

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

COMMENTS OF THE FUTURE OF MUSIC COALITION

October 16, 2015

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 establish the next Joint Strategic Plan for Intellectual Property Enforcement.

FMC is a Washington D.C.-based nonprofit organization supporting a musical ecosystem where artists flourish and are compensated fairly and transparently for their work. FMC works with musicians, composers and industry stakeholders to identify solutions to shared challenges. We promote strategies, policies, technologies and educational initiatives that always put artists first while recognizing the role music fans play in shaping the future. FMC works to ensure that diversity, equality and creativity drives artist engagement with the global music community, and that these values are reflected in laws, licenses, and policies that govern any industry that uses music as raw material for its business.

Since 2000, FMC's main focus has been creator compensation and the ability for music artists to reach potential audiences. While we champion innovations that allow musicians and independent labels to conduct business on a more level playing field, we recognize the challenges to achieving a legitimate digital marketplace that rewards creators and satisfies consumers. We support protections for those whose work powers the 21st century music ecosystem, especially for smaller artists and rightsholders. We also understand that many of the tools today's creators use to cultivate fans and generate revenue benefit from open and accessible online

infrastructure. We feel strongly that the next Joint Strategic Plan should embrace and advance this balance.

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.¹ At present, the compensation picture for musicians and composers is incredibly complex, with a range of revenue streams that can vary depending on an artist's vocational focus. As recorded music continues its shift from an ownership to access model, there is a need to identify what structures make the most sense in terms of artist compensation and consumer access to lawful products and services. Clearly, the enforcement of rights in a digital environment is crucial. In many ways, the safeguarding of rights would benefit from a new approach for licensing content in a dynamic and largely digital marketplace. We describe potential approaches below.

International Rights Database(s)

Future of Music Coalition has for many years supported the creation of accessible, machine-readable, interoperable and publicly searchable databases on music copyright ownership, along with broadly deployed data standards to reduce inaccuracies in reporting and royalty distribution. The establishment of voluntary rights databases is an important prerequisite to an efficient, global licensing system. Earlier efforts to establish a comprehensive, authoritative database for musical works—the Global Repertoire Database (GRD)—broke down for any number of reasons, including governance, expense, political will and corporate incentive. This does not mean that government should abandon database efforts to the private marketplace, where there is still a strong tendency to view copyright ownership information as proprietary, and where even those companies that promote technological efficiency through data may not adhere to universal standards. We believe that the US policymakers—IPEC, Congress, the Copyright

¹ *Artist Revenue Streams Study*. Future of Music Coalition, n.d. Web. 16 Oct. 2015.

Office, USPTO, USTR, and beyond—should encourage US rightsholders and technology interests into bringing authoritative databases to fruition by any means at their disposal.

We recognize the many barriers to implementation. In today's music marketplace, data is a kind of currency. It can be difficult getting key players—such as major record labels, publishers and performance rights organizations (PROs)—to pool their resources for fear of losing whatever competitive advantage they believe they have by withholding such information. Another issue is technological capacity. Many of the organizations and societies responsible for the collection and distribution of music royalties were born in an analog era and may not be equipped to track data at increasing global scale and volume. Globally, rights societies were established to serve specific territories with their own unique laws and customs; adapting to a global marketplace poses not only technical challenges, but also faces cultural resistance. Lastly, there is an issue of cost and management. Who pays for such a database, and who is ultimately responsible for its integrity and functionality? These remain open questions.

To an extent, there are legitimate reasons for delays in achieving comprehensive ownership databases for music. But the result is still the same: the lack of such systems not only frustrates transparent payment to creators, but also makes it more difficult for new services to enter the marketplace. Going further, the absence of authoritative databases affects outside investment in the music sector, and thereby growth. Who would invest in such a fractured and inefficient market?

We suggest that the next Joint Strategic Plan recommend a process whereby stakeholders can affirmatively commit to adopting data standards, with oversight by a federal agency (most likely the United States Copyright Office). From there, IPEC could either work towards a voluntary agreement for copyright owners to establish interoperable, publicly searchable searchable databases using these standards, or recommend to Congress that legislation be enacted to compel standards and

databases. Implementation will likely require a combination of public and private resources, but every day that goes by without reliable systems is another day of black boxes and finger-pointing. The digital transition is difficult enough without the specter of market failure. We encourage IPEC to endorse or help spearhead efforts to align incentives among stakeholders. Although what we describe is a music industry concern, achieving a protocol for information management in copyright-centric industries could help pave the way for the adoption of analogous systems in other creative sectors.

