

Music Community Written Submission
October 16, 2015

Regarding Development of the Joint Strategic Plan on Intellectual Property Enforcement, in response to Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments, 80 Fed. Reg. 52800 (September 1, 2015)

The submitting parties (the “Music Community”), described in Appendix A hereto, are associations and organizations whose members create and disseminate a wide variety of copyrighted musical compositions and sound recordings. The Music Community has fully embraced the Internet marketplace as the primary avenue for delivering high-quality content to fans of music through a variety of exciting platforms. Collectively, the Music Community represents hundreds of thousands of songwriters, composers, music publishers, recording artists, record labels, studio professionals, and others, who rely on copyright protection for their livelihoods.

I. Introduction

The Music Community sees itself as a key contributor and participant in the digital marketplace. Music can be experienced in a rapidly increasing variety of ways through an ever-evolving choice of innovative platforms that are in high demand. As a result, musicians, songwriters, music publishers, record labels, consumers, device manufacturers, online music distributors, website providers, app developers and Internet access providers are all benefitting.

However, significant challenges remain. Copyright theft continues to proliferate online, despite the widespread availability of affordable, lawful content. Thus, the Music Community strongly believes that it is crucial for the Office of the IPEC to continue to play a positive role in strengthening and ensuring the appropriate balance for our copyright system for the digital age. This can be achieved in a variety of ways, including via government involvement in coordinating voluntary best practices initiatives, as well as legislative reform and regulatory actions.

For example, the enforcement mechanism and eligibility tests for the safe harbors in the Digital Millennium Copyright Act (“DMCA”) must be improved. Since passage of the DMCA, the digital landscape and the music industry have dramatically changed. Initially the DMCA was primarily designed to prevent isolated infringement by third parties on specific online sites when connection speeds were slower than today and storage space was limited. In that environment, these third parties were not able to infringe on the massive scale that they do today, and the “takedown notice” provisions were thought to provide an alternative to lengthy and expensive legal proceedings. The qualification standards for the safe harbor eligibility were thought to be available only to innocently infringing ISPs with no connection to the third party content they hosted, linked to or otherwise transmitted. The notice and take down process was intended as a safeguard to provide a mechanism for copyright owners to prevent infringement by even innocent ISPs.

But in the transformed Internet environment of today, as online speeds have dramatically increased while the cost of storage space has dramatically decreased, the DMCA’s failure to

scale has rendered it increasingly obsolete and futile from an enforcement standpoint. Large, sophisticated entertainment-oriented websites have developed, and they premise their business models on being shielded from responsibility by the safe harbors. Instead of sending a relatively small number of “take-down” notices to prevent isolated infringement in a manner that ensures the material doesn’t reappear, the Music Community is instead faced with the unprecedented burden of attempting to “take-down” literally billions of infringing copies of music and associated links from thousands of unauthorized sources in an environment where infringers feel free to simply continuously repost links to the infringing content. This mismatch between the amount of infringement and the burden of enforcement has increasingly led to the devaluation of music and the perception that there is no effective remedy against unauthorized infringement. Once a song is available, authorized or not, the law provides no means to effectively protect the Music Community’s property. Adding insult to injury, some ISPs have complained about “abusive DMCA notices” – they seek to curtail one of the only remedies left for copyright owners.

In sum, after 15 years of case law and changes in the marketplace noted above, the safe harbors can no longer be said to balance the burdens of policing copyright infringement between the ISPs and the owners. Consider that since the creative community’s last submission to the Intellectual Property Enforcement Coordinator (IPEC) in August, 2012 (the 2012 IPEC Submission),¹ the Recording Industry Association of America (RIAA) has sent over 128 million infringement notices in the aggregate to web site operators, their underlying hosting providers, and search engines. Unfortunately, all too often, when a work is “taken-down” on a particular site or in a search engine index, it immediately re-appears someplace else on that site, or on mirror sites. Congress never intended for things to work in this way. The extent of this “whack-a-mole” problem was not anticipated and, unfortunately, this DMCA loophole has been embraced as a way to continually use and profit from unauthorized use of music, and still arguably maintain the “safe-harbor” protections built into the DMCA, at least until a costly and time consuming lawsuit is filed and won.²

The Music Community stands willing to monitor for infringement and to do its best to cooperate to limit its impact. Self-help against pirate sites is certainly an action available to copyright owners, but without cooperative partners it has limited utility. And, generally, the

¹ Joint Submission of MPAA, NMPA, and RIAA to Office of the Intellectual Property Enforcement Coordinator 7-13 (Aug. 10, 2012), <http://www.regulations.gov/#!documentDetail;D=OMB-2012-0004-0248> [hereinafter 2012 IPEC Submission].

² It must be noted that what is expensive and difficult for large copyright owners is an impossible challenge for small copyright owners seeking to protect the value of their works from indiscriminate sharing online. As Maria Schneider, a three-time GRAMMY winning jazz and classical composer, bandleader and conductor noted in describing the frustration with the DMCA, “[t]he DMCA makes it my responsibility to police the entire Internet on a daily basis. As fast as I take my music down, it reappears again on the same site—an endless whack-a-mole game.” See *Section 512 of Title 17: Hearing Before the Subcomm. on Courts, Intell. Prop. and the Internet of the H. Comm on the Judiciary*, 113th Cong. 57 (2014) (statement of Maria Schneider).

courts have not been helpful in this regard. Recent judicial decisions have interpreted the DMCA in a way that puts an unfair burden on the copyright owner, while allowing the online services to use the “safe harbor” provisions in the law more as a sword than as a shield. Moreover, litigation against sites that provide pirated content has proven a long and costly process.³ And it simply doesn’t scale when there are thousands of sites that are dedicated to music theft.

This also places an undue burden on the literally hundreds of licensed sites in the United States. These services have acknowledged the moral and legal responsibility to pay for music yet they, like the copyright owners, are forced to compete with illicit businesses offering stolen versions for “free.”

The submitting parties, representing a vast cross-section of authors and owners of music, believe the IPEC can play a positive role in promoting reform of the enforcement mechanism of the DMCA and other aspects of the Copyright Act. It can also do much to advance the proposition that reducing the availability of infringing content online should be the shared goal of all legitimate businesses that operate online, as well as of consumers and the U.S. government. Whether by facilitating legislative reform, or helping to develop voluntary industry-wide best practices, the IPEC can help restore the rights of those who have been profoundly harmed as the scope and volume of the online infringement problem has rushed far beyond the ability of the DMCA framework to scale.

II. Current Trends in the Music Industry

A. Strong Public Demand for Music Fuels the Success of the Internet and the Consumer Electronics Industry

Demand for music online is higher than ever, with many sites directly dependent upon professionally produced, copyrighted music for their success. Over 65% of Americans ages 13+ agree that music is important to their lifestyle.⁴ American consumers spend, on average, more than 24 hours per week listening to music and, in a typical week, 75% of U.S. consumers listen to music online.⁵ Twelve of the top 20 most followed people on Twitter are from the Music Community.⁶ Fifteen of the top 20 celebrities on Facebook are musicians.⁷

³ For example, it took over five years of litigation for the record labels to prevail in their litigation against LimeWire, which had spent the better part of a decade inducing – and profiting from – peer-to-peer pirating of sound recordings. *See* Arista Records, LLC et al. v. Lime Group LLC, et al., 784 F. Supp. 2d 398 (S.D.N.Y. 2011).

⁴ Source: MusicWatch Inc., 2014 Annual Music Study.

⁵ *Music is Still the Soundtrack to our Lives*, Nielsen (Sept. 14, 2015), <http://www.nielsen.com/us/en/insights/news/2015/music-is-still-the-soundtrack-to-our-lives.html>.

⁶ Twitter Top 100 Most Followers, Twitter Counter, <http://twittercounter.com/pages/100> (last visited Oct. 2, 2015).

Since the last IPEC Joint Strategic Plan on Intellectual Property Enforcement, legitimate online services that enable people to listen to and interact with music have continued to proliferate and become more viable business models.⁸ Consumers have never had so many choices for experiencing music legitimately and instantaneously. However, for these services to have continued success, strong protection of copyright is required, as many unauthorized disseminators of music undermine the value of the legitimate sites.

