



**Statement of the Recording Industry Association of America (RIAA) before
the United States International Trade Commission**

**Global Digital Trade I: Market Opportunities and
Key Foreign Trade Restrictions**

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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 percent of all legitimate recorded music produced and sold in the United States. Our membership includes several hundred companies, most of which are small-to-medium-sized enterprises (SMEs) distributed by larger record labels.

The RIAA welcomes this opportunity to provide information to the United States International Trade Commission (the Commission) with respect to investigation no. 332-561, *Global Digital Trade I: Market Opportunities and Key Foreign Trade Restrictions*, for the purpose of preparing the first of three reports requested by the Office of the United States Trade Representative (USTR) on January 13, 2017 under section 332(g) of the Tariff Act of 1930 (19 U.S.C. §1332(g)). In this submission, RIAA will provide data and analysis regarding the specific topics enumerated in the Federal Register Notice (82 Fed. Reg. 10397, February 10, 2017) with respect to the first of those three reports.

Specifically, in this statement RIAA will address the five topics to be covered by the Commission's first report, including:

- B2B Developments.
- B2C Developments.
- The Importance of Data-Flows and the Adoption of Digital Technologies.
- Regulatory and Policy Measures.
- Key Digital Markets.

Introduction

Digital trade and policies that promote its legitimate and sustainable development are critical to U.S. as well as global economic growth and security. As the Commission estimated in 2014, digital trade – comprising both U.S. domestic commerce and cross-border trade – increased U.S. GDP by approximately 3.4 percent to 4.8 percent (\$517.1 to \$710.7 billion) in 2011, and increased U.S. real wages by approximately 4.5 percent to 5.0 percent and total U.S. employment

by 2.4 million full-time equivalents in the same year.¹ In 2014, the United States had a \$158.9 billion trade surplus in digitally deliverable services (where exports totaled \$399.7 billion and imports totaled \$240.8 billion). Such digitally delivered services account for over 50 percent of all of U.S. services trade.²

*In 2014, the United States had a **\$158.9 billion trade surplus** in digitally deliverable services.*

Likewise, digital trade is vital to the global economy. According to one study, the Internet has contributed \$4.2 trillion to the global economy in 2016.³ The same study estimates that gross domestic product (GDP) in developed countries is 5 percent to 9 percent higher annually because of the Internet, and 15 percent to 25 percent higher in developing countries per year. Another report found that total cross-border e-commerce from Internet sales (not including domestic sales) accounted for 10 percent to 15 percent of total e-commerce transactions in 2014, and estimates that by 2025, annual global cross-border e-commerce revenues could grow to between \$250 billion and \$350 billion, thereby significantly increasing from about \$80 billion today.⁴ Additional studies have found that roughly 50 percent of the world's traded services are already digitized,⁵ and that approximately 12 percent of the global trade in goods occurs via international e-commerce channels.⁶

¹ U.S. International Trade Commission; *Digital Trade in the U.S. and Global Economies, Part 2*; Publication No: 4485, Investigation No: 332-540; August 2014; p. 13; available at: <https://www.usitc.gov/publications/332/pub4485.pdf>.

² Department of Commerce; Economics and Statistics Administration, *Digitally Deliverable Services Remain an Important Component of U.S. Trade*, May 28, 2015; available at: <http://www.esa.doc.gov/economic-briefings/digitally-deliverable-services-remain-important-component-us-trade>.

³ Zwillenberg, Paul; Field, Dominic; and Dean, David; *Greasing the Wheels of the Internet Economy*, Boston Consulting Group, February 2014; available at: https://www.bcgperspectives.com/content/articles/digital_economy_telecommunications_greasing_wheels_internet_economy/.

⁴ Van Heel, Bas; Lukic, Vlad; and Leeuwis, Erwin; "Cross-Border E-Commerce Makes the World Flatter"; Boston Consulting Group; September 18, 2014; available at: https://www.bcgperspectives.com/content/articles/transportation_travel_tourism_retail_cross_border_ecommerce_makes_world_flatter/.

⁵ Castro, Daniel and McQuinn, Alan, *Cross-Border Data Flows Enable Growth in All Industries*; Information Technology and Innovation Foundation; February 2015; available at: <http://www2.itif.org/2015-cross-border-data-flows.pdf>.

⁶ Manyika, James; Lund, Susan; Bughin, Jacques; Woetzel, Jonathan; Stamenov, Kalin; and Dhingra, Dhruv; *Digital Globalization: The New Era of Global Flows*; McKinsey Global Institute; March 2016; p. 23; available at: <http://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/digital-globalization-the-new-era-of-global-flows>.

*The Internet has contributed **\$4.2 trillion** to the global economy in 2016.*

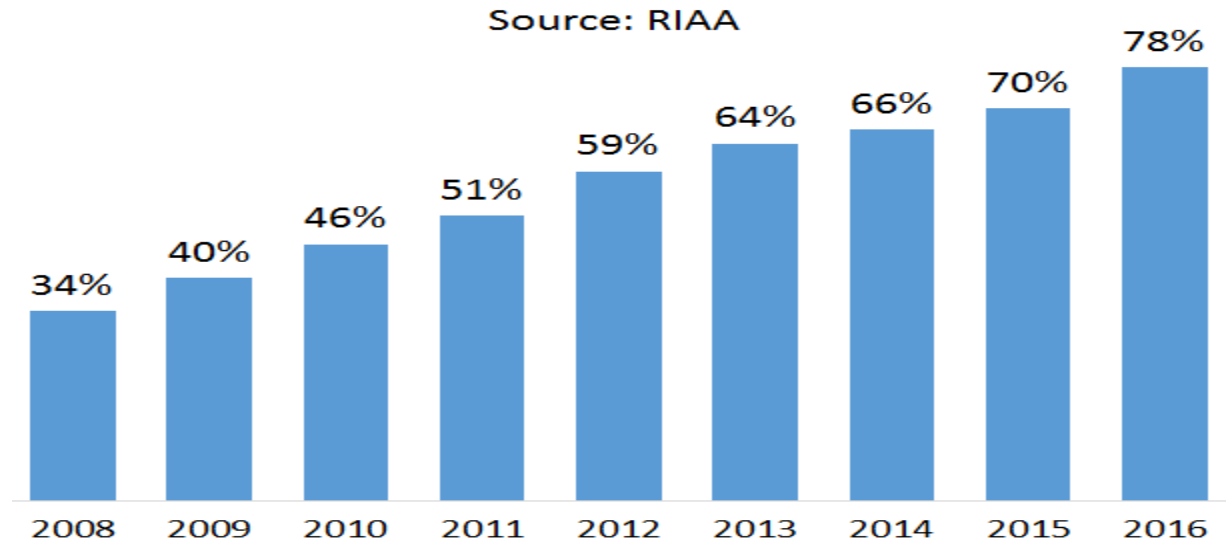
The U.S. recording industry is a driving force in global digital trade. Our industry is digitally intensive and technologically innovative. Record companies are technology companies that invest heavily in creativity and innovation adapted to the Digital Age, including 16.9 percent of their global revenues in artists and repertoire (A&R; the industry’s research and development equivalent).⁷ Record companies also make significant investments in developing digital products as well as technology systems to provide artists with information about how their music is consumed online and the revenues that result.