Transparency

A topic *du jour* in music and technology debates, transparency may mean different things depending on what position one occupies in the digital ecosystem. We have identified three distinct kinds of transparency, each of which is crucial to a functional—and global—digital music marketplace built on integrity and accountability.

1. structural transparency: how different services function and how they compensate artists
2. repertoire transparency: readily available ownership information to facilitate more efficient licensing and accuracy in payment
3. rates and revenue transparency: how money is split, who gets paid what and why

Structural transparency relates directly to aforementioned data issues. In some areas, such as the public performance of sound recordings on digital radio, we see efficiencies borne of structural transparency. In the US, both the label and the performer are paid via SoundExchange—the nonprofit organization designated to collect and distribute royalties to labels and recording artists. The revenue splits are straightforward: labels get 50 percent; the featured performer gets 45 percent (which can be split among band members if the featured performer is a group); five percent goes to background singers and musicians. SoundExchange pays labels and

artists directly and simultaneously, and the artists' portion is not held against "recoupables," or their debt to their label.

SoundExchange has consistently improved their systems and disburse royalties on a monthly basis to the tune of \$161 million in the second quarter of 2014 alone. It is important to note that federal policy is the reason this entire system exists. The so-called "statutory license" established by the 1995 Digital Public Performance Right in Sound Recordings Act mandates payment to labels and performers for digital radio plays. The result is a framework that can claim structural transparency (artists know what they're getting paid and why); rates transparency (the splits are clearly articulated and apply across the board); and repertoire transparency (a licensed service knows it can play any sound recording, provided that it pays a set rate and fulfills reporting requirements).

Repertoire transparency is important in areas of the marketplace that operate under statutory or de-facto compulsory blanket licensing schemes. Major music publishers are currently seeking to withdraw digital catalog from performing rights organizations ASCAP and BMI. This would mean that any online radio service—including smaller commercial or non-commercial platforms and new entrants—would need to obtain specific permission from the publishers in order to perform music. This might result in higher rates for the major publishers, but independents are unlikely to have a seat at the negotiation table. Likewise, smaller radio operators—college stations, niche webcasters, etc.—would face hurdles in obtaining rights to perform songs controlled by major publishers if they are unable to get blanket licenses from the PROs.

Another frustration around repertoire transparency comes down to not knowing what is and isn't in a publisher or PRO's catalog. Without the benefit of a blanket license or (at the very least, information about what songs are off-limits), broadcasters are opening themselves up to liability—up to \$150,000 per work for willful infringement. For direct licensing to work, there must be publicly available

information about publishing repertoire that can be easily matched to sound recordings.

Rates and revenue transparency are also crucial, on both the publishing and sound recording side. For songwriters and composers, there are concerns that direct deals can be structured in a way that the rates are below market, but publishers receive cash advances and potentially equity shares, with no established means of sharing this revenue with writers. The Songwriters Guild of America, which conditionally supports modifying or sunseting the consent decrees that govern ASCAP and BMI, has been forthright about their transparency concerns.²

Recording artists and music managers have similar frustrations with regard to royalty distribution for sound recordings. According to “Dissecting the Digital Dollar,” a recent report from the UK Music Managers forum: “labels, publishers and CMOs have created templates for streaming service deals, with revenue share arrangements, minimum guarantees, advances, equity and other kickbacks. Artists and managers are often kept in the dark about these arrangements; are rarely consulted on the merits of each component of the deal; and many feel artists are being unfairly excluded from profits generated by advances, equity and other benefits offered to corporate rights owners.”³

While not strictly a matter of enforcement, it is instructive to consider how transparency in the digital content ecosystem can reduce friction and aid in enforcement simply by creating conditions for parties to act in good faith as a common practice, rather than an exception. Enforcement abuses often occur in an environment of mistrust; “infringement as a business model” becomes attractive where an excuse can be made that licensing is too difficult achieve. We by no means intend to suggest that these are appropriate responses to existing tensions.

