

**IN THE MATTER OF COORDINATION AND STRATEGIC PLANNING OF
THE FEDERAL EFFORT AGAINST INTELLECTUAL PROPERTY
INFRINGEMENT: REQUEST OF THE INTELLECTUAL PROPERTY
ENFORCEMENT COORDINATOR FOR PUBLIC COMMENTS REGARDING
THE JOINT STRATEGIC PLAN**

COMMENTS OF THE FUTURE OF MUSIC COALITION

March 24, 2010

The Future of Music Coalition (FMC) is pleased to submit these comments to the Office of the Intellectual Property Enforcement Coordinator (IPEC) to promote the development of a Joint Strategic Plan for improving the government's intellectual property enforcement efforts.

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.

As IPEC considers a range of issues, many of which could impact the creative sector, we urge that any strategies adopted to protect intellectual property do not stifle artistic or technological innovation or unduly impact the lawful uses of copyrighted work. FMC understands that revenue streams and marketplace conditions for artists and the music industry have continued to evolve, with new challenges and opportunities presented by ongoing technological developments. As such, any strategy for intellectual property protection in the digital era must consider the following questions:

- How to encourage the development of legal, licensed services as a viable alternative to unlawful filesharing
- How to ensure that all creators have access to a legitimate digital music marketplace
- How the independent sector would be affected by new efforts to enforce intellectual property

The Importance of a Legitimate Digital Music Marketplace

The music industry is in the midst of a rocky yet unavoidable transition to a digital marketplace. Yet even when physical media, traditional broadcasting and brick and mortar retail were the cornerstones of most business models, there were already troubling signs for the industry. In the 1990s and early 2000s, when CD sales were strong, major

labels and commercial radio stations were becoming increasingly consolidated, leaving little room for innovation-based growth and independent artist participation.

The music industry's considerable investment in — and dependence on — the terrestrial production and distribution pipeline undermined its ability to more smoothly transition to digital platforms. Even today, there seems to be a desire among some in the industry to compel digital technologies to conform to earlier, scarcity-based models. But as we have seen in the past decade, most of these attempts — from DRM on digital downloads to geolocation limitations on streaming media — have not been embraced by consumers. While it is true that traditional promotion and retail have been massively impacted by the advent of new technologies, there has also been unprecedented growth in the number of services for the lawful distribution and discovery of music.

Technological innovation has reshaped the way that music is recorded, manufactured, promoted and distributed. Digital studios and software programs dramatically reduce production costs. The internet vastly increases promotional and commercial opportunities. The marketplace for independent music has exploded, as indie labels and artists take advantage of the vast reach and direct-to consumer potential of the web. While much of this music is simply not meant to attract the kind of mass audience attractive to major labels or commercial radio, there clearly is a market for a wide range of creative content. To fulfill consumer desire for broader forms of artistic expression, new systems for distribution of and access to content have emerged. At this point in time, there are a plethora of platforms for lawful music discovery, including webcasters such as Pandora, download stores such as iTunes and eMusic and on-demand streaming services such as Rhapsody, Napster and MOG, all of which compensate rightsholders. It is still early days for these new business models, and their viability will depend on consumer adoption and whether operational and licensing costs can be balanced against revenue generation. Still, the fact that these services have emerged over last ten years has been a promising development for creators.

As these new digital services take shape, many musicians are embracing business models that allow greater independence and facilitate direct contact with their fans. Of course, there are those who express understandable skepticism that even legitimate digital distribution structures can be monetized at a level that would replicate revenue streams generated by physical media. Yet in the midst of ongoing conversations about monetization for traditional industry stakeholders, we must not overlook the independent and niche music artists for whom access to the marketplace has historically been restricted by powerful gatekeepers such as major labels and commercial radio station programmers. The ability for these artists to reach potential audiences and participate in new revenue streams has been greatly enhanced by technologies like the internet. Therefore, it is important to consider whether and how public policies that relate to these technologies would impact the ability for musicians to access the marketplace without having to sign away their copyrights to as a condition of doing business.