Likewise, sound recordings are digital products that fuel digital growth through a diverse array of online and cloud-based music services, including increasingly streaming as well as downloads and e-commerce purchases of compact discs (CDs) and vinyl records. In fact, the music industry is the leader in terms of sectors for which e-commerce is the dominant channel for trade.⁸ We have become a pioneer in the provision of digital products and services through both B2B and B2C channels and work closely with our digital partners to promote digital growth. As exemplified in the chart below, the music industry has transformed its self from a predominantly physical goods industry to a predominantly digital industry in ten years. We have revolutionized our business model, from production to distribution, retail and other digital services, to help pioneer disruptive changes to e-commerce that promote economic growth, create quality jobs, and expand legitimate access to music.

⁷ *Investing In Music: The Value of Record Companies*; International Federation of the Phonographic Industry (IFPI) and Worldwide Independent Network (WIN); p.11; available at: <https://www.riaa.com/wp-content/uploads/2017/01/ifpi-iim-report-2016.pdf>. (The proportion of revenue invested in A&R remains higher than the equivalent spent on research and development by any other sector: Pharmaceuticals (14.4%); Software & Computer Services (10.1%); Technology Hardware & Equipment (8.0%); Leisure Goods (5.8%); Aerospace & Defense (4.5%); Electronic & Electrical Equipment (4.5%); and Automobile & Parts (4.4%).)

⁸ Van Heel, Bas; *et al*; “Cross-Border E-Commerce Makes the World Flatter”; Exhibit 1.

Proportion of Total US Music Revenues From Digital Distribution



Moreover, music populates the Internet and brings users online generally. For example, visitors to www.musicfuels.com can see how musicians are some of the key drivers of social media worldwide, making up nearly all of the top ten most-followed individuals on Facebook, Instagram, Twitter and YouTube.⁹ In terms of video, 28 of the top 30 most watched on YouTube are music videos.¹⁰ Our ability to license our content on commercial terms to our digital partners contributes to U.S. digital services exports, which help power the U.S. digital services trade surplus. In fact, music companies license over 40 million sound recordings to over 360 digital music services worldwide.¹¹ Enabled by strong protection and enforcement of intellectual property rights, the digital products and services of the U.S. recording industry help fuel digitalization at home and around the world.

*Music companies license **40 million sound recordings to over 360 digital music services** worldwide.*

A U.S. digital trade policy that promotes the creative sector, in turn, benefits the U.S. economy, and its businesses, its workers and its consumers. In 2015, for example, copyright-intensive industries contributed \$1.2 trillion to the U.S. economy, and grew at an aggregate annual rate of

⁹ See <http://www.musicfuels.com/>.

¹⁰ RIAA research.

¹¹ *Investing In Music: The Value of Record Companies*; p. 14.

4.81 percent from 2012 to 2015, compared with average annual growth rate of 2.11 percent for the U.S. economy generally.¹² Likewise, copyright-intensive industries supplied 5.6 million jobs in 2015,¹³ and the compensation paid in the copyright intensive industries far exceeds that of U.S. workers overall – amounting to a compensation premium of 38 percent over the average U.S. annual wage.¹⁴

Copyright-intensive industries supplied 5.6 million jobs in 2015.

Regarding exports, the sale of U.S. copyright products outside of the United States was valued at \$177 billion in 2015.¹⁵ Likewise, licensing of copyright and other intellectual property rights is among the largest contributors to the U.S. trade surplus in digital services.¹⁶ Finally, American creativity, including its music, represents our culture, and digital trade policy can and should play a key role in conveying that culture internationally by protecting and promoting American creativity around the world.

Ultimately, digital trade thrives when the America music industry flourishes. This occurs when the United States:

- Promotes strong IPR protection and enforcement globally; and
- Advances digital market access for legitimate digital music products and digital music services, including copyright licensing, in our trading partners.

A key objective for U.S. digital trade policy should be overcoming barriers to these two digital trade priorities.

¹² Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2016 Report*; Economists Incorporated; Prepared for the International Intellectual Property Alliance; 2016; p. 2; available at: http://www.iipawebsite.com/copyright_us_economy.html.

¹³ U.S. Economics and Statistics Administration and U.S. Patent and Trademark Office; *Intellectual Property and the U.S. Economy: 2016 Update*; 2016; available at: <https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf>.

¹⁴ Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2016 Report*; p. 2.

¹⁵ Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2016 Report*; p. 2.

¹⁶ Grimm, Alexis; “Trends in U.S. Trade in Information and Communications Technology (ICT) Services and in ICT-Enabled Services”; Bureau of Economic Analysis, Economics and Statistics Administration, U.S. Department of Commerce; May 24, 2016; p.2, available at <http://www.esa.doc.gov/economic-briefings/new-bea-estimates-international-trade-digitally-enabled-services>.

With respect to the first priority – IPR protection and enforcement – strong and modern legal frameworks for copyright are critical. Barriers to such strong protection and enforcement include:

- Overbroad ISP Safe Harbors with respect to Copyright Infringement;
- Overbroad Copyright Exceptions and Limitations; and
- Copyright Piracy.

For example, ISP laws and regulations have created and perpetuated a massive “Value Gap”, i.e., a growing disconnect between the value that some digital platforms extract from music and the value returned to rights holders. The lack of clarity surrounding the status of certain online platforms in relation to copyright has enabled these platforms to build large businesses based on the offering of music, attracting huge numbers of users, while not remunerating rights holders properly. This has caused a significant digital market distortion that is highly detrimental to rights holders, competing digital music services, and ultimately music consumers, in the United States and globally.

Legitimate and sustainable digital trade is severely undermined by legal frameworks that create or perpetuate this Value Gap, whether by design or unintended effect, which disincentivizes responsible digital custodianship by Internet intermediaries with respect to copyright licensing and piracy, and which unfairly favor certain intermediary business models that provide access to user-uploaded content, with the result that such legal frameworks operate to the detriment of digital competition and creativity. To address this digital trade barrier, the United States and its trading partners should clarify that non-passive Internet intermediaries that provide access to user-uploaded music must license such music on commercial terms from rights holders. (See *ISP Safe Harbors and the Value Gap* and *EU Copyright Directive* sections below).

With respect to music industry’s second priority – digital market access – the volume of data flows across borders and the adoption of digital technologies are inextricably linked, and play a catalytic role in driving global digital trade. Internet access and digital inclusion as well as the technologies used to go online – particularly smartphones – are of great interest to the music industry.