In addition to physical formats for music, some of the exciting services available today include the following, with most offered on both wireline and mobile platforms:⁹

- Music is available for download through services like iTunes, AmazonMP3, eMusic, GhostTunes, 7digital, Google Play and several others, including in formats that allow consumers access across multiple devices for personal use without interoperability problems.
- Higher resolution music downloads, for greater fidelity, are available from services such as Pono, HD Tracks, Presto Classical and Pro Studio Masters.
- Interactive, on-demand music streaming services such as Rhapsody, Apple Music, Spotify, Deezer and Rdio offer unlimited listening – on computers or smart phones – for modest monthly fees. They also offer to subscribers the ability to listen off-line.
- Free ad-supported, audio-visual streaming sites, such as YouTube and Vevo, offer free streaming of music videos.
- Digital radio services, such as iHeartRadio, iTunes radio, and Sirius/XM, are available for free with limited advertising support or, in some cases, on a subscription basis.
- Over 750 different AM/FM stations are available as digital radio simulcasts.
- Licensed lyrics sites enable music lovers to access the lyrics to their favorite songs with the click of a mouse and to comment on those lyrics and learn about the songwriters and recording artists.
- Licensed apps like Flipagram enable consumers to interact with music like never before by creating photo and video stories set to music.

Due to all of this innovation, in the first half of 2015, digital dissemination accounted for 76% of the overall recorded music market by value, compared with 59% for 2012.¹⁰ In the U.S.,

⁷ Top Celebrities on Facebook, Fan Page List, <http://fanpagelist.com/category/celebrities/> (last visited Oct. 11, 2015). See also *Music Fuels the Internet*, an RIAA site that notes the top accounts on social media on a daily basis: <http://www.musicfuels.com/>.

⁸ See Cary Sherman, *Valuing Music in A Digital World*, Forbes (Sept. 23, 2015), <http://www.forbes.com/sites/realspin/2015/09/23/how-government-set-licensing-killed-the-music-industry/>.

⁹ See www.whymusicmatters.com for a variety of other licensed music services available in the United States, and www.pro-music.org for a worldwide listing.

digital subscription revenues increased in 2014, as sales of smartphones and tablets that promote use of streaming services increased streaming revenues sharply (in some cases, substituting for downloads).¹¹ In the first half of 2015, U.S. revenues from digital paid subscriptions were \$478 million, up 25% from the previous year.¹²

B. There is an Unacceptable Value Gap between the Demand for Music and the Revenue Returned to the Authors and Owners of that Music

Despite music being more popular than ever today, music industry revenues have been nearly flat since 2010, and are less than half what they were in 2000 (adjusted for inflation). Why is that?

The fact is that while the technology industry is benefitting from the increased availability of online music, and profiting from the unprecedented consumption and interest in music, the Music Community is facing a value gap. “When vinyl records, which peaked in the 1960s and ’70s, generate more revenue for the industry in 2014 than the billions of ad-supported on-demand streams on YouTube and similar services, something is fundamentally wrong with the market.”¹³ In short, music adds significant value to technologies and network access, but the Music Community is not receiving a fair share of the revenue.¹⁴

The broken state of the law, particularly the DMCA (discussed in more detail below), is playing a significant role in perpetuating this unfairness.¹⁵ The laws that “were designed to exempt passive intermediaries from liability,” the so-called safe-harbors, should never have been allowed to “exempt active digital music services from having to fairly negotiate” licenses with rights holders.¹⁶ Not only do certain actors take advantage of these safe harbors to profit from music without compensation to the authors and owners of that music, this situation unfairly

¹⁰ See Joshua P. Friedlander, *News and Notes on 2015 Mid-Year RIAA Shipment and Revenue Statistics 1* (Sept. 22, 2015), <http://riaa.com/media/238E8AC7-3810-A95C-44DC-B6DEB46A3C6E.pdf> [hereinafter *RIAA Shipment and Revenue Statistics*].

¹¹ IFPI Digital Music Report 2015, 7-8, <http://www.ifpi.org/downloads/Digital-Music-Report-2015.pdf>.

¹² See *RIAA Shipment and Revenue Statistics*, *supra* n. 10, at 2.

¹³ See Sherman, *supra* n. 8.

¹⁴ See David Israelite, *NMPA Head Says “Free” May Work For Pandora But is Devastating to Songwriters: Op-Ed*, *Billboard* (Sept. 24, 2015), <http://www.billboard.com/articles/business/6707834/nmpa-david-israelite-oped-pandora-songwriter-payments>.

¹⁵ See Sherman, *supra* n. 8. The flawed U.S. music licensing regime also plays a factor in this value gap. See Israelite, *supra* n. 14.

¹⁶ See Frances Moore, *Artist and Record Companies need a Fair Digital Marketplace* (July 29, 2015), <http://www.ifpi.org/news/Artists-and-Record-Companies-Need-A-Fair-Digital-Marketplace>.

distorts the market value for music, creating below-market discounted rates that harm the entire music industry. It cannot be right, for example, that, by some accounts, YouTube has 40% of the music listening but only provides 4% of the revenue to the record labels.¹⁷ As the CEO of RIAA noted, the Music Community is faced with a “Hobson’s choice: Accept below-market deals or play that game of whack-a-mole. The notice and takedown system—intended as a reasonable enforcement mechanism—has instead been subverted into a discount licensing system where copyright owners and artists are paid far less than their creativity is worth.”¹⁸

To turn the digital transformation of the music industry into sustainable long-term growth, this value gap must be addressed. A successful Music Community that invests in music and rewards creators needs a balanced digital marketplace in which to negotiate terms for the use of its music. And, as further discussed below, it needs a balanced and fair legal enforcement system in which to operate to do so.

III. Online Theft Persists Via an Ever-Evolving Variety of Platforms

A. Music Theft Online Continues to Persist and Harm the Music Community and the U.S. Economy

Though there are more legitimate options than ever for downloading, streaming and interacting with music, online piracy remains a large threat to the Music Community. Since the last IPEC submission, RIAA has monitored 2,159 sites, and noticed 48,391,597 infringements directly to sites. This is in addition to millions of notices sent to ISPs hosting those sites and the search engines indexing and directing traffic to those sites.

This piracy affects the U.S. labor market, and has led to a decline in the number of people employed by the music industry. “The music industry, while enormous in its economic, cultural and personal impact, is by business standards relatively small. So theft on this scale has a noticeable and devastating impact: employment at the major U.S. music companies has declined by thousands of workers, and artist rosters have been significantly cut back. The successful partnership between a music label and a global superstar – and the revenue generated – finances the investment in discovering, developing and promoting the next new artist. Without that revolving door of investment and revenue, the ability to bring the next generation of artists to the marketplace is diminished – as is the incentive for the aspiring artist to make music a full time professional career.”¹⁹ Such piracy hurts not only the large music companies or employees of

¹⁷ See video, *HBOs Richard Plepler and Jimmy Iovine on Dreaming and Streaming from the Vanity Fair Summit*, Vanity Fair (Oct. 8, 2015), <https://www.youtube.com/watch?v=HoODo8HkvoI>; Kia Makarechi, Twitter Posting (Oct. 7, 2015, 1:25pm), https://twitter.com/kia_mak/status/651855850840195078?refsrc=email&s=11.

¹⁸ See Sherman, *supra* n. 9.

¹⁹ See *Piracy Online: Scope of the Problem*, RIAA, https://www.riaa.com/physicalpiracy.php?content_selector=piracy-online-scope-of-the-problem, (last visited Oct. 9, 2015) [hereinafter *Scope of the Problem*].

those companies – independent creators are harmed as well. The Nashville Songwriters Association International reports that, since 2000 (essentially, in the post-Napster era), the number of full-time songwriters in Nashville has declined by 80%.²⁰ In the end, consumers and legitimate technology companies also suffer, because incentives for music production decline, lawful services are forced to square off against unfair competition, and the drivers of the Internet’s success are threatened.

