From:	[redacted]
To:	FN-OMB-IntellectualProperty
Subject:	IPEC enforcement strategy
Date:	Wednesday, February 24, 2010 11:48:06 PM

To: Victoria Espinel, Intellectual Property Enforcement Coordinator

From: Karl Giesing

Dear Ms. Espinel,

My name is Karl Giesing. I am an independent musician and U.S. citizen who has taken an interest in intellectual property. I am responding to your public request for comments and recommendations on your intellectual property enforcement strategy.

As an artist, my concerns are with copyright infringement, and specifically non-commercial peer-to-peer copyright infringement (what many people think of as "piracy"). These suggestions may or may not be appropriate for patents and trademarks, but I will leave this to your discretion, as those subjects are out of my area of interest.

PART I: AN AN ANALYSIS OF THE THREAT POSED BY VIOLATIONS OF INTELLECTUAL PROPERTY RIGHTS

The threat to both the U.S. economy and its public safety that is poised by "IP theft" is quite a contentious issue. A number of studies have been produced that show a loss in the billions. But the conclusions reached in those studies are suspect, as they are based on some shaky assumptions, and have a number of flawed methodologies.

1. They count each download as a lost sale.
This completely ignores those who download content, who would not pay for that content were it not free. In these circumstances, a sale would not occur in any case, whether piracy was an option or not. This is most likely the majority of cases. In addition, this does not account for people who download content, then later buy that content. Significantly, this does not account for losses due to purchasing of entirely legal content in other forms (such as legally purchased iTunes media).

2. They do not account for the promotional value of downloads.
This ignores those who would not have been aware of the downloaded content if it was not available for free. Such users could make up a significant portion of downloaders. If a person downloads an album, then buys it later because they liked what they heard, it would still be counted as a loss - even though the download resulted in a sale that would not have occurred otherwise. This type of promotion will be of increasing importance as music listeners continue to move away from terrestrial radio and onto the Internet.

3. They count all losses of profit as losses from piracy.
This does not take into account other factors, such as the percieved quality of the content, the convenience of getting the content immediately, the desire to get that content without undue restrictions attached (such as DRM), or the moral choice not to support organizations that the users do not approve of. Concerning music, they ignore the 1990's "boom" that the recording industry experienced with the introduction of CD's, which is now "busting" as the purchase of CD's wanes. These situations have little to do with piracy, yet all affect sales, and blaming these losses on piracy is simply disingenuous.

4. They make no distinction between counterfeiting and filesharing.
Counterfeiting is the production of tangible goods, for profiit, by a specific (often criminal)

agency, that are passed of as originals. Filesharing is non-commercial, does not produce tangible goods, and is done on a peer-to-peer basis (by the users themselves, not through any specific agency). Conflating the two is both a legal and methodological mistake.

Studies that use any of these methods should be viewed with extreme suspicion. Such studies are almost always done by those who have an agenda of maximizing apparent losses due to piracy. On the other hand, all independent studies that have come to my attention show the net losses from piracy as being negligible or non-existant; none show any evidence whatsoever that stamping out piracy will increase sales. On the contrary, they show a distinct improvement of media industries since the advent of filesharing:

- The music industry is actually growing. The only losses to the industry are in the sales of physical media; in all other areas, more money is being made now than ever before.

- The movie industry made more money in 2009 than in any year in its entire history.

- The amount of new music and new movies that is being produced has increased dramatically in the past ten years. The amount of movies coming out of Hollywood has doubled in the past five years.

- People who share unauthorized content buy significantly more albums and DVD's than people who do not. In other words, filesharing does in fact act as an effective promotional tool.

Sources: Oberholzer-Gee and Stumpf, 2002; Jupiter Research, 2002; The Leading Question, 2005; CRIA, 2006; PRS for Music, 2007; Nielsen SoundScan, 2008; Hollywood.com, 2009; Digital Competitiveness Report of the European Union, 2009; BI Norwegian School of Management, 2009; Oberholzer-Gee and Stumpf, 2009.

It should be said that these studies deal with non-commercial, peer-to-peer filesharing, and not counterfeiting.