In turn, an array of market access barriers impede digital trade, both at and behind the border. Such barriers include duties on digital music products, discriminatory treatment of digital music products and services, and data flow restrictions. Limitations on investment and services, as well

as forced technology transfer, impose additional obstacles to digital market access for the music industry in third countries.

B2B and B2C Developments in the Digital Music Business

The recording industry has revolutionized the way it does business, from production, to licensing, distribution and retail. It has become a pioneer in its provision of digital goods and services through both B2B and B2C channels. With respect to the digital B2B economy, the licensing of intellectual property rights, and copyrights in particular, is the digital service that powers legitimate access to music and other copyright-intensive digital products. Regarding the music industry's B2C ecosystem, digital trade is the engine for growth, spurred by music streaming and downloads and complemented by online sales of CDs and vinyl.

B2B Developments in Global Digital Music Trade

IPR licensing is a critical driver of global digital trade. For the sound recording industry, copyright licensing enables mutually beneficial relationships between music companies and our digital partners, which in turn catalyze access to legitimate content around the world. Copyright licensing is, therefore, a vital feature of the digital B2B landscape and a crucial component of legitimate and sustainable digital trade.

In addition to investing directly in artists, music companies also invest, along with distributors, in the fast-developing infrastructure of the digital market. Servicing a supply chain with around 360 licensed digital services worldwide brings significant costs. Substantial investment goes into systems to manage the large and complex task of efficiently and securely distributing more than 40 million recordings, videos and images across multiple platforms. This ensures the right music is made available around the world in the right format.¹⁷

These systems ensure the revenue generated can be tracked and distributed accurately while also providing huge amounts of data about where the music is being listened to in order to inform their approach to marketing and promoting artists. This investment remains constant as record companies adapt to keep pace with the needs of each individual digital service as well as those of the fans, artists and managers.

Record companies have also invested heavily in the development of online "portals" that show artists and their managers how and where their music is being consumed and the revenues being generated. These are designed to be easily accessible and can provide up-to-date information that can be filtered in different ways to show an artist how their music is being listened to on

¹⁷ *Investing In Music: The Value of Record Companies*; p.14.

digital services and around the world. Copyright licensing, and related information and communications technologies (ICT) services, are therefore fundamental to the music sector as well as other sectors that make our content available. These services in turn help fuel the U.S. economy and power global digital trade.

The profound importance of the provision of such services to the U.S. economy is exemplified by the considerable U.S. digital services trade surplus. According to the United States Bureau of Economic Analysis, U.S. exports of ICT services were \$68.4 billion and imports into the United States were \$37.8 billion, with a resulting U.S. ICT services trade surplus of \$30.6 billion in 2014. Moreover, in that same year, U.S. exports of potentially ICT-enabled services were \$385.1 billion, and imports of potentially ICT-enabled services into the United States were \$230.9 billion, with a resulting U.S. trade surplus of potentially ICT-enabled services of \$154.2 billion.^{18,19}

Significantly, from 1999 to 2014, both ICT services and potentially ICT-enabled services exports tripled, and both ICT services and potentially ICT-enabled services exports rose faster than imports, resulting in an increase in the trade surplus in ICT services from 1.7 percent to 2.6 percent of total services trade and in an increase in the trade in potentially ICT-enabled services from 10.9 percent to 13.0 percent of total trade in services.²⁰

IPR licensing, which the Bureau of Economic Analysis defines as a potentially ICT-enabled service, in turn drives the U.S. digital services trade surplus. In 2014, IPR licensing accounted for the largest digital trade surplus (i.e., \$88.2 billion) of the services categories included in the Bureau's analysis, and the second largest exports (i.e., \$130.3 billion), behind travel services (i.e., \$177.7 billion).²¹ From 1999-2014, U.S. services exports of IPR licensing grew from \$47.7 billion to \$130.4 billion, which was among the largest increases of the potentially ICT-enabled services export categories over the course of this period.²² During the period from 2006-2014, IPR licensing experienced an annual growth rate of 6.7 percent.

¹⁸ Grimm, Alexis; "Trends in U.S. Trade in Information and Communications Technology (ICT) Services and in ICT-Enabled Services"; p.2.

¹⁹ See Sturgeon, Timothy; Fredriksson, Torbjörn; Fondeur, Scarlett; and Korka, Diana; *International Trade in ICT Services and ICT-Enabled Services: Proposed Indicators from the Partnership on Measuring ICT for Development*; United Nations Conference for Trade and Development (UNCTAD), Division of Technology and Logistics, Science, Technology and ICT Branch, ICT Analysis Section, October 2015, p.3 (Defining "ICT services" as those that are "intended to enable and/or fulfill the function of information processing and communication", and "ICT-enabled services" as "services that are delivered remotely over ICT networks" and "include activities that can be specified, performed, delivered, evaluated and consumed electronically".).

²⁰ Grimm, Alexis; p.2.

²¹ Grimm, Alexis; p.1.

²² Grimm, Alexis; p.4 and 6.

*In 2014, IPR licensing accounted for the **largest surplus (i.e., \$88.2 billion)** of all digital services trade categories.*

Finally, several forms of IPR licensing form the basis of B2B relationships between music companies and their digital partnerships. Such licensing can relate directly to an artist's music – such as licensing a track for use in a movie, TV program or video game – or draw on the wider brand of the artist – where they may endorse a product or even develop products of their own. Individual artists commonly earn up to 90 percent of the revenues earned from a branding partnership, and music has been the catalyst for this. A record company may have as many as 200 long-term brand partnerships active on behalf of their artists at any point in time. In careful collaboration with their artists, record companies actively seek out, develop and secure these opportunities.²³

The recording industry contributes significantly to and relies heavily on cross-border digital IPR licensing enabled by strong copyright protection and enforcement, as evidenced by the significant role played by copyright and trademark licensing in driving up the U.S. digital services trade surplus. The Bureau of Economic Analysis, for example, found that copyright licensing for audio-visual and related products, accounted for U.S. exports valued at \$19.4 billion, with a trade surplus of \$11.7 billion, in 2014.²⁴ Likewise, in the same year, trademark licensing accounted for U.S. exports valued at \$16.8 billion.²⁵

B2C Developments in the Global Digital Music Trade

As with its B2B relationships, the music industry has fundamentally transformed its business model with respect to the provision of B2C digital products and services used primarily by consumers and individuals. The music industry has become digitally intensive and streaming has become an increasing large segment of the digital music market.

The streaming world has dramatically changed the economics of marketing new releases, creating new opportunities and risks. Streaming services can sustain the popularity of new releases over a long period of time, but they also require a longer period of marketing investment. On streaming services, where revenue is generated by the number of times a track is listened to, it can take about a third longer, compared to physical and download formats, for a company to recoup its investment in an artist. Consequently, record companies are now funding

²³ *Investing In Music*; p.15.

²⁴ Grimm, Alexis; p.1.