B. Current Forms of Music Theft Online

Three years ago, the creative industries highlighted in the 2012 IPEC Submission that online theft continued unabated. Although much has changed in the last three years, much has stayed the same. The same forms of piracy that existed three years ago, from unauthorized streaming and download sites, to cyberlockers, peer-to-peer networks, and mobile apps, continue to proliferate at unacceptable levels today.²¹ Others, such as stream-ripping, which existed three years ago, have gained increased popularity in the past year, as more and more users turn to this form of piracy to download music to their devices. In the last three years we have also seen escalating damage from the unauthorized dissemination of pre-release music, *i.e.*, albums slated for commercial release that have not yet been commercially released to the public.²²

Some of the piracy problems the Music Community is encountering include:

- **Mobile Applications:** Infringing mobile applications provide unauthorized streaming, downloading, stream-ripping, syncing to other videos or photographs, and/or distribution of music. Despite the industry’s efforts to have these infringing apps taken down from the leading mobile app storefronts,²³ they nonetheless continue to proliferate. For example, in 2014, “the most popular of these Android apps, Music Maniac, ha[d] been downloaded more than 10 million times – and afford[ed] free access to all 10 of the top songs listed on the current Billboard’s Hot 100 list.”²⁴ In addition, live video streaming

²⁰ See Nate Rau, *Nashville’s Musical Middle Class Collapses* (Jan. 28, 2015), <http://www.tennessean.com/story/entertainment/music/2015/01/04/nashville-musical-middle-class-collapses-new-dylans/21236245/>.

²¹ For a detailed overview of various forms of piracy, see 2012 IPEC Submission, *supra* n. 1. Websites for the sale of physical counterfeits also remain a problem.

²² For example, ShareBeast, a cyberlocker that caused significant damage to the industry, trafficked in pre-release music, and boasted millions of users, was recently shut down by the Department of Justice. Andre Yoskowitz, *FBI Takes Down Pre-Release Music Piracy Site Share Beast*, News By AfterDawn, (Sept. 16, 2015), <http://www.afterdawn.com/news/article.cfm/2015/09/16/fbi-takes-down-pre-release-music-piracy-site-sharebeast>.

²³ To date, RIAA has noticed over 5,700 mobile apps to the major mobile app storefronts.

²⁴ Dawn Chmielewski, *Music Piracy Goes Mobile*, Re/Code, Mar. 24, 2014, <http://recode.net/2014/03/24/music-piracy-goes-mobile/>. Though Music Maniac is no longer available through Google Play, it remains available through other websites.

apps owned by Twitter and Facebook have led to unauthorized streaming of concerts by new and leading artists. Unfortunately, even when the Music Community has some success in inhibiting the reach of an unlicensed, infringing app, a new one takes its place, or the app developers find new avenues to distribute the app. For example, in December 2014, Google removed from its Play Store several clearly infringing applications associated with the notorious Pirate Bay website.²⁵ However, the apps remain available elsewhere and usable with Android devices. Moreover, all the apps downloaded prior to the takedown of the app from the storefront continue to function.²⁶

- Unauthorized Streaming and Download Services, Including Sites that Cater to Pre-release Music: This class of digital sites and apps directly or indirectly offers unauthorized on-demand streaming and/or downloading of our members' music, including their most popular and valuable content. They often provide not just one link to a particular track, but instead several pages of links to the same track, and/or have several more "URLs" with the same track "at the ready" to post to their site when another URL to the same track is noticed.²⁷ Several of these sites go further, providing unauthorized downloading of pre-release music.²⁸ Some are so brazen as to publicly tout their infringing activity and seek crowd sourcing to fund their illegal efforts.²⁹ Such infringing activity clearly

²⁵ Angela Moscaritolo, *Pirate Bay Apps Yanked from Google Play*, PC Magazine (Dec. 8, 2014) <http://www.pcmag.com/article2/0,2817,2473253,00.asp>.

²⁶ For example, while the Pirate Bay Browser App was removed from the Google Play store in June 2013, nearly a year later, in May 2014, there were an estimated 500,000+ monthly U.S. users of the app. *Source*: RIAA analysis of Mobidia data.

²⁷ *See* Capitol Records, LLC v. Escape Media Group, Inc., 2015 U.S. Dist. LEXIS 38007, *18-19 (S.D.N.Y. Mar. 25, 2015) (characterizing the infringing service Grooveshark as a "technological Pez dispenser" that required copyright owners to send "successive takedown notices" in order to remove a single song from the service).

²⁸ Leaks of pre-release music have long plagued the Music Community. *See* Stephen Witt, *The Man Who Broke the Music Business* (Apr. 27, 2015), <http://www.newyorker.com/magazine/2015/04/27/the-man-who-broke-the-music-business>. But with so many devices and unauthorized services at consumers' fingertips, unlawful releases of albums before they hit the legitimate marketplace can be devastating.

²⁹ A particularly egregious example is the new service Aurous, which allows users to search for, stream, and download pirated copies of popular music, and which is designed specifically to search for and retrieve copies from online sources notorious for offering pirated music. Aurous has promoted itself by linking to articles that call it "BitTorrent Music for Your Dad," and "Popcorn Time for Music"; in other words, as a site that makes it incredibly easy to find and stream or download pirated music. Aurous brazenly began a crowdfunding campaign for its mobile app, which it has since shut down. *See* Aurous, Twitter Posting (Sept. 17, 2015, 11:55am), <https://twitter.com/aurousapp/status/644585368440938496?lang=en> ("We need your help to bring Aurous to Iphone, Android and Windows phone! Please consider donating to our Indiegogo..."); Aurous, Twitter Posting (Sept. 19, 2015, 1:00pm), <https://twitter.com/aurousapp/status/645326516600086528?lang=en>. The RIAA, on behalf of its members, has brought suit against Aurous, seeking injunctive relief against this blatant infringer,

harms U.S. artists, songwriters, record labels and music publishers by disseminating their work without authorization and severely diminishing the commercial value of those works.

- Cyberlockers: While significant efforts have been invested in shutting down some of the worst actors in this space, such as Megaupload, ShareBeast, and RockDizFile, numerous websites still exist that are designed to encourage their users to post and disseminate infringing copies of music.³⁰ These sites become repositories for free access to professionally produced, copyrighted content.
- Peer-to-peer Networks: While 8.1 million people pay for streaming subscriptions in the United States, more than twice that many are still using peer-to-peer piracy sites for illegal downloads.³¹ And while use of peer-to-peer sites may not be rising as quickly during recent years as it once did, the harm that the availability of infringing copies on those networks presents remains devastating.
- Unauthorized Lyrics Sites: Sites that provide unauthorized access to reproduced song lyrics also present a real problem for music publishers and songwriters. There are so many of these websites, with associated applications, that National Music Publishers' Association (NMPA) was forced to initiate a litigation campaign to compel those sites that wanted to avoid injunctions and liability to obtain licenses.³² Although this approach had some success, myriad infringing sites and apps remain available, supported by advertising.
- Stream Ripping: Finally, some companies are profiting from enabling consumers to exceed their authorized access to lawful products, such as YouTube and audio-only streaming services, by creating "ripped" illegal copies of streams. This is particularly damaging because it prevents copyright owners from obtaining full value from licensors who offer purchases of permanent copies of works.

and the court granted a temporary restraining order against Aurous on October 15, 2015. *See* Atlantic Recording Corporation et al. v. Andrew Sampson, Case No. 1:15-cv-23810 (S.D. Fla., filed Oct. 13, 2015); Temporary Restraining Order, *id.* (Oct. 15, 2015).

³⁰ For examples of such cyberlockers, see the RIAA Notorious Market Submission Report (Oct. 5, 2015), <http://riaa.com/media/9F859538-E1E1-CC7E-A701-84F9FB3851BF.pdf> [*hereinafter* RIAA NMR Submission].

³¹ Ryan Faughnder, *Music Piracy is Down But Still Very Much in Play*, Los Angeles Times (June 28, 2015), <http://www.latimes.com/business/la-et-ct-state-of-stealing-music-20150620-story.html>.

³² *See* Ed Christman, *NMPA Launches Suits Against Infringing Lyric Sites*, Billboardbiz (May 21, 2014), <http://www.billboard.com/biz/articles/news/publishing/6092270/nmpa-launches-suits-against-infringing-lyric-sites>; Ben Sisario, *In Music Piracy Battles, Lyrics Demand Respect Too*, New York Times (Nov. 11, 2013), http://www.nytimes.com/2013/11/12/business/media/in-music-piracy-battles-lyrics-demand-respect-too.html?_r=0.