² “‘Transparency’ Is the Unspoken Word at NMPA Town Hall Meeting.” *Www.songwritersguild.com*. Songwriters Guild of America, n.d. Web. 16 Oct. 2015.

³ “‘Dissecting The Digital Dollar’ Report.” *The MMF*. N.p., n.d. Web. 16 Oct. 2015.

However, the most egregious behaviors can perhaps be mitigated with a new standard of transparency across the three core areas we identified. IPEC can play a role in encouraging rightsholders and digital service providers to do their part to promote transparency.

Open and Collaborative Approaches to Enforcement

The American copyright community includes creators and rightsholders in numbers that well exceed the trade industry groups operating in Washington, DC. With the expansion of digital technology, stakeholders can be literally anyone who fixes a work in a tangible medium. This includes independent musicians, graphic designers, bloggers, performing artists, screenwriters, game designers, podcasters, arts presenters and countless others. We see the current call for public comments as a worthy attempt at including more voices in this important process. Irrespective of its provisions, the Trans-Pacific Partnership has been criticized for its lack of opportunities for review and input beyond a narrow category of industry.

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 corporations, whether they are technology or content companies. Without an examination of how creators are faring beyond the common narratives, it is more difficult to craft effective policy. 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 long been a shortage.

Notice-and-takedown

In practice, the Digital Millennium Copyright Act (DMCA) S. 512 notice and takedown system hasn't been impeded by lack of compliance so much as selective or ineffective compliance. There are perfectly reasonable arguments on all sides of the

issue, which tend to break down to who bears the burden of enforcement, at what cost and under which conditions. We understand very well that smaller music companies and independent artists may lack the time and resources to send takedown notices in all the places infringement may occur. On the other hand, safe harbors are important because they allow for the development of innovations that power the legitimate marketplace that musicians use every day. Rather than focusing solely on the large rightsholders who are in a position to automate the process or large-scale technology platforms with the ability to process bulk requests, we believe more attention should be paid to small-to-medium size enterprise (SME) on the rightsholder and developer side. Here, the interests may be more aligned than the rhetoric from bigger companies might lead one to believe. SME on the content side are often in a position to make use of a new innovation well before larger companies can schedule the meetings necessary to arrive at a decision. Twitter, for example, was not something that larger media conglomerates found particularly useful until individual artists began using it to have real-time exchanges with fans. Twitter's developers didn't exactly know how users would respond to the service either. But they may have never gotten the experiment off the ground had it not been for safe harbors limiting their exposure to potential infringement committed by users. FMC does not have a perfect reply to exhortations of imbalance or accusations of abuse with regard to S. 512. We do believe, however, that before entering a policy battle to amend or modify the existing requirements, there should be a consideration of how changes might impact independent creators, content publishers, developers and users. It is entirely possible that DMCA S. 512 creates conditions for a suppression of market rates for music licensing. We want streaming services to succeed and for artists to be paid more as adoption increases; if data can demonstrate that safe harbors are impacting growth, a policy response is warranted. But first we need the data. It is also possible that DMCA-enabled services are among the few viable options for bringing a product forwards in an environment of incredible consolidation among content companies. A combination of effective technologies to allow for greater control over where a work is used, comprehensive and authoritative databases for ownership information and more flexible and

expansive licensing frameworks may help avoid a potentially destructive showdown over safe harbors and takedown requirements. The United States Copyright Office intends to examine these issues more closely, and we encourage IPEC to do the same. We only suggest there be a commitment to considering the interests of a broad range of parties.

Neighboring rights

FMC and our allies and partners in the music community believe 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 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.

Conclusion

FMC believes that intellectual property is of little value if exclusive rights cannot be effectively enforced. We appreciate government efforts to better understand and address the challenges in protecting intellectual property in a globally networked environment. However, in order to achieve progress in advancing American intellectual property and encouraging innovation, it is crucial to evolve past the dichotomy of content vs. technology. We believe that IP enforcement can and must exist alongside with free expression, innovation and commerce.

Respectfully,

Casey Rae

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