²⁵ Grimm, Alexis; p.1. (Note that the trade balance data for trademark licensing was suppressed in this study to avoid the disclosure of the data of individual companies).

and supporting sustained marketing campaigns for a longer period of time with the aim of achieving commercial success with their act.²⁶

Nearly four in ten Internet users (i.e., 37 percent) use audio streaming services worldwide. Audio streaming is valued for its ease of use and the vast range of content available. Security is cited by many consumers as an important reason for choosing streaming. Users note trust in the service, a safe environment, and security around the payment process.²⁷

For example, in the United States, in the first half of 2016, 78 percent of U.S. recorded music revenues were digital, including streaming and permanent downloads accounting for 47 percent and 31 percent of revenues, respectively. This was up from digital revenues of 61 percent in the first half of 2012, where downloads accounted for 47 percent of music revenues and streaming for only 14 percent of music revenues. During this same four-year period, revenues for physical goods dropped from 35 percent to 20 percent.

In the first half of 2016, 78 percent of recorded music revenues in the United States were digital.

Globally, in 2015, streaming – helped by the spread of smartphones, increased availability of high-quality subscription services and connected fans migrating to licensed music – grew to 19 percent of global industry revenues, up from 14 percent in 2014. Between 2011 and 2015, streaming increased dramatically year over year, by 46.7 percent in 2011, by 56.0 percent in 2012, by 40.9 percent in 2013, by 37.5 percent in 2014, and by 45.2 percent in 2015.²⁸

Subscription streaming services have seen dramatic growth as well. For example, subscription services combined with ad-supported freemium revenue on services such as Deezer and Spotify grew 58.9 percent in 2015. It is estimated that in 2015 68 million consumers around the world paid for music subscription services, up from 41 million in 2014, and eight million when data was first collected in 2010. Streaming revenues have overtaken income from download sales in no less than 42 countries and account for 43 percent of digital revenues globally.²⁹

²⁶ *Investing In Music*; p.12.

²⁷ *Music Consumer Insight Report 2016*; IPSOS Connect and IFPI; p.5; available at: <http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2016.pdf>

²⁸ *Global Music Report (2016): Music Consumption Exploding Worldwide*; IFPI; p.16-17; available at: <http://www.ifpi.org/downloads/GMR2016.pdf>.

²⁹ *Global Music Report*; p. 16-17.

Finally, online sales of physical CDs and vinyl remain an important part of the music business, particularly with respect to certain key trading partners and regions (see the *Key Digital Markets* section below). This is consistent with global trends. As one study estimates, roughly 12 percent of the global trade in goods occurs via international e-commerce.³⁰ Ensuring access to legitimate music products that provide secure payment systems for, and timely delivery to, consumers continues to be a digital trade priority for the recording industry.

The Importance of Data-Flows and the Adoption of Digital Technologies

In the Digital Age, data flows have had a profound and catalytic impact on international trade. According to its econometric analysis, McKinsey estimates that digital trade flows generated \$2.4 trillion in value in 2014 and that global data flows grew 45 times between 2005 and 2014.³¹ A different report estimates that global data and communications flows have increased more than seven fold between 2008 and 2013.³² Another study calculates that between 2002 and 2012 cross-border Internet traffic grew 60 percent a year.³³

In turn, the volume of data flows across borders and the adoption of digital technologies are inextricably linked and play a critical role in driving global digital trade. As the Congressional Research Services explained, “[p]owering all these connections and data flows are underlying information and communication technologies (ICTs).”³⁴ Trade in ICT goods and services has in turn become a significant driver of U.S. trade competitiveness, not only fueling global digital trade, but also fueling great data flows. For example, as the United Nations Conference on Trade and Development (UNCTAD) estimates, 50 percent of all traded services are enabled by the technology sector, including by cross-border data flows.³⁵

³⁰ Manyika, James; Lund, Susan; Bughin, Jacques; Woetzel, Jonathan; Stamenov, Kalin; and Dhingra, Dhruv; *Digital Globalization: The New Era of Global Flows*; McKinsey Global Institute; March 2016; available at: <http://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/digital-globalization-the-new-era-of-global-flows>.

³¹ Manyika, James, et al; *Digital Globalization: The New Era of Global Flows*.

³² Manyika, James, Bughin, Jacques, and Lund, Susan; *Global Flows in a Digital Age: How Trade, Finance, People, and Data Connect*; McKinsey Global Institute; April 2014; <http://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/global-flows-in-a-digital-age>.

³³ Lund, Susan, and Manyika, James; *Strengthening the Global Trade and Investment System for Sustainable Development: How Digital Trade is Transforming Globalization*; The E15 Initiative. McKinsey & Company; January 2016; available at <http://e15initiative.org/publications/how-digital-trade-is-transforming-globalisation/>.

³⁴ Fefer, Rachel; Akhtar, Shayerah Ilias; and Morrison, Wayne; “Digital Trade and U.S. Trade Policy”; Congressional Research Service; January 13, 2007; p. 4; available at: <https://fas.org/sgp/crs/misc/R44565.pdf>.

³⁵ “Information Economy Report”; *United Nations Conference on Trade and Development*; 2009; available at: http://unctad.org/en/docs/ier2009_en.pdf; and Makiyama, Hosuk Lee; “Digital Trade in the U.S. and Global Economies,” *European Centre for International Political Economy*, available at: http://www.ecipe.org/app/uploads/2014/12/USITC_speech.pdf.

According to the Congressional Research Service, ICT services trade has surpassed ICT goods trade. Notably, as discussed extensively above (see the Digital Music B2B Landscape and Global Digital Music Market sections above), ICT services trade includes charges for the use of intellectual property, (e.g., licenses and rights), including copyright-protected music. Where digital trade in ICT services begets more digital trade, digital intellectual property licensing services lead the way.

In measuring data flows, Internet usage is frequently cited as an indicator of digital connectivity and a barometer of data flow intensity, and value. According to one estimate, there are greater than 2.7 billion Internet users globally.³⁶ World Bank calculations are even higher, at 3.2 billion in 2015, representing 60 percent of the total global population.³⁷ Relatedly, it is estimated that cross-border bandwidth grew 45 times since 2005.³⁸ Likewise, Internet protocol traffic worldwide is estimated to increase nearly threefold over the next 5 years, and will have increased nearly a hundredfold from 2005 to 2020.³⁹ Similarly, Internet protocol video (including music videos) traffic, will be 82 percent of all consumer Internet traffic by 2020, which was 70 percent of Internet protocol traffic in 2015.⁴⁰

Internet access and digital inclusion as well as the technologies used to go online are of great interest to the music industry. Likewise, the recording industry is a leader in the field of digital technological innovation, driving the up-take of broadband access, devices, digital services and social media. For example, key digital indicators are often present in the top global music markets, which reflect the interrelationship between the up-take of digital technologies and trade in digital music products, including streaming and downloads. These digital indicators include the number of Internet users, broadband connections, mobile subscriptions, and active smartphones.