A significant change from three years ago is the ability of rogue actors to engage in piratical activity across a variety of digital platforms, whether via computer software applications, web sites, plug-ins for Internet browsers, widgets for smart televisions, or mobile applications. Consider, for example, that before the infringing service GrooveShark was shuttered in light of a court order finding it liable for willful infringement, GrooveShark offered access to its service via a website, a mobile application, a browser plug-in, and was negotiating deals to have GrooveShark widgets on certain smart TVs.³³

In addition, it is now easier than ever for rogue operators to jump physical jurisdictions and digital domains, while obfuscating their path while they do so. The increasing ubiquity of high-bandwidth connectivity and technologically sophisticated hosting services in a growing number of offshore jurisdictions will make it increasingly easy for thieves to fully exploit the U.S. market while minimizing, for practical purposes, their exposure to U.S. copyright or criminal law. Another factor that will accelerate this disturbing trend in future years involves the domain name system. Beyond the existing framework of country code Top Level Domains (ccTLDs), the ongoing rollout of new generic Top Level Domain (gTLD) registries includes some based in jurisdictions more tolerant or even encouraging of theft of U.S. intellectual property. This gives pirates a wider range of havens to seek.

Consider that in 2014, rogue site Mp3Skull was at domain mp3skull.com, and hosted at a U.S. hosting company. Since then, Mp3Skull had moved to five different top level domains, with two changes in the last two weeks. As of October 11, 2015, Mp3Skull was located at mp3skull.wtf, and had moved its servers outside of the U.S.³⁴ It obfuscates its operators and location by using a privacy/proxy service to hide the operator and Cloudflare to hide its IP address.³⁵

This domain hopping, along with the steps such pirate sites take to obfuscate its identity and physical location, provide further obstacles to effective enforcement.

This highlights that as the landscape continues to shift under our feet at rapid speeds, it has become even harder to pin down where and how the next form of infringement will emerge, and what combination of jurisdictions – digital or physical – will be implicated.

³³ Consider also that rogue cyberlocker 4shared.com offers its service both via a website and a mobile application. See www.4shared.com, last visited October 11, 2015. Rogue stream-ripper FLVTO offers its infringing activity via a website and a computer application. See www.flvto.biz, last visited October 11, 2015.

³⁴ Another example, noted in the RIAA NMR Submission, is rogue site Viperial. Viperial, which was originally at viperial.com, then redirected to viperial.co, and now redirects to viperial.me. See also footnote 59 and Appendix B for further examples.

³⁵ See IP Tracker Lookup, “mp3skull.com”, <http://www.ip-tracker.org/locator/ip-lookup.php?ip=mp3skull.com>, last visited Oct. 12, 2015.

C. The Role of Third Parties in Supporting, Promoting, or Profiting from Copyright Theft

Numerous third parties, both legitimate actors and illegitimate, including some of those noted above, help to facilitate access to the infringing services discussed above, including domain name registrars and registries, search engines, app stores, hosting companies and content delivery networks (CDNs), advertisers, and payment processors. Regardless of whether the activities engaged in by such companies rise to the level of incurring liability under existing copyright laws, far more could and should be done by such third parties to help prevent and limit infringement.

Below is a brief description of the role some of these third parties play, and what efforts, if any, have been taken to curb infringement occurring or facilitated via their services.

- Registrars, Registries, and Privacy/Proxy Services: A domain name is often a key resource that enables sites dedicated to digital theft to be accessed by their customer base; and even though registrar, registry and privacy/proxy terms of service almost uniformly prohibit the use of domain name registrations for such activities, these provisions are rarely enforced. Cooperation of registrars, registries and privacy/proxy service providers with right holders often leaves much to be desired. This refusal to take action despite verifiable evidence of infringement, coupled with the unfettered expansion of new internet real estate for the infringers to use, further exacerbates the music infringement problem.
- Search Engines: Search engines continue to be a key driver for music discovery and a significant tool that leads traffic to infringing sites.³⁶ While recent efforts by search engines to demote sites for which they have received high volumes of infringement notices have made an impact,³⁷ over time these efforts are being shown to have limited

³⁶ In a survey of digital music listeners by consumer research firm MusicWatch, search engines were found to be one of the most common ways users discover sites to download music without paying. See Joshua P. Friedlander, *More Evidence Is In – Intermediaries Matter*, RIAA Music Notes Blog (Sept. 15, 2014), http://www.riaa.com/blog.php?content_selector=riaa-news-blog&blog_selector=Intermediaries-Matter&news_month_filter=9&news_year_filter=2014. Another study from Carnegie Mellon University, perhaps the most comprehensive study yet on the link between search engines and media piracy, confirmed what search engines have likely known all along: that more highly placed links do have an effect influencing consumer behavior. The study showed that even users looking for lawful content could be led astray by promoted links to pirated content. Liron Sivan, Michael D. Smith, and Rahul Telang, School of Information Systems and Management, Heinz College, Carnegie Mellon University, *Do Search Engines Influence Media Piracy?: Evidence from a Randomized Field Study* (Sept. 12, 2014), available at <http://ssrn.com/abstract=2495591>.

³⁷ See, e.g., Katherine Oyama, *Continued Progress on Fighting Piracy*, Google Public Policy Blog (Oct. 17, 2014), <http://googlepublicpolicy.blogspot.com/2014/10/continued-progress-on-fighting-piracy.html>.

utility. First, far too often search engine operators are slow to act, electing to allow infringement to continue unabated for too long before down-ranking a site. Second, as shown in Appendix B, sites that engage in domain hopping after being demoted quickly rise again in search results. Clearly, the system is broken when Google estimates it will receive around 350 million takedown notices this year,³⁸ including tens of millions from the Music Community, and the piracy problem continues to exist at its current levels. More effective tools are required to reduce the amount of traffic search engines send to known rogue operators.

- Hosting Companies, CDNs, and their ilk: Hosting Companies, CDNs, and companies that provide similar services vary in the levels of cooperation or obstacles they place in the face of evidence of infringement occurring on or via their systems. Some, like Cloudflare or WebZilla, refuse to terminate service with their customer despite receiving thousands of notices of infringement attributable to one of their subscribers' accounts. Other hosting companies appear to terminate service with their rogue customer after receiving repeated notices of infringement associated with that customer, but there is no consistency in the response to the rights holder or in the level of knowledge of repeat infringement that leads to termination or suspension of service.
- Advertisers and Ad Networks: Following pledges made in 2012,³⁹ many U.S. advertisers, ad agencies and ad networks have taken proactive steps to deter placing ads on sites that engage in copyright infringement. Many will also take action when notified that their ads or services were used to place ads on infringing sites. In addition, over the past several months, portions of this industry have created and adopted further programs to help improve the digital ecosystem, including the Trustworthy Accountability Group's Brand Integrity Program Against Piracy.⁴⁰ However, several other ad networks, both in the U.S. and abroad, continue to funnel ad dollars to infringing sites. Other advertisers, particularly those that advertise using pay-per-install potentially unwanted programs (PUPs), continue to prominently interact with infringing sites. Moreover, the rogue operators are getting more sophisticated, engaging in various forms of ad fraud, such as

³⁸ See Chris Castle, *What Is the Intention of Justice? Notice and Stay Down Is the Government's Responsibility*, Huffington Post (Oct. 1, 2015), http://www.huffingtonpost.com/chris-castle/what-is-the-intention-of-b_8208768.html.

³⁹ See ANA, 4A's Release Statement of Best Practices Addressing Online Piracy and Counterfeiting, Association of National Advertisers (May 3, 2012), <https://www.ana.net/content/show/id/23408>.

⁴⁰ See *Advertising Industry Launches Initiative to Protect Brands Against Piracy Websites*, TAG (Feb. 10, 2015), <https://www.tagtoday.net/advertising-industry-launches-initiative-to-protect-brands-against-piracy-websites/>. Indeed, Group M, a leading global media investment management group, has announced that it will require all of its partners to be DAAP validated in 2016. *GroupM Requires Partners to use TAG-Certified Anti-Piracy Services*, TAG (Sept. 23, 2015), <https://www.tagtoday.net/groupm-requires-partners-to-use-tag-certified-anti-piracy-services/>.

pop-unders or re-directs to phony webpages, to channel advertising dollars their way. More needs to be done to address this fraudulent behavior.