Given these studies, it appears that fighting filesharing is a waste of the government's resources, which would be better spent on the counterfeiting of tangible goods.

PART II: RECOMMENDATIONS

In my opinion, the only way to effectively fight piracy is to change your business model. If too many people are pirating your content, then you are not making it available to consumers in a way that would convince them to buy it. Perhaps it is unavailable in their area; or it is priced out of the range of most consumers; or it is only offered with unjustified restrictions. (Sometimes, these restrictions are actually dangerous, as in the case of the Sony "rootkit" DRM.) Also, filesharing can be easily incorporated into a forward-thinking business model, as promotion or for other ends. A smart business model would not fight piracy, it would exploit it.

Of course, this is completely out of the hands of law enforcement and the government in general. It might, however, be a consideration in your choice of prosecution strategy.

Given that your emphasis should be on counterfeiting rather than filesharing, I would like to make the following general suggestions. Some of them may be outside your power to implement. Nonetheless, I believe you should keep these points in mind, as you are involved in the allocation of funding, and you may be called upon by Congress to give your opinion on the ever-changing copyright laws.

1. Make copyright law enforcement open to the public, not just to specific industries.

Obviously this is already on your agenda; if not, I would not have the opportunity to write to you. I commend you for this, and ask that you keep up the good work. President Obama campaigned on just such a policy of openness, and it is heartening to see someone in the administration live up to that promise.

However, other people in the administration apparently do not share your views. I am thinking specifically of two cases: the Biden round-table discussion on "piracy" in December of 2009, and the ongoing ACTA negotiations.

The former was a meeting where Biden claimed "all stakeholders are present," yet the list of attendees was limited to traditional media representatives. Not present were any representatives from internet service providers, online content providers, or public advocacy groups. In addition, all representatives from the press were escorted out after closing remarks.

ACTA, as I'm sure you know, is a treaty that attempts to codify global IP enforcement. Despite the fact that it could change copyright law, its meetings are held overseas, the public is not invited, and the press is routinely asked to leave. Any public information about the treaty is known only through unofficial leaks.

Both cases have led to near-universal condemnation of all parties involved. I hope that you do not make the same mistake, and that you encourage others in the administration to be more open as well. Restricted meetings such as these send a message that the law is not benefitting the people. Aside from the moral issues involved, this undermines confidence in the administration, and presents a tremendous challenge to law enforcement.

2. Emphasise innovation and the public domain.

As you know, the Constitutional Article that created copyrights and patents begins: "To promote the Progress of Science and useful Arts." This is its statement of intent, and that intent is clear: to grow the public domain, and to promote innovation. Yet, somewhere in our history, its interpretation has been mistaken as an order to "protect the rights" of artists and inventors.

This interpretation puts the cart before the horse. Certainly, copyrights should exist, but only if they eventually grow the public domain. Patents should exist, but only if they have the effect of promoting innovation. If this is not true, then the laws should be changed, or not enforced. (I assume you also handle trademark infringement, but trademarks do not arise from the same Constitutional law.)

3. Consider fair use and other copyright exemptions.

In general, fair use stimulates creativity for the enrichment of the general public, while infringement aims only to supersede the original for profit. With that in mind, the Copyright Act of 1976, 17 U.S.C. 107 exempts certain uses of content from copyright. In addition, the Audio Home Recording Act of 1992 makes private, noncommercial copies by consumers exempt from copyright. This should be taken into account in any infringement investigation.

In this digital age, many works are created which can be considered fair use, yet are accused of (and sometimes sued for) infringing on copyrights. Attempting to enforce such accusations is without question a waste of your office's funds, and does not serve the public in any way. The state of California has something called an anti-SLAPP law (Code of Civil Procedure 425.16). This law effectively prevents malicious accusations of copyright infringement for the purpose of stifling free speech. If possible, it would be a very good

idea to adopt this law on a federal level.

4. Respect first-sale doctrine.

If digital files are indeed to be considered a "product," then the right of first sale applies. This could become significant if a consumer pays for e.g. downloaded music or movies, then sells them to another party; under first-sale doctrine, this should be perfectly legal.