Smartphone adoption, in particular, is a key digital technology trend for the recording industry. For example, one forecast projects that mobile data traffic worldwide grew 63 percent in 2016, and grew 18-fold over the past five years.⁴¹ Consistent with this trend, the same study found that

³⁶ *Powering the Digital Economy: A Trade Agenda to Drive Growth*; Business Software Alliance; 2015; available at: http://www.bsa.org/~media/Files/Policy/Trade/DTA_study_en.pdf.

³⁷ *World Development Report 2016: Digital Dividends*; The World Bank Group; 2016; <http://www.worldbank.org/en/publication/wdr2016>.

³⁸ Manyika, James, et al; *Digital Globalization: The New Era of Global Flows*; p. 23.

³⁹ CISCO; *Visual Networking Index: Forecast and Methodology, 2015-2020*; White Paper; 2016; p. 2; available at: <http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/complete-white-paper-c11-481360.pdf>.

⁴⁰ CISCO; *Visual Networking Index: Forecast and Methodology, 2015-2020*; White Paper; 2016; p. 3.

⁴¹ CISCO; *Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2016-2021*; 2017; p. 1; available at: <http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/mobile-white-paper-c11-520862.pdf>.

almost half a billion (429 million) mobile devices and connections were added in 2016, with smartphones accounting for the great majority of that growth.⁴² As with Internet protocol traffic generally, video (including music videos) accounts for a significant share of total mobile data traffic, i.e., 60 percent of total mobile data traffic in 2016.⁴³

Video, including music videos, accounted for 60 percent of total mobile data traffic in 2016.

With respect to sound recordings, one consumer survey reports that smartphones are progressing toward becoming the most common devices for music consumption, especially in developing country markets. Smartphones have already become the most commonly used device among paid streaming users. For example, 55 percent of Internet users listen to music on a smartphone. This trend is particularly pronounced in the United States, Japan and France, which experienced growth in smartphone music consumption of 29 percent, 26 percent and 12 percent, respectively. Likewise, more than two out of three Internet users use their smartphones for music in Mexico (77 percent), South Korea (75 percent), Brazil (69 percent), and Italy (68 percent). Other markets with high smartphone music consumption are: Spain (65 percent); Sweden (64 percent); the United Kingdom (55 percent); the United States (54 percent); Australia (52 percent); and Germany (52 percent).⁴⁴

In 2016, 55 percent of Internet users listen to music on a smartphone.

Regulatory and Policy Measures that Significantly Impede Digital Music Trade

Several trade barriers impede the ability of the music industry to unlock the full potential of the global digital economy. Noting the market-specific data and analysis provided above (see the *Key Digital Markets* section below), and recalling the detailed treatment of IPR-related market access barriers enumerated in the 2016 Special 301 Report (and the upcoming 2017 Special 301 Report, scheduled to be issued in late April 2017), the following identifies an illustrative list of key barriers that significantly impede digital trade for the music industry, in particular, and that

⁴² CISCO; *Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2016-2021*; 2017; p. 1.

⁴³ CISCO; *Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2016-2021*; 2017; p. 2.

⁴⁴ *Music Consumer Insight Report 2016*; p. 8-9.

undermine legitimate and sustainable digital markets, in general. We have organized these barriers into two categories of measures:

- Market Access Barriers; and
- Barriers to Strong IPR Protection and Enforcement.

As a threshold matter, the following identifies a series of “measures”, consistent with the Federal Register Notice (82 Fed. Reg. 10397, February 10, 2017) announcing this investigation.

Specifically, the Federal Register states:

Describe regulatory and policy *measures* currently in force in important markets abroad that may significantly impede digital trade. Such measures affecting digital trade *might include*: FDI and other market access restrictions; cross-border data flow limitations (data localization requirements, Internet blocking, censorship, cultural regulations of digital content, and data privacy protections); cybersecurity regulations and limitations on the choice of encryption technologies; ISP regulations, including limitations on ISPs intended to protect IPR; and rules determining liability for third-party content.

First, the failure to provide market access, or strong and effective IPR protection, is itself a “measure”. This is consistent with both USTR’s National Trade Estimate⁴⁵ and Special 301 Report,⁴⁶ which both enumerate extensive examples of instances in which trading partners have not provided such market access or such protection, including with respect to digital trade.

Moreover, the United States government has long held that a measure can include omissions. For example, in the context of the WTO Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, USTR has taken the unambiguous position that “a measure may not be an ‘instrument’ but may be an ‘action’ by a Member or in some cases could be

⁴⁵ USTR; *National Trade Estimate Report on Foreign Trade Barriers*; March 2017; p. 1 (stating, “This report classifies foreign trade barriers into ten different categories. These categories cover government-imposed measures and policies that restrict, prevent, or impede the international exchange of goods and services. The categories covered include:...Lack of intellectual property protection (e.g., inadequate patent, copyright, and trademark regimes and enforcement of intellectual property rights”); available at: <https://ustr.gov/sites/default/files/files/reports/2017/NTE/2017%20NTE.pdf>

⁴⁶ USTR; *Special 301 Report*; March 2016; p. 1 (noting, “The Special 301 Report (Report) is the result of an annual review of the state of intellectual property rights (IPR) protection and enforcement in U.S. trading partners around the world, which the Office of the United States Trade Representative (USTR) conducts pursuant to Section 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988, the Uruguay Round Agreements Act, and the Trade Facilitation and Trade Enforcement Act of 2015 (19 U.S.C. § 2242)....To facilitate administration of the statute, USTR has created a Priority Watch List and Watch List within this Report. Placement of a trading partner on the Priority Watch List or Watch List indicates that particular problems exist in that country with respect to IPR protection, enforcement, or market access for persons relying on IPR.”); available at: www.ustr.gov.

viewed as ‘inaction’ by a Member.”⁴⁷ In support of its position, USTR cites the Appellate Body in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, which states, “[i]n the practice established under the GATT 1947, a ‘measure’ may be any act of a Member, whether or not legally binding, and it can include even non-binding administrative guidance by a government. *A measure can also be an omission or a failure to act on the part of a Member.*”⁴⁸

Second, we note that the fifth topic identified in the Federal Register Notice (excerpted above) provides an illustrative list, rather than an exhaustive list, of possible measures that may significantly impede digital trade. In this statement, RIAA has enumerated a series of such measures, including those specifically enumerated in the Federal Register Notice, as well as others that fall within its scope, but that were not explicitly enumerated. We welcome the Commission’s consideration of all such trade barriers identified by RIAA.