- Payment Processors: In 2011, after significant assistance from the Office of the IPEC, payment processors and credit card companies implemented a set of best practices to investigate complaints and stop processing transactions for sites that distribute counterfeit and pirated goods. As implemented, these best practices have led to a significant reduction in the use of premier credit card services for not only sites that directly charge for unauthorized music downloads or streams, but also those that attempt to hide their efforts by charging indirectly for unauthorized access to music.⁴¹ While rogue sites continue to find alternative payment methods to profit from their illegal enterprises, the adoption and implementation of these best practices is an example of what is possible when industries agree to adopt reasonable approaches to exercise their responsibility to help ensure that Internet-based transactions are lawful.
- App Stores: Recently, some leading digital storefronts, such as iTunes and Google Play, have made increased efforts to address and remove from their digital storefronts apps that facilitate music infringement. Nonetheless, too often, digital storefronts, whether for mobile applications, browser plug-ins, or more traditional software applications, continue to offer applications that obviously facilitate piracy. This includes apps that clearly advertise the availability of unlicensed music. These platforms should do more to help lawful applications succeed by limiting piracy before the infringing apps ever make it on their storefront.

All of these third parties gain some financial benefit from their interactions with the rogue operators, whether in the form of information or dollars, and each has an ability to deter the use of its services for such illegal activity. As noted in the 2012 IPEC Submission, where commercially reasonable measures can be taken to address predictable and identifiable harms enabled by the services these businesses offer, those measures should be made. This not only helps address the infringement problem, it also helps create a safer, more robust digital ecosystem.⁴²

⁴¹ RogueBlock, the initiative that grew out of an agreement of the leading credit card companies and payment processors to develop best practices to deny sites that engage in copyright theft or counterfeiting the economically essential services they provide, has terminated over 5,000 individual counterfeiter's merchant accounts, impacting over 200,000 websites. *See RogueBlock*, IACC, <http://www.iacc.org/online-initiatives/rogueblock> (last visited Oct. 10, 2015).

⁴² *See, e.g.*, RIAA Comments to NTIA in Response to the Request for Public Comment on Stakeholder Engagement on Cybersecurity in the Digital Ecosystem (May 27, 2015), http://www.ntia.doc.gov/files/ntia/riia_5-27-15.pdf (noting the correlation between malware and other cybersecurity threats with online infringement).

IV. The Law is Inadequate to Address these Problems

As was noted in the 2012 IPEC Submission, the overarching challenge for copyright owners is to find meaningful ways to enforce their rights. Today, as then, there is not enough money in the world to fund litigation against every significant pirate, even if copyright owners could find courts that could exercise jurisdiction over all of them. And the statute that the U.S. enacted in 1998 to facilitate inter-industry cooperation in enforcement against infringement in the digital environment, the Digital Millennium Copyright Act (DMCA), has failed to achieve its purpose.

When the notice and takedown provisions of the DMCA were enacted, Congress intended to “preserve the strong incentives for service providers and copyright owners to detect and deal with copyright infringements that take place in the digital networked environment.”⁴³ The legislation was not “intended to discourage the service provider from monitoring its service for infringing material.”⁴⁴ However, given the increased availability of higher broadband speeds and low-cost server space, coupled with the continued misinterpretation of the DMCA by the courts and those that want to take advantage of its safe harbors,⁴⁵ the DMCA regime fails to accomplish the balance sought by Congress.

As a consequence of these judicial decisions, rather than providing incentives for cooperation, the DMCA has provided incentives for Internet businesses to turn a blind eye to infringement, or even to build willful blindness into their business models.⁴⁶ In fact, the DMCA,

⁴³ Report of House Commerce Committee on H.R. 2281, the Digital Millennium Copyright Act, H.R. Rep. No. 105-51, pt. 2, 49 (1998).

⁴⁴ Conference Report on H.R. 2281, the Digital Millennium Copyright Act, H.R. Rep. No. 105-796, 73 (1998).

⁴⁵ See, e.g., *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099 (C.D. Cal. 2009), *aff'd*, *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir. 2011); *Viacom Int’l, Inc. v. Youtube, Inc.*, 940 F. Supp. 2d 110, 115 (S.D.N.Y. 2013); *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500 (S.D.N.Y. 2013), *reconsideration granted in part, reconsideration denied in part*, 972 F. Supp. 2d 537 (S.D.N.Y. 2013); *Lenz v. Universal Music Corp.*, No. 13-16106, 2015 U.S. App. LEXIS 16308 (9th Cir. Sept. 14, 2015).

⁴⁶ See Terry Hart, *Grooveshark is Done*, Copyhype (Oct. 1, 2014), <http://www.copyhype.com/2014/10/grooveshark-is-done/>. (Grooveshark instructed its employees to create user accounts and to upload infringing files to the site, knowing that the business “depended on the use of infringing content); see also William Hensley, *Copyright Infringement Pushin’: Google, YouTube, and Viacom Fight for Supremacy in the Neighborhood that may be Controlled by the DMCA’s Safe Harbor Provision*, 51 IDEA 607, 626 (2011) (“YouTube’s business model was designed to maximize the number of site viewers in order to increase advertising revenue to attract a buyer. To increase the number of viewers, they needed infringing material.”). The DMCA’s current provision providing that monitoring is not required was intended to apply to innocent ISPs who otherwise meet the statutory eligibility tests for the safe harbors – not to shield ISPs operating with full awareness of the widespread presence of infringing content and indeed active inducement of posting of such content.

as interpreted by some, creates a perverse incentive for Internet business to take actions to deter the appearance of monitoring, contrary to the diligence expected in nearly any other business environment.

Even while removing individual infringing links identified in takedown notices, services based on infringement can thrive financially and expect to enjoy near-complete immunity from liability. More and more rogue operators appear to specifically design and engineer their systems and processes to make the DMCA, as they interpret it, irrelevant and ineffective to their ongoing infringement. Essentially, these rogue operators have learned the weaknesses of the DMCA as it has been interpreted and implement their services to exploit those weaknesses. In short, the problems with the DMCA identified in the 2012 IPEC Submission continue unbounded. The time is now for action to address this continued inequity.

V. Recommendations

Much can be done to curb the problems identified above so that legitimate music offerings succeed, more new music is produced than ever before, and the Internet marketplace delivers to consumers the types of exciting new services they are flocking to in large numbers. Improvements can be made through voluntary initiatives, legislatively, and through continued enforcement efforts.

A. Voluntary Best Practices

In addition to legislative, enforcement, and regulatory approaches to address intellectual property enforcement (discussed below), the Office of the IPEC and the government should continue to encourage the development and implementation of voluntary best practices to help move toward a piracy-free, robust and innovative online ecosystem.

It is important that online intermediaries, not just right holders, fully engage in the fight against digital theft, because often the service providers possess information that rights holders cannot obtain or have difficulty locating. For example, YouTube's Content ID system now enables rights holders to limit infringing files, which are technologically matched via fingerprint-based content recognition technology, from being made available via YouTube.⁴⁷ Facebook also will be testing a matching technology that will allow creators to identify matches of their videos on Facebook across the site, allowing for easier removal of unauthorized repeat content.⁴⁸ These systems rely on information collected from right holders to allow the services to identify and block infringing files before the public gains access to them. Only the sites themselves can enable such preventative measures, because only they have instantaneous access to information regarding what is being uploaded to their services. If other services that allow user-posted content (such as distribution hub sites) adopted similarly robust tools, a large amount of unauthorized content could be automatically removed or blocked from the web.

⁴⁷ See *How Content ID Works*, YouTube Help, <https://support.google.com/youtube/answer/2797370?hl=en>, last visited Oct. 14, 2015.

⁴⁸ See *An Update on Video Management on Facebook*, Facebook Media (Aug. 27, 2015), <https://media.fb.com/2015/08/27/an-update-on-video-management-on-facebook/>.

Effective private-sector action is not only possible, it is in the best interest of all legitimate businesses and consumers. The Music Community firmly believes that reducing the availability of infringing content online should be the shared goal of all legitimate businesses that operate online, as well as of consumers and the U.S. government. If the U.S.-based Music Community is thriving and producing compelling content, Internet usage will increase, consumers will eagerly embrace new services, more advertisements will be viewed, more searches will be conducted, more consumers will have the opportunity to enjoy their favorite content at affordable prices, and more good-paying jobs will be created and preserved. As discussed above, many of today's most popular and profitable Internet services and consumer electronics devices are tied to the availability of professionally-produced music. If the Music Community continues to lose revenue to piracy, the cultural products that keep consumers interested in going online may decrease in number and quality. Thus, legitimate service providers throughout the Internet ecosystem should be self-interested in decreasing infringement.