It is also important to recognize that we are still in the early days of a significant marketplace transition. While peer-to-peer technologies that facilitate the widespread

distribution of copyrighted content remain popular, a legitimate digital marketplace is emerging. Consumers and creators alike are embracing licensed platforms for music access and discovery, including satellite radio, digital subscription services, internet radio, licensed video sites and digital download stores. Increasingly, the public is displaying a willingness to adopt legitimate services, which reinforces the critical notion that the combination of technical innovation, access to the underlying delivery mechanisms and reasonable licensing terms can create a revitalized industry that serves both musicians and music fans.¹ By more clearly understanding consumptive behavior, such as the increasing desire for on-demand content, the creative industries will be better able to implement models that fulfill consumer expectation while diminishing the attractiveness of piracy.

FMC is by no means suggesting that current conditions are ideal, or that we have a tidy solution to a host of increasingly interlinked marketplace and policy concerns that impact the creative sector. We recognize that the digital transition is complicated, but the goal of a more functional music ecosystem is one that stakeholders across the industry can and should share. Any strategies for the protection of intellectual property in the digital realm should take into consideration these factors.

Additionally, we feel confident that tomorrow's content marketplace will be defined by consumer adoption of broadband technologies, which come with their own regulatory and technological concerns. Spectrum and internet policy, as well as the viability of traditional broadcast mediums, will play a significant role in determining how consumers are able to access content and how creators will be compensated in the future.

Enforcement Should Not Stifle Innovation and Creator Access

A government mandated plan for intellectual property that creates too many barriers to open internet innovation could compromise artists' ability to reach audiences on their own terms and participate in potentially rewarding new revenue streams.

FMC has long advocated for structures that allow more musicians to access the marketplace and cultivate fans, with equitable compensation mechanisms as an essential component of any model². Increasingly, the internet is the main tool creators have at their disposal to advance their careers. Musicians, in particular, depend on open internet structures to engage in a variety of ways; from direct interaction with audiences, fans and patrons to booking tours and selling merchandise to collaboration with other artists.

FMC feels strongly that the continued innovation fostered by open internet structures will benefit and expand the legitimate digital marketplace, as more consumers discover

¹ Claire Cain Miller, *Pandora: In the Middle of Music*, NEW YORK TIMES, March 8 2010. available at <http://bits.blogs.nytimes.com/2010/03/08/pandora-in-the-middle-of-the-music/?scp=2&sq=Pandora&st=Search>

² *Digital Music Interoperability: Hearing Before the House Committee on the Judiciary*, 109th Cong. (2005) (Statement of Michael Bracy, Policy Director, Future of Music Coalition) available at <http://futureofmusic.org/filing/testimony-fmc-policy-director-michael-bracy-front-house-judiciary-committee-digital-music-int>

robust, legal and licensed services that provide lawful access to a broad array of high-quality content — primarily on-demand. Although the entertainment industries are currently experimenting with pricing models, recent developments indicate that, where licensed services are available, consumers are beginning to forego peer-to-peer trading of both audio and visual content³. This is encouraging news for rightsholders; stakeholders and policymakers must be careful not to frustrate this marketplace before it has a chance to mature.

Rightsholders tried many different methods to control the unauthorized dissemination of their works: Digital Rights Management (DRM) embedded in songs, watermarked CDs, lawsuits against P2P sites like Napster and Grokster and, eventually, suits against individual filesharers. Each of these remedies had their own drawbacks, and it's fair to say that none of them was particularly successful at boosting music sales. What really changed the landscape was the Apple iTunes Music Store. Launched in 2003, iTunes gave consumers access to an organized, streamlined music store that offered a huge range of tracks — independent and major — at a price many consumers embraced. iTunes was followed up by equally impressive music ventures such as Amazon's music store, Pandora, ReverbNation, MOG, and dozens more; each a tangible demonstration of the positive outcomes that can occur for musicians when technological innovation and consumer access to broadband come together via legal, licensed music services.

It is important that we remain flexible in terms of pursuing legal or technological remedies to the problem of unauthorized filesharing. While methods and strategies are discussed and potentially implemented, creators must be assured that their own content would not be unfairly discriminated against or subject to ISP monetization schemes that favor only the best-funded enterprises. Likewise, any legal remedies meant to enforce IP protection must be balanced with a respect for lawful uses, regardless of the means of transmission of said use.