Market Access Barriers

Several types of market access barriers can impose significant negative impacts on digital trade. For instance, the Commission estimated in 2014, that decreasing barriers to cross-border data flows would increase U.S. GDP in the United States by 0.1 to 0.3 percent.⁴⁹ As described above (see *The Importance of Data-Flows and the Adoption of Digital Technologies* section above), given the importance of trade in ICT goods and services to the creative industries and the importance of the creative industries to trade in ICT goods and services, many ICT-related trade barriers have a negative effect on the music industry. Indeed, as stated in the 2016 National Trade Estimate:

[b]arriers to trade in telecommunications services and goods can have outsized effects beyond the telecommunications sector because a large and growing segment of international trade is conducted digitally or otherwise depends on high quality telecommunications...., [with such barriers including:] restrictions on cross-border data flows, foreign investment caps, limitations on competition, increased termination rates for international traffic, and restrictions on the supply of satellite services, as well as concerns about possible local content requirements and burdensome equipment standards and conformity assessment procedures.⁵⁰

The following types of barriers can impede trade in digital products and services of the music industry:

⁴⁷ USTR; *Further Contributions of the United States on Improving Flexibility and Member Control in WTO Dispute Settlement*; Addendum II; pp. 3-4; available at: https://ustr.gov/sites/default/files/asset_upload_file267_10411.pdf.

⁴⁸ WT/DS60/AB/R at footnote 47; internal citations omitted; (emphasis added).

⁴⁹ *United States International Trade Commission*; “Digital Trade in the U.S. and Global Economies, Part 2”

⁵⁰ Office of the United States Trade Representative, *The 2016 National Trade Estimate*; 2016; p. 2; available at:

- Duties. Customs duties imposed on digital products, including on sound recordings, as well as on ICT products used to access sound recordings legitimately, remain a constant potential barrier to digital trade. We support continued prohibitions on the application of duties on cross-border trade in digital products, and engagement to eliminate tariffs on such ICT products.
- Discrimination and Quotas. Digital discrimination remains a pervasive potential challenge to digital music trade. U.S. digital products, including sound recordings, should benefit from national treatment from our trading partners.
- Data Flow Restrictions. Many limitations on the cross-border flows of data can significantly impede trade in digital music. For this reason, we urge the United States government to protect the free flow of data across borders, in a manner consistent with intellectual property rights protection and enforcement (see below), including by removing any localization requirements imposed by our trading partners on cloud- and Internet-based digital products and services.
- Investment & Services Limitations. Strong investment and services commitments in third countries are vital to the music industry and our digital partners. Such commitments include, for example, that services with respect to distribution and retail clearly apply to digital products and services.⁵¹ U.S. digital trade policy should continue to ensure digital market access through commitments on investment & cross-border services, including digitally delivery.
- Security Concerns. Where the Internet is not secure, digital trade cannot thrive. Protecting digital environment against cybercrime should remain a key priority, including to ensure that the policies and measures of our trading partners provide security in a manner that safeguards privacy, promotes trust, and fosters creativity. Such disciplines should include prohibitions against circumventing access controls (i.e., technological protections measures, see below) and manufacturing, importing, offering to the public, providing, or otherwise trafficking in such TPM circumvention devices.

⁵¹ See WTO Panel Report (DS363); *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*; (In this WTO dispute, Panel found that China’s measures regarding distribution services for electronic sound recordings were inconsistent with China’s market access or national treatment commitments in respect of Articles XVI and XVII, respectively, of the General Agreement on Trade in Services. Specifically, the Panel found, which the Appellate Body affirmed, that the entry “sound recording distribution services” in sector 2.D of China’s GATS Schedule extends to the distribution of sound recordings in electronic form, and thus that China’s measures prohibiting foreign-invested entities from engaging in the distribution of sound recordings in electronic form were inconsistent with the national treatment obligation in Article XVII.); available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm.

- Forced Technology Transfer. Too often, market access for digital service providers is conditioned on technology transfer. Such requirements can have a significant negative impact on U.S. companies, particularly in the technology intensive music industry. Removing such technology transfer requirements, including with respect to source code, encryption keys and other TPMs, as well as other digital technologies, should remain a U.S. digital trade priority.
- Contractual Freedom. Copyright licensing is a driving force for digital growth for the music industry, which relies heavily on the right to negotiate and enforce contracts. Our industry strongly supports U.S. engagement that upholds the freedom to contract with respect to copyright and related rights, including the ability to transfer such rights by contract, and to exercise and enjoy fully the benefits derived from such rights that have been transferred.
- Lack of Transparency. Transparency and the rule of law are inextricably linked, and this is no different in the digital environment. Legislative and regulatory processes in our trading partners that impact digital trade should be transparent and provide opportunities for meaningful engagement with creative industries and other stakeholders, including through advanced notice of, and an opportunity to comment on, draft laws, regulations, standards and other measures affecting digital trade.

Intellectual Property Rights and Barriers to Strong Protection and Enforcement

Strong IPR protection and enforcement are critical digital trade priorities for the music industry. With IPR, we can create good jobs, make significant contributions to U.S. economic growth and security, invest in artists and their creativity, and drive technological innovation. By promoting strong and up-to-date IPR protection and enforcement, U.S. digital trade policy can sustain and grow digital IPR licensing services, which continue to drive U.S. digital services trade.⁵² Without strong and up-to-date IPR protection and enforcement for copyright-intensive industries, including for the recording industry, these many contributions are imperiled.

The importance of IPR has long been recognized as a well spring of innovation and creativity from which U.S. and global economic growth and many other benefits flow. The music industry strongly supports the priority placed on IPR protection and enforcement in the President's 2017

⁵² For a detailed assessment of specific trading partners and IPR-related barriers they may impose with respect to copyright-intensive digital products, including sound recordings, RIAA also refers the Commission to the submission of the International Intellectual Property Alliance for the 2017 Special 301 Report, which is available at: <http://www.iipawebsite.com/special301.html>.

Trade Policy Agenda.⁵³ Similarly, we recall the recent *Intellectual Property and the U.S. Economy: 2016 Update*, where the Economics and Statistics Administration and the U.S. Patent and Trademark Offices conclude:

Innovation and creative endeavors are indispensable elements that drive economic growth and sustain the competitive edge of the U.S. economy. The last century recorded unprecedented improvements in the health, economic well-being, and overall quality of life for the entire U.S. population.⁵⁴ As the world leader in innovation, U.S. companies have relied on intellectual property (IP) as one of the leading tools with which such advances were promoted and realized. Patents, trademarks, and copyrights are the principal means for establishing ownership rights to the creations, inventions, and brands that can be used to generate tangible economic benefits to their owner.⁵⁵

In the statement of the G20 Digital Economy Ministerial of April 6-7, 2017, G20 Ministers “reaffirm[ed] support for ICT policies that preserve the global nature of the Internet, promote the flow of information across borders, and allow Internet users to lawfully access online information, knowledge and services of their choice. At the same time the G20 recognizes that applicable frameworks for privacy and personal data protection, as well as intellectual property rights, have to be respected as they are essential to strengthening confidence and trust in the digital economy.”⁵⁶ Likewise, in their 2016 communique, G-20 countries “recognize [d] the key role of adequate and effective IPR protection and enforcement to the development of the digital economy.”⁵⁷ As the World Intellectual Property Organization explained, copyright is not only “...a legal category, but also as a mechanism which helps creators to earn a living, thereby

⁵³ Office of the United States Trade Representative; *2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program*; pp. 1-2; available at: <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf>. (“Ensuring that U.S. owners of intellectual property (IP) have a full and fair opportunity to use and profit from their IP” appeared as the fourth of the Administration’s eleven enumerated key trade objectives, and “provide adequate and effective protection and enforcement of U.S. intellectual property rights” appeared in the third of the Administration’s top priorities for trade).

