many in the creative sector, FMC is pleased at IPEC's efforts to align incentives in the content, technology and service industries to protect the rights of IP owners while not unduly compromising those structures that are the very oxygen of the digital ecosystem. We see the voluntary best practices between payment processors and rightsholders as an important step in promoting greater respect for creative expression and intellectual property. We would, however, suggest that this and further efforts include a realistic means through which to measure outcomes, such as how many sites have been denied payment processing and what impact, if any, such restraints have had on the legitimate digital marketplace. In some instances, voluntary systems may have a greater chance of success than legislative mandates, but without clear targets and objectives, there is a danger that even the most well intended policies could be abused, or even ineffective.

There has been considerable coverage of the Department of Homeland Security's Immigrations and Customs Enforcement division, which has had some difficulties in determining legitimate online actors from those who perpetuate the kind of large-scale infringement that justifies the government's enforcement policies.⁴ Many in our industry are familiar with the record label practice of providing MP3s to taste-making bloggers. Often, however, the legal divisions of these entertainment companies are not able to verify which use has been authorized.

In today's marketplace where "leaking" is part of a larger promotional strategy, it makes little sense for the US government to target outlets whose purpose is to expose consumers to more music, rather than profit off of IP infringement. We recognize this is not an easy problem to solve, nor is it necessarily IPEC's sole responsibility to do so. Still, it is clear that such tensions necessitate a thoughtful, deliberate approach to enforcement that balances the dynamics of today's creative marketplace.

⁴ See e.g. Ben Sisario, *U.S. Shuts Down Websites in Piracy Crackdown*, N.Y. TIMES, Nov. 27, 2010, at B2 (quoting experts that say the law is too broad and may implicate sites that have nothing to do with file sharing).

We would extend our observations to the soon-to-be operational Copyright Alert System (CAS), which approaches the issue of online infringement in a more-or-less pragmatic manner. Consumer education must play a large role in combatting infringement, as there is no known combination of technological or policy measures that can single-handedly change the behaviors of millions of users. Under CAS, Internet Service Providers have agreed to implement a “graduated response” policy to educate and potentially penalize consumers who share or download unauthorized content.

Penalization under CAS comes after a user has accumulated multiple accusations of infringement. Still, the policy is hardly a “three strikes and you’re out” regime.⁵ More importantly, there appears to be sufficient due process, with the system including a kind of arbitration proceeding through which users can defend their behavior. Lastly, the ISPs will not be cutting off users’ internet — at worst, a user could experience redirects, temporary lockouts and slowdowns (which can already happen based on bandwidth usage, or an ISP’s individual customer agreement). The jury is still out on whether the system will actually help curb online infringement, but one thing seems clear: CAS is not a draconian policy. We do stress, however, that attention be paid to the impact of the system on unauthorized distribution, as well as any available data on whether implementation produces any measurable increase in consumer adoption of legal, licensed distribution platforms.

Musicians (and other creators) are not a monolithic group. What works for one type of artist (or discipline) may not be practical for others. This is especially true in today’s digital marketplace, where the challenges facing creators are not evenly distributed. Nor are opportunities portable, or necessarily scalable. This makes the financial impact of downloading and enforcement extraordinarily difficult to gauge. There is no doubt that the consistent collection and evaluation of data would result in a fuller picture. From our own research, however, it is clear that unauthorized distribution impacts different musicians in very different ways, though often significantly.

Any attempts to address infringement should take into account the broader creative ecosystem. Through more direct engagement with stakeholders that include actual musicians, managers and labels, we believe that both statutorily mandated and voluntary polices can be made more unambiguous and effective.

Transparency in Process

One major takeaway from recent legislative attempts to enhance US IP enforcement capabilities is that process matters to policymaking. The American copyright community includes creators and rightsholders in numbers that exceed those interests represented by a handful of established Washington, DC trade organizations — for example, independent musicians, performing arts organizations, screenwriters, mixed-media

⁵ See generally Center for Copyright Information, *Copyright Alert System (CAS)*, <http://www.copyrightinformation.org/alerts> (last visited August 6, 2010) (describing how CAS works).

makers, and many more. We feel very strongly that the perspectives of these creators and rightsholders must be recognized by lawmakers in order to devise effective IP policies.