Thoughtful Policies and a Broader View of Stakeholders

As we previously mentioned, the marketplace for artists is still evolving. In order to establish viable alternatives to unauthorized filesharing, business models may need to be refined, if not re-conceptualized, while leaving the door open for further innovation. It must also be noted that the internet's global reach presents a range of challenges for intellectual property enforcement. Halting the manufacture and distribution of knockoff physical products is hardly the same as policing real-time flow of data across networks, which means that a one-size-fits all solution to the problem of infringement is inadvisable (as well as difficult to achieve).

US concept of copyright may not be entirely compatible with the sovereign laws of other countries. So it is important to be transparent about our intellectual property concerns and

³ Robin Wauters, *More Research to Back the Notion That Streaming Kills Piracy*, WASHINGTON POST, December 2, 2009: available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/02/AR2009120200748.html>

develop best practices for protecting the interests of American stakeholders, while remaining open to broader discussions about potential solutions.

There is currently no one-size-fits-all legal remedy for IP enforcement on either the domestic or international front. There is reason to believe that a globally-harmonized intermediary liability regime will reduce flexibility and may additionally harm the ongoing development of intellectual property and copyright concepts within the US legal structure.⁴ Courts have developed secondary liability structures over time and in response to technological development. By adopting global standards that legislators have avoided codifying for years, the US could risk entrenching a standard that will not serve the interest of US innovation policy.

Likewise, imposing rigid three strike obligations or filtering requirements for ISPs may overburden lawful use of copyrighted content and hinder nationwide digital adoption efforts. Enforcement tools that are too broad run the risk of ignoring the fair use of copyrighted works or unfairly blocking internet access to consumers merely upon an accusation of infringement. Stakeholders — creators, rightsholders and ISPs alike — must develop an open dialogue about the technology used to protect intellectual property. It is important for all parties to encourage proper consumptive behavior through the use of legal channels, where intellectual property is properly licensed and creators can access a legitimate digital marketplace without having to submit themselves to the whims of gatekeepers — whether content industry or network-based.

In examining the larger picture of intellectual property, IPEC should consider the fact that respect for creators often comes from education about copyrights. We urge the Coordinator to consider digital copyright literacy initiatives that promote respect for the creation of art and what this understanding might mean for a legitimate digital music marketplace. Whether through the U.S. Department of Education⁵ or through a national Digital Literacy Campaign⁶, a strategic enforcement plan should also strive to educate future consumers and creators about the value of creativity and intellectual property to both our economy and cultural standing.

CONCLUSION

FMC is supportive of government efforts to comprehend the challenges facing intellectual property protection in the digital age. In examining potential remedies, however, we urge IPEC to consider a broad set of stakeholders that includes musicians, particularly those independent artists for whom access to online technologies is increasingly crucial. While we believe that protecting IP is of utmost importance in order for artists to exploit their copyrights across platforms, we also recognize that the legitimate digital music marketplace needs time to mature. It is our view that innovation,

⁴ Gwen Hinze. *ACTA Harmonization at What Cost?*, Electronic Frontier Foundations, Jan. 26, 2010. available at <http://www.eff.org/deeplinks/2010/01/acta-international-harmonization-what-cost>

⁵ FEDERAL COMMUNICATIONS COMMISSION, NATIONAL BROADBAND PLAN p.232 released March 16, 2010 available at <http://download.broadband.gov/plan/national-broadband-plan.pdf>

⁶ NATIONAL BROADBAND PLAN at 174.

education and adoption of new technologies may hold important keys to the stabilization of the marketplace and a healthier music ecosystem.

In addressing international IP issues, we suggest that IPEC remain flexible and not seek one-size-fits-all remedies that may stymie market expansion and freeze the development of US copyright law. Finally, by approaching intellectual property with an eye towards education, IPEC may have a role to play in furthering a broader understanding of and respect for IP among the American public, particularly younger generations.

We thank you for the opportunity to submit these comments, and humbly offer FMC as a resource to IPEC in further considerations about intellectual property and technology as it applies to the creative sector.