The Music Community commends the IPEC for encouraging industry players involved in e-commerce to work together, both within their sector and across sectoral lines, to craft and implement "best practices" that will assist in the fight against online copyright theft. As noted in RIAA's comments in response to the USPTO's Request for Comments in its Voluntary Best Practices Study, voluntary initiatives promote a growing recognition among all responsible stakeholders in the Internet ecosystem that they have an important role in promoting a legitimate online environment.⁴⁹ And, as previously discussed, several such initiatives have been implemented to date with positive results.

In addition, several foreign countries have also promoted voluntary best practices, which may provide significant guidance for possibilities within the U.S. For example, the Government of France in May 2014 published *Operational Tools to Prevent and Combat Online Infringement*,⁵⁰ which highlighted and recommended important voluntary initiatives for reducing online piracy, including (1) the signature of sector charters involving the stakeholders in advertising and on-line payment (Visa, MasterCard, PayPal); (2) creation by a public authority of a list of massively infringing sites, which would be used to inform all the technical and financial intermediaries of the sites at issue; (3) the creation of an order for prolonged removal, targeting specific counterfeit content; and (4) creating monitoring arrangements of legal decisions regarding massively infringing websites to combat the reappearance of pirated content and to make sure that legal decisions were not circumvented.

Going forward, there are challenges in two areas: first, to meaningfully and constructively implement the commitments and undertakings embodied in these important initiatives; and second, to expand this trend into other areas where clear statements of industry best practices, and inter-industry cooperation to fight online copyright theft, are sorely needed. The first dimension will require follow-up and monitoring of the agreements already reached, to

⁴⁹ Comments of RIAA, USPTO's Request for Comments in its Voluntary Best Practices Study (Aug. 19, 2013), <http://www.uspto.gov/ip/officechiefecon/PTO-C-2013-0036.pdf#page=15>.

⁵⁰ *Outils opérationnels de prévention et de lutte contre la contrefaçon en ligne, Rapport à la ministre de la culture et de la communication*, May 12, 2014, English Language summary available at <http://merlin.obs.coe.int/iris/2014/6/article18.en.html>.

ensure that they produce concrete results that do, in fact, help to cut off the revenue streams now flowing to online pirates. The IPEC is well situated to conduct this follow-up; to coordinate the activities of other federal agencies that have a role to play; to report on the results, as appropriate; and to encourage the parties involved to move forward on the constructive paths on which they have embarked.

Some areas where new or more refined voluntary best practices are needed include the following:

- Registrars/Registries: The Internet Corporation for Assigned Names and Numbers (“ICANN”) must play a central role to encourage increased cooperation among copyright and trademark holders and domain name registration businesses, in order to have an impact on limiting infringement. In the current transition context, ICANN needs to demonstrate publicly its stated commitment to accountability and the rule of law. Beyond encouraging voluntary initiatives and discussions, there should be explicit statements that confirm as part of ICANN’s core mission its authority to negotiate and enforce its contracts with registrars and registries – including contractual provisions targeting abusive uses of domain names. In 2013, revision of the Registrar Accreditation Agreement (“RAA”) resulted in domain name registrars taking on important new obligations to respond to complaints that domain names they sponsor are being used for copyright or trademark infringement, or other illegal activities. But registrars are not properly responding, and to date ICANN is not taking action to clarify and enforce these RAA provisions. We anticipate the same may be true in connection with rogue sites on new gTLDs. In addition, the 2013 RAA also set in motion long-overdue steps toward developing standards for the widespread phenomenon of proxy registration services. Further progress will be critical if the role of the Whois database in advancing online accountability and transparency is to be saved.

The Music Community urges the Office of the IPEC to stay actively involved in convincing ICANN, registries, registrars and privacy/proxy services that protecting copyrights and trademarks is in the best interest of the entire Internet ecosystem.

- Hosting and CDN Companies: Companies that provide such services should come to the table to discuss ways to continue delivering quality products while also respecting the property of others. We need greater certainty in the responses in the face of notices of widespread infringement, and additional efforts to ensure that a takedown notice is effective. We also need to develop a common sense approach to implementing a repeat infringer policy.
- App Stores: Far more could be done by the providers of digital storefronts where consumers locate and obtain/purchase applications for mobile devices, browser plug-ins, or software applications. Given that real world stores have to avoid distributing infringing content, there is no reason why digital storefronts cannot do more as well. While we appreciate that notice programs have been developed to address infringing apps that are available on some mobile app storefronts, we need to address how to increase the diligence so that infringing apps are more likely to be rejected before making it into the

storefront in the first place, and better tools to avoid repeat infringing apps, whether by the same developer under a different name, or a copycat app that provides substantially the same infringing service under a substantially similar name.

- Search Engines: Search engines continue to provide a critical link between online copyright theft sites and the audiences they seek to serve, including U.S. consumers. While demotion efforts have made a difference, without greater cooperation by the major search engines with right holders, online theft sites will continue to benefit from the substantial traffic sent to them by the search engines. These critical players in the e-commerce environment must be encouraged to work toward an agreed-upon framework for delisting from search results those sites that are clearly dedicated to, and predominantly used for, infringement. They also should refine their “suggested searches” functionality, so as not to drive innocent users to infringing versions of content. A strong and comprehensive set of best practices in the search engine area, similar to the principles adopted by a number of user-generated content services,⁵¹ could deliver enormous benefits to all Internet players whose interests are undermined by the prevalence of online theft, and could reduce pressure for legislative or regulatory initiatives that seek the same goal.
- Making the Standard Technical Measures Condition to the DMCA Meaningful: Reasonably priced, commercially available technologies exist today to identify and protect copyrighted works. While some service providers have implemented such measures, many others feel no compulsion to do so. The IPEC should call together service providers and copyright owners to discuss these technologies and develop “standard technical measures” around them as contemplated in 17 USC § 512(i).

B. Legislative Recommendations

The Music Community urges the IPEC to consider supporting several legislative reforms of the Copyright Act and laws impacting enforcement of the copyright laws. The areas that require the most immediate attention include: (i) the “notice and takedown” provisions of 17 U.S.C. § 512; and (ii) resolving issues related to websites located outside of the U.S.

1. Fix the DMCA

The Music Community recommends that the IPEC support revision of the notice and takedown system to update it to address the current technological environment.

- (a) Clarify that Inducers and Willfully Blind Operators have Red Flag Knowledge

The statute strips service providers who have “red flag” knowledge of infringement on their websites of safe harbor protection unless they take action to prevent or limit the

⁵¹ See Principles for User Generated Content Services, <http://www.ugcprinciples.com/>, last visited Oct. 12, 2015.

infringement. 17 U.S.C. § 512(c)(1)(A)(ii); Report of the Senate Committee on the Judiciary on S. 2037, the Digital Millennium Copyright Act, S. Rep. No. 105-190 (1998) (the “intended objective” of the “red flag” knowledge standard was “to exclude sophisticated ‘pirate’ directories—which refer Internet users to other selected Internet sites where pirate software, books, movies, and music can be downloaded or transmitted—from the safe harbor”). The statute also allows copyright owners who learn of the presence of infringing material on a website to notify the service provider of a “representative list” of infringed works and thereby cause the service provider to remove other clearly infringing material. 17 U.S.C. § 512(c)(3)(A)(ii). However, current case law has been read to allow service providers to willfully blind themselves to infringing activity while intentionally raking in profits attributable to it. Thus, many service providers refuse to respond to representative lists and ignore all infringing content until they receive particularized notices of each individual infringement from copyright owners. Even after receipt of such notices, they refuse to be proactive in any way – instead, they only remove one link to an infringed work while others remain, and allow new links to the exact same content to be added minutes later. Some social media sites invoke the safe harbors while enabling their users to shield their content from public searching – further impeding the enforcement of copyright rights. This is simply not a system that Congress ever would have designed.

Given that the statute was intended to encourage “innocent” Internet service providers to prevent or limit infringement that may arise unintentionally from their normal activities,⁵² the liability limitations should be expressly unavailable to any service provider who intentionally induces or encourages infringement, or is willfully blind to it – even if they are not aware of specific individual instances of infringement through notices from rights holders. It should clarify that red flag knowledge does not require notices of particular infringing URLs when other indicators of that infringement are apparent. Moreover, the statute should define the term “representative list,” and clarify that copyright owners can put service providers on notice of widespread and actionable infringement on their sites, thereby shifting the burden to the service providers to properly safeguard their properties.

