

Testimony of
Future of Music Coalition
On
“The Scope of Copyright”
Hearing

**House Subcommittee on the Courts, Intellectual
Property and the Internet**

January 14, 2014

House Subcommittee on the Courts,
Intellectual Property and the Internet
2138 Rayburn Office Building
Washington, DC 20515

September 18, 2013

Dear Chairman Goodlatte, subcommittee Chairmen Coble and Marino and members of the committee:

We are honored to submit the following testimony for the record in this hearing on the scope of copyright.

Future of Music Coalition (FMC) is 13 year-old national nonprofit education, research and advocacy organization for musicians. The bulk of our work over the years has concerned how musicians and composers reach audiences and are compensated. FMC understands that balancing access and remuneration can be a challenge—especially given the range of established and emerging stakeholders—but we are convinced that this balance is essential for musicians and other creators to flourish.

The advent of the global Internet has made striking this balance even more urgent. No longer is expression limited to the geographic region in which it was created—art and ideas can now be published across the world with the click of a mouse or a tap of a screen. Clearly, the scope of content distribution can facilitate new commercial opportunities, as well as new opportunities for freedom. But it also creates challenges. America's free market and speech traditions, often the envy of individuals abroad, are not always mirrored in the laws and norms of other nations. Therefore, we must be thoughtful when considering the scope of copyright and how our intellectual property agenda squares with our values when played out on an international stage. To demonstrate and maintain leadership in the 21st century, America must encourage respect for speech and creativity even while pursuing new avenues of enterprise. And more so, we must pay more than lip service to the needs of our own creators, by ensuring that copyright—in

both scope and application—serves the interests of those whose inspiration and creativity give it substance.

The current scope of copyright is informed by the historic development and ongoing influence of major media companies that own a tremendous number of works. These companies may perceive themselves at a disadvantage against today's successful technology concerns, but increasingly, the two sides share a common agenda: demonstrating consistent growth in a global marketplace. Monetizing content is a crucial component of this agenda. This is likely why Comcast now owns NBC/Universal, not to mention the ongoing role played by companies like Apple and Google in determining how works are accessed. Vertical integration of content, application and pipe may be a winning proposition for large corporations, but it doesn't necessarily spell success for individual creators. Congress has a responsibility to ensure that our copyright laws serve those whose expression powers the entire marketplace. To do so will require resisting the readymade narratives of a handful of corporations in order to hear and better understand the experiences of artists.

Being a music organization, FMC will keep these comments focused on those aspects we see as having a direct bearing on the musician and composer communities. Our observations around copyright and compensation are both quantitative and qualitative: FMC's ongoing research into artist revenue streams offers data-rich insights into how today's artists are earning a living;¹ our own efforts as artists, songwriters, label owners and producers—as well as the experiences of the many musicians, rightsholders and advocates with whom we work—also inform our views.

Putting Creators Front and Center

In earlier eras, bringing a work to the marketplace was a time and labor-intensive proposition that often came with considerable expense. The vast majority of creators had few, if any, opportunities to reach audiences due to these factors. Those who were lucky

¹ "Artist Revenue Streams | a Multi-method, Cross-genre Examination of How US Based Musicians and Composers Are Earning a Living." *Artist Revenue Streams*. N.p., n.d. Web. 13 Jan. 2014.

enough to attract the investment necessary to bring a work to the marketplace were typically required to enter deals with entities in a position to assist in manufacturing, distribution and promotion of a work. Such contracts were not always fair to creators; critiques of the historic inequities in the entertainment industries are comprehensive. Today's environment is less restrictive in terms of offering artists access to potential audiences, yet many of the structures that govern the marketplace—legal and otherwise—are vestiges of an earlier formula.

Given the sheer amount of entertainment options competing for our attention everyday, it would be lacking in judgment to say that creators no longer require any assistance in exploiting their work. However flawed the old system might have been, it did engender investment in the creation and dissemination of music. Investment is still important, even with lower barriers to entry and new options such as crowdfunding. With the changes to the creative landscape, Congress has even more of a duty to ensure that the Constitutional imperatives of copyright remain viable for creators and not just those who facilitate access to works or their commercial exploitation.

To be blunt, Article I, Section 8, Clause 8 of the United States Constitution² nowhere mentions rightsholders. It secures to *authors* (and inventors) limited-time exclusive rights. Therefore, it is well within the mandate of Congress to establish copyright laws that foremost serve authors, including musicians and composers. We understand the many complexities in doing so, and offer a few basic principles as guidance.