It is encouraging that IPEC has solicited the viewpoints of the broader creative community, and we see the current call for public comments as keeping with this practical approach. Unfortunately, not all agencies and branches of government exhibit such a willingness to hear from those who would be ultimately affected by IP-related policies. Recent efforts to enact international IP provisions through trade agreements such as the Anti-Counterfeiting Trade Agreement and the Trans-Pacific Partnership have met tremendous controversy; sometimes on the substance, but mostly around the draft process, which was seen by public interest and civil society groups as lacking opportunities for broader input. The secrecy involved in crafting these proposals is troubling, but criticism of the process should not be taken as a dismissal of the need for a global approach to IP enforcement.

More can be done to ensure a proper balance between rightsholder protections and the public interest. Yet there is also a need to expand dialogue with those in the creative sector whose interests may not always align with major record labels and film studios. These musicians, composers, managers and independent labels also have a stake in debates about intellectual property and networked technologies. Without a means to evaluate how these creative entrepreneurs pursue their ambitions in today's marketplace, it is less likely that a given policy will be effective. Data-driven assessments about creativity, copyright and technology are essential to the formulation of policies that will not only protect rightsholders, but also grow and expand the legitimate digital marketplace. Greater transparency in process will also go a long way towards building trust between camps in which there has been a shortage of good faith collaboration.

A License to Express and Innovate

As FMC has long pointed out, the innovation fostered by an open, participatory internet will benefit and expand the legitimate digital marketplace, as more consumers discover robust, legal and licensed services that provide access to a broad array of high-quality content. There remains a tendency among some in the entertainment industries to foist a scarcity-based content model on an environment where instant access and abundance are the norm. Rather than to attempt to put the toothpaste back in the tube, we suggest that distribution reflect the increasing consumer demand for ubiquitous access across devices and platforms. We understand that, in some instances, product windowing and withholding content can be a boon. Yet it is important to recognize that the decisions made by major content companies impact not only digital services and downstream creators, but also consumers, who all too often turn to illegitimate platforms when desired content can not be conveniently accessed at a cost deemed reasonable.

The shift to on-demand access may mean that some techniques used to protect copyright are less viable. Still, if the established entertainment companies are to survive and compete in today's marketplace, they will need to become ever more tuned into the needs

of their customers. The good news is that by adopting a tailored approach to licensing, enforcement may become easier. The plain fact, which is not often discussed, is that certain licenses are less cumbersome to administer and defend. One tragedy of copyright enforcement through the deterrent of high statutory damages is that the spoils of litigation rarely, if ever, make their way to the artists whose expression underpins the entire industry.⁶ Surely there is a way to increase compensation opportunities for creators while eliminating the incentive towards endless litigation.

There is reason to be encouraged by the perpetuation of open network structures that allow for unhindered expression, innovation and commerce. Recent developments indicate that, where licensed services are available, consumers are beginning to forego peer-to-peer trading of both audio and visual content.⁷ This is good news. Policymakers, however, must be careful not to frustrate this fragile marketplace before the digital transition is complete. We urge IPEC and the administration not to waver in its support of an open, accessible internet. Without the ability for companies and individuals to compete on a level playing field, the creative and commercial ambitions of millions of artists could be compromised.

Harmonization of Royalty Obligations

Though not specifically a matter of enforcement, FMC believes that a public performance right for terrestrial radio would go a long way towards establishing greater balance across music industry sectors. Additionally, we see the right as beneficial to our global IP efforts, as international actors may be more inclined to respect the US rightsholder agenda were reciprocal compensation for over-the-air broadcasts in place. We appreciate the insights IPEC provided on this matter in the Office's March 2011 recommendations to Congress, and believe that the administration should continue to support a legislative solution to the unnecessary imbalance in creator and rightsholder compensation across terrestrial and digital broadcast platforms.