(b) Address Repeat Infringements, Not Just Repeat Infringers

The DMCA conditions the liability limitations on the adoption and reasonable implementation of a policy to terminate the access of “repeat infringers” in “appropriate circumstances.” 17 U.S.C. § 512(i)(1)(A). However, as important as addressing repeat infringers is to address *repeat infringement*. Copyright owners should not be required to engage in the constant game of sending repeat takedown notices for the same song (or other work), simply because it appears at a marginally different URL than the first time. The current standard of “URL by URL” takedown doesn’t make sense in a world where there is an infinite supply of URLs. Technologies exist to identify content that is reposted after it is removed and they should be deployed as a standard industry practice.

⁵² *ALS Scan, Inc. v. RemarQ Communities, Inc.* 239 F. 3d 619 (4th Cir. 2001).

2. Consider an Alternative or Additional “Duty of Care” Standard

As implemented, many believe that currently, the DMCA places the burden exclusively on creators alone to police for infringing activity. Given the marketplace changes that have taken place since the DMCA was enacted, reasonable reform should attempt to balance the burden so that services seeking safe harbor protection have a heightened duty of care to establish reasonable measures to prevent infringing activity from appearing on their sites *ex ante* when it is reasonably foreseeable that such infringing activity would occur or is occurring. This could work as an alternative scheme to the DMCA or in conjunction with an improved notice and takedown (and stay down) system. Prominent scholars have advocated this recalibrated approach, which represents a return to more traditional tort principles.⁵³

3. Legislative Reform to Address Ex-U.S. Sites

The difficulty and complexity of pursuing services and sites dedicated to online theft increases when those services are hosted outside the U.S., operated by individuals or entities located outside the U.S., and/or when they rely upon domain names registered in ccTLD registries overseas or new gTLDs operated outside of the U.S. These problems can be expected to intensify. As noted above, online copyright thieves have become increasingly peripatetic and can shift their bases with increasing velocity. They are adept at jumping across borders and assuming alternate identities to evade the long arm of the law.⁵⁴

As the Obama Administration has forthrightly stated, “online piracy is a real problem that harms the American economy, threatens jobs for significant numbers of middle class workers and hurts some of our nation’s most creative and innovative companies and entrepreneurs,” and “online piracy by foreign websites is a serious problem that requires a serious legislative response.”⁵⁵ Further concerns raised with other proposed options to address this serious problem

⁵³ See Peter S. Menell and David Nimmer, *Legal Realism in Action: Indirect Copyright Liability’s Continuing Tort Framework and Sony’s DeFacto Demise*, 55 UCLA L. Rev. 1 (2007).

⁵⁴ The Pirate Bay remains a classic example. Its operators initially set it up in Sweden. After criminal and civil decisions against the operators, the Pirate Bay began changing ISPs and temporarily moved its services to the Netherlands and Germany before returning to Sweden. The Pirate Bay also registered the domain names depiraatbaai.be and baiedespirates.be, allowing Belgian users to access the site again, without using alternative DNS providers. Moreover, The Pirate Bay now has dozens of active proxies, mirrors, and clones, *e.g.*, thepiratebay.tn; thepiratebay.lv; mythepiratebay.org. See *All Pirate Bay Mirrors*, Tech Toy (Jan. 16, 2014), <http://techttoy.co.uk/pirate-bay-mirrors/>. This multiplies the number of takedown notices required to remove a single work that previously would have been hosted at only one URL.

⁵⁵ Victoria Espinel, Aneesh Chopra, and Howard Schmidt, *Combatting Online Piracy While Protecting an Open and Innovative Internet*, Jan. 14, 2012, <http://www.whitehouse.gov/blog/2012/01/14/obama-administration-responds-we-people-petitions-sopa-and-online-piracy>.

have proved to be unfounded.⁵⁶ Any updated IPEC strategy should include a review of the approaches taken by other countries to address this issue in considering how best to address this evolving problem.

C. Enforcement Recommendations

The Music Community commends federal law enforcement agencies for their vigorous and persistent efforts to use available legal tools to crack down on online copyright theft, including their recent enforcement activities in connection with the criminally infringing sites RockDizFile and ShareBeast.

However, more funding is required to sustain and enhance such efforts. Further, brazen copyright infringement must remain an enforcement priority. The economic harm, loss of livelihoods, and damage to our creative culture from these activities must not be underappreciated. We urge federal law enforcement agencies to redouble their efforts towards cracking down on online infringement, and increase cooperation with their overseas law enforcement counterparts in other countries. The increasingly trans-national character of the organized enterprises that dominate the world of online copyright theft requires this.

D. Regulatory Guidance

The Music Community urges the IPEC to consider incorporating the Copyright Office's views on the problems with the DMCA and, as applicable, requesting further guidance from the Copyright Office on the proper statutory construction of the DMCA.⁵⁷

The IPEC should also consider requesting the Federal Trade Commission to investigate and issue a report on the evolving relationship between sites/services that engage in infringement, those that support or profit from such sites/services, and cybersecurity threats posed by such sites/services.⁵⁸

IV. Conclusion

Pirates do not make copyrighted music available for free online as a public service. They make money from it: lots of money relative to the level of effort involved to engage in this behavior. They sell advertising on their services, and rake in huge profits from their illicit activity. Yet, it causes exponentially more harm to the Music Community. Unlike legitimate companies, these services have no interest in actually removing infringing files or links; their

⁵⁶ See Daniel Castro, *Oops. DNS Blocking Did Not Break the Internet* (October 12, 2015) <http://thehill.com/blogs/pundits-blog/technology/256635-oops-dns-blocking-did-not-break-the-internet>.

⁵⁷ See, e.g., *The Register's View on Copyright Review: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 1 (2015) (statement of Maria A. Pallante, Register of Copyrights and Dir., U.S. Copyright Office), http://judiciary.house.gov/_cache/files/9855f607-e28b-4ff9-b2f6-7a1106d4ce48/114-22-94408.pdf.

⁵⁸ See *supra* n. 42 for literature noting the ties between sites that engage in infringing activity and the creation of other cybersecurity risks, including malware and identity theft.

incentive is exactly the opposite – to ensure that users can access as much illegal content as possible, so that advertising revenues can continue to flow.

The important takeaway is that these services are not responsible entities who, when given notice of infringement, actually try to do something about it. These pirate services have an economic interest in ensuring that access to pirate copies remains uninterrupted, and they use technology to make that happen, regardless of how many takedown notices they get. The underlying assumption of the DMCA takedown process – that responsible entities will do the right thing and remove or disable infringing files and will not control or profit from the infringing activity – is simply not accurate with respect to these pirate operators. And the cost, complexity, broken legal framework, and resources involved with civil or criminal litigation against such operators limit the utility of those tools.

Thus, we must also look to those service providers who do represent the responsible parties envisioned by the DMCA and who provide visibility and viability to these bad online actors. And changes in the law are required to further incentivize these companies to fully engage in fighting online theft, and to discourage rogue entities from attempting to use our antiquated laws as a sword to continue their illegal activities. Although much is being done, it is far too little and is often done far too slowly. Because the success of creative industries, like the Music Community, is vital to making the Internet marketplace as successful as possible and ensuring that the rising digital tide actually lifts all boats, we ask the IPEC to consider the proposals made herein for legislative and regulatory action as well as for instigation of private cooperative efforts.

APPENDIX A

DESCRIPTIONS OF MUSIC COMMUNITY ORGANIZATIONS

American Federation of Musicians

American Federation of Musicians (AFM) is the largest organization in the world representing the interests of professional musicians. Whether negotiating fair agreements, protecting ownership of recorded music, securing benefits such as health care and pension, or lobbying our legislators, the AFM is committed to raising industry standards and placing the professional musician in the foreground of the cultural landscape.

Americana Music Association

The Americana Music Association is a professional non-profit trade organization whose mission is to advocate for the authentic voice of American Roots Music around the world. The Association curates events throughout the year including the annual Americana Music Festival and Conference in Nashville, the acclaimed Americana Honors & Awards program (and PBS special) and “Americana NYC” in partnership with Lincoln Center, New York City.