⁵⁴ Gordon, Robert; *The Rise and Fall of American Growth: The U.S. Standard of Living Since the Civil War*. Princeton University Press; 2016.

⁵⁵ U.S. Economics and Statistics Administration, and U.S. Patent and Trademark Office; *Intellectual Property and the U.S. Economy: 2016 Update*.

⁵⁶ Statement of the G20 Digital Economy Ministerial Conference; Dusseldorf Conference; April 6-7, 2017; p. 6, para. 26; (stating also “Consumer protection is of great importance to promote inclusive growth built on adequate and effective intellectual property rights protection and enforcement are essential to building the trust needed to further develop these markets for the benefit of consumers and businesses alike.” And “We welcome new innovative digital business models, including like online-platforms and the sharing economy and call on Ministers responsible for the digital economy to consider principles that support investment and innovation, while protecting intellectual property rights.”); available at: http://www.bmwi.de/Redaktion/DE/Downloads/G/g20-digital-economy-ministerial-declaration-english-version.pdf?__blob=publicationFile&v=10.

⁵⁷ G20 Leaders’ Communique; Hangzhou Summit; September 4-5, 2016; paragraph 14; available at: https://www.g20.org/Content/DE/_Anlagen/G7_G20/2016-09-04-g20-kommunique-en.pdf?__blob=publicationFile&v=6.

generating significant employment, wealth, and trade.”⁵⁸

Specifically, the music industry relies on copyright protection for sound recordings, including as digital products, to be licensed as a digital service. Several rights are critical for the continued growth and viability of the global digital music market.

Copyright Protection

- Communication to the Public and Broadcasting Rights. For example, producers and performers should be granted full exclusive communication to the public and broadcasting rights, instead of the remuneration rights. Due to technological and market developments, the justification for granting remuneration rights instead of full exclusive rights has disappeared.
- Making Available Right. Likewise, the exclusive making available right is the essential right underpinning all online commerce in content. Record companies have successfully licensed their exclusive rights, resulting in broad availability and access of legitimate content on a diverse array of music platforms around the world. The exclusive making available right granted to record producers and performers under the WIPO Performances and Phonograms Treaty (WPPT) should be formulated and interpreted in a harmonized and broad manner across territories, to cover (1) all transmissions that entail an element of interactivity, and (2) all acts of active participation or intervention in a communication.
- TPMs. Increasingly, technological protections measures (TPM), which are protected by a separate right under U.S. law, and which are used to protect access to copyright-protected sound recordings, include encryption technologies and password protection, are critical for Internet services, including those that are cloud based. Strong protections against the circumvention of TPMs, that control access to content, as well as prohibitions on manufacturing, importing, offering to the public, providing or otherwise trafficking in such circumvention products or services should also continue to be a core aspect of U.S. digital trade policy.

Copyright Enforcement

Strong copyright protection in isolation, however, is of limited value without robust enforcement, particularly in the digital environment. Likewise, the absence of adequate and effective IPR enforcement tools constitute important impediments to digital music trade.

⁵⁸ *Guide on Surveying the Economic Contribution of the Copyright Industries: 2015 Revised Edition*; World Intellectual Property Organization; 2015; p. 11; available at: <http://www.wipo.int/copyright/en/performance/>.

- Primary and Secondary Liability. A strong copyright enforcement framework is predicated upon clear legal basis for liability, including both primary and secondary liability. Such liability should include linking sites.

- Injunctive Relief. Remedies for copyright infringement are also essential features of a digital trade policy, including injunctions and damages. Injunctive relief should provide relief against infringing services, covering the catalogue of the claimants, including both the current and future catalogue. Injunctions should also be available against all types of intermediaries, including ISPs, search engines, advertisers, payment providers), and should be dynamic, i.e., covering future domain changes. Preliminary injunctions should also be available. Furthermore, injunctions should be able to be obtained expeditiously and in a non-burdensome manner.

- Foreign Infringing Websites. Injunctive relief also provides a vital tool for addressing piracy by way of orders to ISPs to deny access to foreign infringing websites. Given that a local ISP cannot “take down” infringing content based on such websites, because such content is not hosted on that ISP’s servers, a number of countries around the world have adopted a legal basis to require local ISPs to prevent their subscribers from accessing specific foreign websites. ISPs have been ordered by courts and other administrative bodies to deny access to copyright infringing websites in at least 24 countries, and a legal basis for such orders is available in many more countries around the world, including most EU Member States.⁵⁹ The costs for implementing such orders to deny access to infringing websites should be borne by ISPs because these costs are minimal and part of an ISPs’ costs of running its business. Regarding legal costs, if the ISP chooses to oppose the request or application to implement an order to deny access to infringing websites, and it is unsuccessful, it should also bear the legal costs of the right holder.

- Damages. Damages are also particularly critical in promoting a legitimate and sustainable digital music trade. The music industry places particular importance on the availability of

⁵⁹ The Pirate Bay, as well as a high number of related mirror and proxy sites, have been ordered to be blocked in 18 countries: Argentina, Australia, Austria, Belgium, Denmark, Finland, France, Iceland, Indonesia, Ireland, Malaysia, Norway, Portugal, South Korea, Spain, Sweden, Turkey and the United Kingdom. Blocks have been implemented by mobile network operators in Argentina, Belgium, Finland, India, Ireland, Italy, Malaysia and South Korea. Website blocking is effective when blocks are implemented at DNS and IP level because (i) it leads to a reduction of usage of the blocked site; (ii) if multiple sites are blocked, it can result in a decrease of overall piracy; and (iii) it can have a positive impact on the usage of legitimate services. A recent study found that the website blocks of 53 sites in the UK resulted in: (1) a 90 percent drop in visitors to such sites; (2) a 22 percent drop in overall piracy; and (3) an 8 to 10 percent increase in legitimate sites. See Danaher, Brett; Smith, Michael; and Telang, Rahul; *Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behaviour*; April 2016; pp. 15-17; available at: <https://techpolicyinstitute.org/wp-content/uploads/2016/04/UK-Blocking-2-0-2016-04-06-mds.pdf>.

statutory damages given the difficulties in proving numbers of infringements or obtaining financial records from infringers. In the alternative, damages should be based on the harm caused to right holders and/or profits obtained by the infringer. Damage calculations should take into account deterrence for future infringers and should adequately compensate right holders.

- Additional Enforcement Tools. Other enforcement priorities for the recorded music industry include the presumption of ownership, a right of information against all intermediaries, and the absence of burdensome requirements to submit evidence into courts, e.g., no notary reports required. Note that the music industry’s enforcement priorities with respect to ISP safe harbors and notice and stay down obligations are detailed below.