Other Considerations

Two other areas that may require a specific policy approach (though not necessarily enforcement related):

- **Copyright reversion for unexploited works:** While there is undoubtedly more opportunity now than at any other point in history for artists to retain and exploit

⁶ See e.g. Brian Barrett, *Money Won in Pirate Bay Convictions Won't Go Back to Artists*, GIZMODO, July 29, 2012, (indicating a deliberate decision to not compensate artists when litigation results in a monetary award). <http://gizmodo.com/5929944/money-won-in-pirate-bay-convictions-wont-go-back-to-artists-because-ugh>

⁷ DIGITAL MEDIA PROJECT, *CONTENT AND CONTROL: ASSESSING THE IMPACT OF POLICY CHOICES ON POTENTIAL ONLINE BUSINESS MODELS IN THE MUSIC AND FILM INDUSTRIES* 10—20, app. AII-4 available at http://cyber.law.harvard.edu/media/files/content_control.pdf (Jan. 2005) (describing the different models of content distribution and how they may decrease illegal P2P file sharing).

their own copyrights, it is still all too common for creators who have transferred their rights to an outside entity (such as a label or publisher) to have their expressions remain unexploited. Worse, these copyrights may remain with the label or publisher for the full statutory term of 35 years, depriving the author of other economic opportunities arising from their work. We thereby suggest that a copyright that has been transferred to a third party and has not been commercially exploited for three (3) years should revert to the original creator.

- **World Intellectual Property Organization (WIPO) Treaty for Sharing Accessible Formats of Copyrighted Works for Persons Who are Blind or Have other Reading Disabilities:** We would like to take this opportunity to express our support for WIPO's Treaty for the Visually Impaired. As a policy matter, FMC maintains that the visually impaired, as a matter of right, should be able to access certain types of media which are now restricted to them due to specific copyright provisions. The Treaty will allow the cross-border distribution of special-format reading materials. It also recognizes that 90 percent of visually impaired persons live in countries of low or moderate incomes, and attempts to redress this imbalance by taking into account disparities of incomes. We agree with the American Council of the Blind and American Foundation for the Blind that "[e]xpanded copyright exceptions and limitations and a global opportunity to share resources will truly benefit the population of people in the United States with print disabilities." We would appreciate any efforts on behalf of IPEC to inform the USTR about the benefits of limited exceptions to improve the lives of the visually impaired.

Conclusion

FMC believes that intellectual property is of little value if the exclusive rights attached cannot be effectively enforced. We appreciate government efforts to better understand and address the challenges in protecting intellectual property in a globally networked environment. We also suggest that the false dichotomy between technology and IP must be abandoned in order to achieve progress in advancing American intellectual property and encouraging the very innovations that can make this possible in an international context.

We feel strongly that recent legislative efforts to enforce intellectual property were not emblematic of a process that could have provided relief to those whose IP is being exploited for large-scale commercial gain by overseas actors. By ignoring the technical experts and the broader community of creators and rightsholders, the authors of the Stop Online Piracy Act, in particular, missed an opportunity to work meaningfully with a community whose interests are not opposed to the implementation of tools to combat infringement. Worse, crafting workable policy to address some of these issues has become less likely in the face of persistent skepticism among Americans of all backgrounds regarding legislative process and intent.

There is no reason why IP enforcement cannot exist comfortably with free expression, innovation and commerce. To achieve the appropriate balance between these ideals will require consultation with a wide array of stakeholders, as well as the close consideration of data that can shine light on how the existing IP marketplace functions. Going further, there is a need to understand how creators — including musicians and songwriters — are faring in today’s cultural economy, as well as which structures are proving the most useful advancement of their expressive ambitions.

Solving the most persistent issues at the heart of the digital marketplace will likely require greater flexibility among policymakers and stakeholders. All players in the ecosystem must consider good-faith ideas and proposals as a means to avoid the counterproductive intrigue that marred the SOPA process. IPEC, as well as other government agencies, must be willing to play a role in spurring the IP and innovation sectors towards a mutual respect for the roles each play in advancing American enterprise and ideals.

We thank you for the opportunity to submit these comments, and look forward to the next iteration of the Joint Strategic Plan.

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