The legal details of first sale are variable and often contradictory. The doctrine of first-sale has been upheld in Vernor v. Autodesk, but is currently on appeal. Also, doctrines of first-sale vary from state to state; e.g. some have Anti-UCITA bills and some do not.

Since your office operates on a federal level, it would probably be best to not prosecute these cases at all.

5. Recognize that the Congress has the sole authority to create copyright law.

Here I'm specifically referring to the ACTA treaty. Some current provisions of that treaty directly contradict U.S. law; for instance, they require the abandonment of the DMCA's "safe harbors" provision, and make no mention at all of fair use.

If the treaty is ratified as-is, you should recognize that those changes are in fact unconstitutional unless they are specifically approved by Congress. Until that happens, it would be a very wise idea not to enforce them in any case.

Given this limitation, the following propositions are only suggestions. They involve changes to current copyright law, so cannot be acted upon by your office. I hope, however, that you consider them, should you ever be asked your opionions by Congress.

6. Reduce the length of copyright terms.

Copyrights originally lasted for 14 years, with an optional 14 year extension. But as of this writing, they last for 95 years (120 years for publishers), or life plus 70 years. In comparison, patent terms last for 20 years. This makes copyright terms roughly six times longer than patent terms.

There is no reason whatsoever that copyrights should last this long. The purpose of copyright is to stimulate the creation of new works. Longer terms actually act against this purpose. The only thing this accomplishes is greater harm to the public good, by robbing it of content that should rightfully be in the public domain.

7. De-criminalize non-commercial infringement.

Until the "NET Act" of 1997, non-commercial infringement (like most copyright infringement) was civil law, not criminal. In order to be awarded damages, the person suing had to prove that the infringement made money for the infringer, or that it resulted in losses due to the infringement.

Since non-commercial infringement was criminalized, neither of these things have to be proven. The result was the creation of a "criminal class" of ordinary citizens, without any proof of actual harm to the copyright holders themselves. And because of this, there is no distinction between counterfeiting and filesharing.

For example: on December 14th, 2009, Congress approved $30 million to fight "piracy." The impetus for this was the success of "Operation Holiday Hoax." This was an anti-counterfeiting operation, yet that money was earmarked to target piracy on the internet or using "high technology." It seems that money earmarked specifically to fight

counterfeiting is in fact being spent to prosecute filesharing instead.

Or, consider when Michael Mukasey in 2008 said that IP theft funds terrorism. He was clearly talking about the profits from counterfeiting, not non-commercial filesharing (which could not possibly fund anybody).

Prosecuting non-commercial filesharing means time and money wasted that could be spent prosecuting counterfeiting. For your office to be effective, you will need to make a clear legal distinction between the two.

SOME PERSONAL THOUGHTS ON THE SUBJECT

Recording artists have always viewed music labels as a necessary evil at best. Artists who sign to labels are forced to hand over their copyrights, shoulder a disproportionate share of production costs, and are restricted from making money until the label makes a profit. The vast majority of artists on a label make no money whatsoever from the sale of copyrighted material. Artists signed with labels only because the labels held a near-monopoly on production, distribution, promotion, radio play, and access to live venues. This enforcement of an artificial monopoly on music is a label's sole business model.

The rise of the internet has made all of these things equally available to nearly everyone. This has been a tremendous boon to artists in general, and to independent artists and labels in particular. In fact, a growing trend has been for musicians to get their labels to drop them, so that they do not have to bear the financial burden of their label's short-sighted business tactics.

The response from labels is not to change their business model, but to put even more restrictions on content, while charging even higher rates to access it. To people both inside and outside the industry, aggressive enforcement of copyright is simply a mistaken attempt to support an outdated business model. The idea that aggressive copyright enforcement benefits artists or encourages sales is simply wrong.

Those are my thoughts and ideas, which I hope you will take into consideration. I very much appreciate this opportunity to write to you, and hope that as you move forward, you will continue to keep this dialogue open.

Yours sincerely,

- Karl Giesing

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