Church Music Publishers Association

The Church Music Publishers Association (CMPA), Nashville, TN, is an organization of North American and international publishers of Christian and other religious music that promotes worldwide copyright information, education, and protection. Founded in 1926, CMPA represents 56 member publishers.

Gospel Music Association

Founded in 1964, the Gospel Music Association’s purpose is to foster interest among the general public in gospel and Christian music, to build community and cooperation among industry leadership in order to address mutual business issues to maximize sales of Christian music and to promote public awareness of Christian music in our culture.

Music Managers Forum – United States

The Music Managers Forum (MMF-UF) provides a platform to connect, enhance, and reinforce the expertise and professionalism of music managers. Our goal is to further the interests of managers and their artists in all fields of the music industry, including live performance, recording and music publishing matters.

While many up and coming managers cannot easily have their voices heard or their views recognized, the MMF-US has a vital role to play in ensuring that the industry evolves fairly and profitably for all who work in the management industry and their clients. It is the goal of the MMF-US to make sure managers voices are heard. As the industry continues to evolve, the MMF-US endeavors to help its members to stay ahead of the curve.

National Music Publishers' Association

Founded in 1917, the National Music Publishers' Association (NMPA) is the largest music publishing trade association in the United States and the voice of music publishers and their songwriter partners. Its mission is to protect, promote, and advance the interests of music's creators on the legislative, judicial, and regulatory fronts.

Nashville Songwriters Association International

The Nashville Songwriters Association International (NSAI) is the world's largest not-for-profit songwriters trade association. Established in 1967, the membership of more than 5,000 active and professional members spans the United States and seven other countries. NSAI is dedicated to protecting the rights of and serving aspiring and professional songwriters in all genres of music.

Performing Rights Organizations (BMI, ASCAP, and SESAC)

BMI, ASCAP, and SESAC are the three U.S. music performing rights licensing organizations ("PROs") that collectively represent hundreds of thousands of songwriter, composer, and publisher members and combined repertoires consisting of millions of copyrighted musical works. The PROs each license the non-dramatic public performance rights in musical works to their respective repertoires on a non-exclusive basis to a wide range of users, including diverse digital broadcasting entities such as radio, television, cable, satellite and Internet services. BMI and ASCAP operate as not-for-profit businesses and return all license fees collected, less operating expenses, as royalties to their respective affiliated members whose works are publicly performed. The vast majority of BMI, ASCAP, and SESAC member songwriters and music publishers are small business men and women who depend on the PROs for collecting performing right royalties on their behalf, which constitute a major portion of their income.

Recording Industry Association of America

The Recording Industry Association of America (RIAA) is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members are the music labels that comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States.

Rhythm & Blues Foundation

The Rhythm & Blues Foundation is the pre-eminent non-profit organization dedicated to the historical and cultural preservation of Rhythm & Blues music. It provides financial and medical assistance, educational outreach, performance opportunities and archival activities to Rhythm & Blues artists and their fans.

Screen Actors Guild – American Federation of Television and Radio Artists

Screen Actors Guild – American Federation of Television and Radio Artists (SAG-AFTRA) represents approximately 160,000 actors, announcers, broadcast journalists, dancers, DJs, news writers, news editors, program hosts, puppeteers, recording artists, singers, stunt performers, voiceover artists and other media professionals. SAG-AFTRA members are the faces and voices that entertain and inform America and the world. With national offices in Los Angeles and New York, and local offices nationwide, SAG-AFTRA members work together to secure the strongest protections for media artists into the 21st century and beyond.

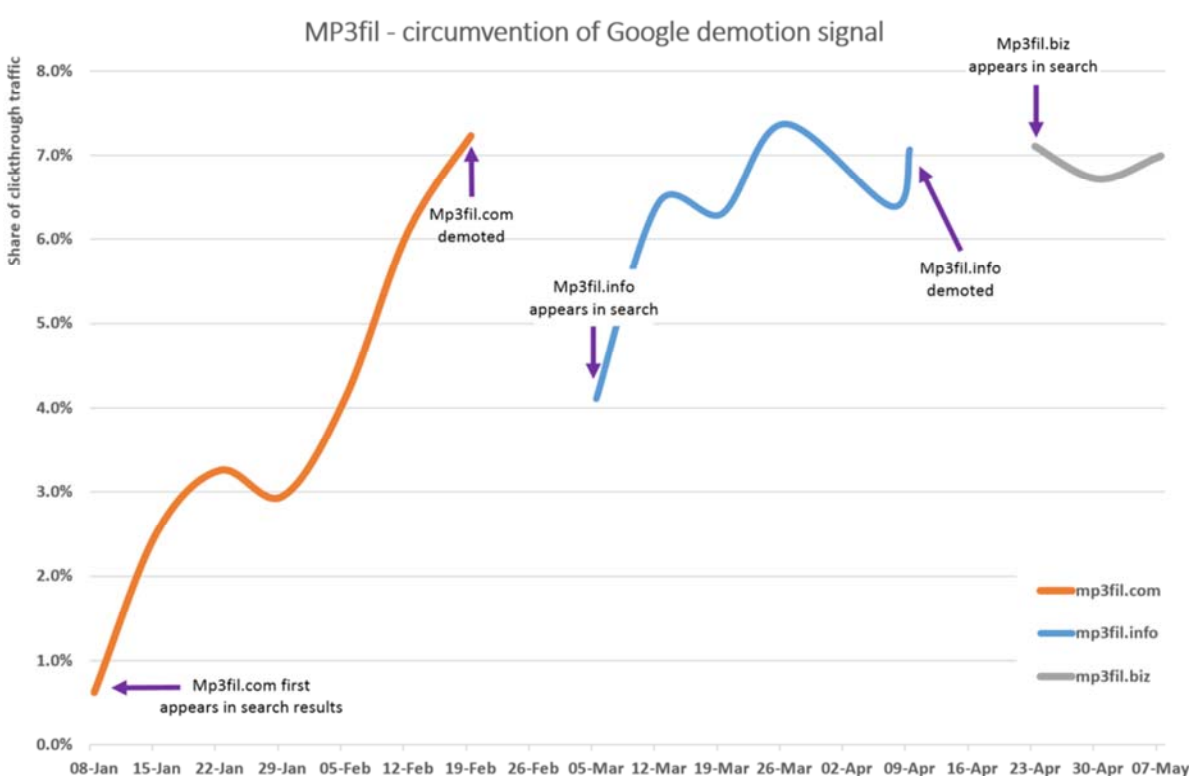
The Recording Academy

Established in 1957, The Recording Academy is an organization of musicians, songwriters, producers, engineers and recording professionals that is dedicated to improving the cultural condition and quality of life for music and its makers. Internationally known for the GRAMMY Awards® — the preeminent peer-recognized award for musical excellence and the most credible brand in music — The Recording Academy is responsible for groundbreaking professional development, cultural enrichment, advocacy, education and human services programs. The Academy continues to focus on its mission of recognizing musical excellence, advocating for the well-being of music makers and ensuring music remains an indelible part of our culture.

APPENDIX B

Apparent Impact of Domain Hopping on Search Results

The chart below shows the progress in search results of the infringing site MP3fil. This site first featured in searches for music content in January 2015 on the domain **mp3fil.com**. Over time, search results featured the site on more occasions and by 19th February 2015, the domain was listed on the first page of search results for 100 common music queries and as the first result for 12 queries. Using data that calculates typical clickthrough rates produced an estimate that 4.8% of traffic from Google searches for music content led to the Mp3fil.com domain.



During the weeks that this domain had been featured in search, the music industry had sent over 120,000 delist requests to Google for the mp3fil.com domain and a few days after 19th February, the mp3fil.com domain was demoted. However, by 5th March the site had moved to the domain **mp3fil.info** – showing exactly the same appearance and structure and with the mp3fil.com domain redirecting to the new domain. By 26th March, this domain was listed on the first page of search results for 52 out of 100 music related search queries and as the first result for 10 queries. A few weeks later, after 115,000 delist requests had been received by Google for the domain, the site was again demoted. Yet the pattern repeated once more, with the site

reappearing in search results two weeks later on 26th April on the domain **mp3fil.biz**, with the same look and feel and with both previous domains redirecting to the new destination.⁵⁹

⁵⁹ The same circumvention behavior has been observed in other sites as well. Source: Analysis by IFPI.