In 2009, FMC published its “Principles for Artist Compensation in New Business Models.”³ (We intend in the coming weeks to update this document to reflect current developments.) Our goal with the Artist Principles was to advance commonsense and implementable criteria by which a more equitable environment for musicians and composers could be established. At the time, some saw these principles as Pollyannaish,

² "Transcript of the Constitution of the United States - Official Text." *Transcript of the Constitution of the United States - Official Text*. N.p., n.d. Web. 12 Jan. 2014.

³ "Future of Music Coalition." *Principles for Artist Compensation in New Business Models*. N.p., n.d. Web. 13 Jan. 2014.

but intervening years and a growing chorus of artist voices have reinforced our belief that we were on the right track. Among the principles advanced:

Equitable compensation

Musicians and composers should be guaranteed fair splits for the commercial exploitation of their work. An example of what we believe to be an artist-friendly compensation structure can in the digital public performance right for sound recordings, in which featured performers receive 45 percent of the royalty, with 50 percent going to the sound copyright owner and five percent to background musicians and singers.⁴ In an environment where direct deals outside of the statutory license are increasingly common,⁵ we believe that Congress has a responsibility to ensure that private marketplace deals do not disadvantage the creators of the work—in this case, performers. Such an arrangement may offend the delicate sensibilities of free market champions, but we believe that protecting the rights of creators to be compensated for the use of their work as a constitutional obligation, and one well within the authority of Congress to enforce. Congress may also consider extending this right to environments outside of a public performance context.

Transparency

Many business deals involving emerging digital business models are fundamentally lacking in transparency. This frustrates the ability of creators and artist advocates in understanding how compensation agreements are arrived at and makes it next-to-impossible to push for more equitable terms. The prevalence of non-disclosure agreements (NDAs) creates unease among stakeholders and may ultimately inhibit the growth of the legitimate digital marketplace. While non-disclosure agreements can certainly be rationalized as necessary to the interests of competing corporations, serious problems arise when creators are kept in the dark. A lack of transparency can be corrosive to trust and participation at a time when these virtues are in short supply. Going

⁴ "Future of Music Coalition." *Public Performance Right for Sound Recordings*. N.p., n.d. Web. 13 Jan. 2014.

⁵ Rae, Casey. "Guest Opinion: Clear Channel/Big Machine Deal Is Step In Right Direction, But Not Far Enough, by Future of Music's Casey Rae." *Billboard*. N.p., 26 July 2012. Web. 13 Jan. 2014.

further, there is a persistent problem with non-attributable income in music industry deals. From damages awarded in filesharing litigation to bundling deals and equity partnerships, there is an appalling lack of clarity regarding artists' economic benefit (or lack thereof). Royalty distribution calculations based on market share reward only the largest corporate players, while "black boxes" remain an ongoing impediment to compensation in an era where informational efficiencies should make it easier to pay and get paid. Congress should do everything in its power to encourage stakeholders to work together to make transparency a common virtue and help align incentives so that participants can recognize the benefits of accuracy and accountability.

Direct compensation

Where possible, revenue owed to artists for any use of their work on digital platforms should go directly to the artist. Without direct payment, all the revenue generated by these new models will be delivered to the labels (and/or publishers) for dissemination to the artists in the form of royalties. However, history has demonstrated that labels' accounting practices are not always to be trusted. We understand that recoupment is important to companies investing up-front capital in a work. Yet it is certainly possible to construct agreements for more limited times than the 35-year term of transfer established by Congress in the 1976 Act. Even without altering the statutory term of grant transfer (or, in the case of the major labels, even recognizing its validity), parties could enter an agreement in which revenue goes to a label for a set period of time (say, 3-5 years), after which the artists' share (let's say 50 percent) is paid directly to the artist until the time of eligibility for filing to reclaim full rights to the work.

There are other issues with a direct bearing on artists, including leverage and representation. It is entirely common for negotiations about creator compensation on emerging platforms to occur without any input from artists. In other instances, artists have proxies, such as performing rights organizations (PROs), or for superstar artists, lawyers and management. Still, huge swaths of artists and songwriters—especially those not affiliated with labels or publishers—have zero representation in these negotiations. Congress should consider these issues closely to determine how (or whether) the diverse

array of creators protected by copyright are currently being served by the companies and organizations involved in setting the terms for today's marketplace.

The Importance of Accessible Communications Networks and Cultural Infrastructure

We now turn to the concept of access and innovation as a driver of creative expression and commercial opportunity. Individual artists and large media companies alike depend on technology to bring their work to the public. For musicians and composers, this means that they needn't solely rely on outside entities to create, distribute and promote their work. Of course, the lower barriers to entry also mean more competition, and the inherently promiscuous nature of networked technologies pose challenges to the protection of rights. Still, it is clear that in 2014, the Internet—both wireline and mobile—remains the most powerful tool an artist has to reach potential audiences.

It may seem that we've solved the problem of access for creators, but this critical resource is hardly evenly distributed. At the time the National Broadband Plan was published in 2010, around 100 million Americans lacked access to broadband Internet in their homes.⁶ Where broadband Internet is available, users often have only one or two choices in providers. Prices remain high for wireline Internet service, and just a few companies control the rapidly growing mobile space. An absence of competition may be a factor in escalating consumer costs as well as the lack of incentive to build out to more communities. It also may encourage telecommunications carriers to enter preferred partnerships with well-capitalized media companies who can afford to pay for premium access to subscribers. This would not only hinder innovations useful to creative entrepreneurs, but would also frustrate independent artists who increasingly depend on a level online playing field. While there are currently rules in place to prevent discrimination by wireline Internet Service Providers (ISPs), there are few protections extended to mobile.

⁶ "The National Broadband Plan." - *Broadband.gov*. N.p., n.d. Web. 14 Jan. 2014.

Telecommunications companies are poised to take advantage of these loopholes. AT&T recently announced a “sponsored data” scheme in which the company would not charge its subscribers for data overages engendered through the use of the services and applications of its preferred partners.⁷ While such activity may be permissible even under current rules for wireline, it illustrates how competition and clear rules of the road are necessary to creators and other innovators. If ISPs are allowed to pick winners and losers among applications and services, creators might find themselves locked into structures that don’t play to their economic advantage, thereby frustrating a key incentive of our copyright regime.

At first blush, access and innovation may not seem germane to discussions about the scope of copyright, but given the interconnected nature of our communications platforms and the role they play in expression and entrepreneurship, there is every reason for Congress to consider issues of broadband competition and openness in its ongoing review. Likewise, given debates about the scope and intent of international trade agreements around intellectual property, it is crucial that the need for meaningful protections not interfere with our commitments to free speech and democratic participation.

Demonstrating Global Leadership

We recognize these discussions about the scope of copyright are taking place with an eye towards harmonizing international standards for intellectual property protections. Judging from the intensity of the public response to legislative proposals such as the Stop Online Piracy Act, passions can run hot regarding international copyright issues. We feel that it is the wrong takeaway for Congress to assume that it has no business in helping to shape American approaches to global IP enforcement. To us, the SOPA blowback is a lesson in transparency and a more inclusive process, not a condemnation of Congress’ role in

⁷ Weinberg, Michael. *The Daily Beast*. Newsweek/Daily Beast, n.d. Web. 14 Jan. 2014.

establishing mechanisms for protection. We feel similarly about international negotiations such as the Trans-Pacific Partnership, which has come under criticisms for a lack of transparency, among other things. As we asserted alongside other public interest groups in a 2009 letter to President Obama regarding the Anti-Counterfeiting Trade Agreement,⁸ the lack of disclosure about terms under negotiation can set a troubling precedent, especially for those countries without strong democratic, speech and open marketplace traditions. Congress can and should play a role in clarifying America's intent with regard to global intellectual property standards and work to ensure that those negotiating on America's behalf understand the importance of a balanced and thoughtful copyright regime at home and abroad.

Conclusion

The scope of copyright is a topic that is too vast for any one hearing or testimony to cover. We sincerely hope that the subcommittee continues to move forward with its review while keeping track of the many varied perspectives of the stakeholders it calls forward, especially those of the creators whose expression forms the basis of our constitutional rationale for copyright. We appreciate the opportunity to submit this testimony and look forward to engaging in future discussions about these important matters.

Casey Rae
Interim Executive Director
Future of Music Coalition

⁸ "Group Letter to President Obama Expressing Concern Over Lack of Transparency and Openness Surrounding Negotiations of ACTA | Public Knowledge." *Group Letter to President Obama Expressing Concern Over Lack of Transparency and Openness Surrounding Negotiations of ACTA | Public Knowledge*. N.p., n.d. Web. 13 Jan. 2014.