Barriers to Copyright Protection and Enforcement that Distort Digital Trade

Copyright protection and enforcement, and contributions described above that flow from them, face three critical digital trade distortions that significantly impede legitimate and sustainable digital trade in music. These impediments are:

- Overbroad Internet Service Provider (ISP) Safe Harbors with respect to Copyright Infringement;
- Overbroad Application of Copyright Exceptions and Limitations; and
- Copyright Piracy, including Illegal TPM Circumvention.

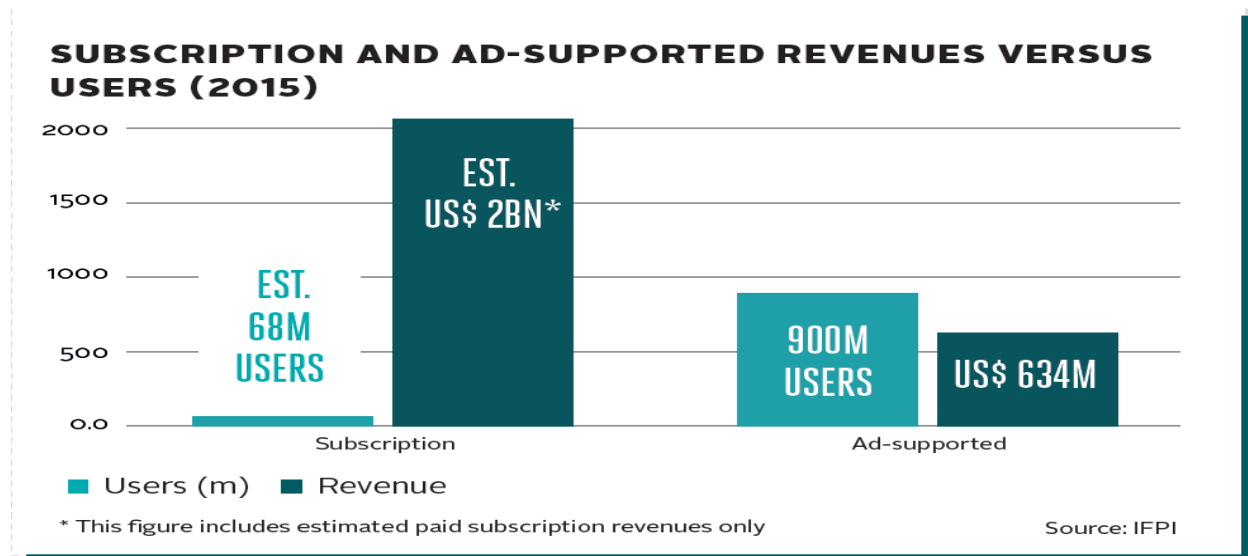
A. ISP Safe Harbors and the Value Gap

As a threshold matter, ISP safe harbors with respect to copyright infringement cannot exist in a vacuum. Instead, strong and clear primary and secondary liability for such infringement must be a condition precedent in the laws of our digital trading partners. This sequenced approach, which relies fundamentally on building a strong foundation first before subsequent articulation is initiated, is critical to ensuring legitimate and sustainable global digital trade. There is substantial risk that our trading partners take an *à la carte* approach to copyright protection that is highly selective and ultimately “copy-light”, by over-implementing ISP safe harbors, while under-implementing foundational copyright protections.

With that baseline, and turning to ISP safe harbors themselves, overbroad ISP safe harbors for copyright infringement impose a monumental impediment on the digital music economy, both in the United States and as exported into U.S. trading partners. Such overbroad safe harbors

exempt a dominant incumbent video streaming service from requirements to commercially license the music uploaded by users to that service. This exemption results in a massive structural barrier to global digital music trade, by denying right holders the ability to commercially license their copyrights with the largest and most-used global music service, which has over 1 billion users, 82 percent of which use it for music.⁶⁰

To illustrate the magnitude of this digital trade barrier, consider the fundamental disconnect between the fact that there are now more opportunities to purchase or simply access music than ever before. However, as a result of a critical distortion in the digital music market, a large share of music consumption on digital platforms today is not fairly remunerating artists and investors in music. As indicated in the *Introduction* above, this is the Value Gap, a fundamental anomaly underlying the digital music market. The figure below illustrates the enormity of the Value Gap, juxtaposing subscription and ad-supported revenues versus users in 2015.⁶¹



The Value Gap arises because some major and highly popular digital services are able to circumvent the normal rules that apply to music licensing. While user upload services comprise the world’s largest on-demand music audiences, estimated to be more than 900 million users, these services claim that they do not need to negotiate licenses for the music available on their platforms, or conclude licenses at artificially low rates. Instead, they claim protection from safe harbor rules that were established in the early days of the Internet. These liability privileges,

⁶⁰ *Music Consumer Insight Report 2016*; IPSOS Connect and IFPI; p.10; available at: <http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2016.pdf>

⁶¹ *Global Music Report (2016): Music Consumption Exploding Worldwide*; IFPI; p. 22; available at: <http://www.ifpi.org/downloads/GMR2016.pdf>.

established both in the United States and the EU, were intended to protect truly passive online intermediaries from copyright liability. They were not designed to exempt companies that actively engage in the distribution of music online from playing by the same rules as other online music services.⁶²

The negative impacts digital music trade of this abuse of safe harbor rules include:

- An unfair negotiating situation. Claiming exemption from liability prevents a free and fair negotiation when those services come to negotiate licenses. It allows them to take an “act first, negotiate later” approach, fundamentally distorting copyright licensing, which as explained above, is a key driver of the U.S. digital trade surplus and U.S. competitive advantage.
- Reliance on an ineffective notice and takedown system. Most user upload platforms implement a notice and takedown system to remove infringing content, but the system is ineffective. This system does not properly protect the rights of artists and labels and instead allows the platforms to build a business on the back of the availability of unlicensed content. The notice and takedown system has been subverted into a discount licensing system.⁶³
- Unfair payments to rights holders. While the availability of music generates substantial value for large technology companies, rights holders are be deprived of a fair reward for their work.
- Fair competition undermined. Fully licensed digital services and new market entrants have to face unfair competition in the marketplace from services that have access to music at below market rates. This stifles growth, innovation, competition, and consumer choice. The misapplication of safe harbors also distorts competition for subscription services subject to normal licensing conditions, limiting their ability to attract subscribers to their premium model.

According to one recent report, this safe harbor exemption acts as an enormous subsidy to the dominant incumbent service, a subsidy worth approximately \$650 million to \$1 billion

⁶² *Global Music Report (2016): Music Consumption Exploding Worldwide*; IFPI; p. 23; available at: <http://www.ifpi.org/downloads/GMR2016.pdf>

⁶³ Cary Sherman, *Valuing Music In a Digital World*, FORBES (Sept. 23, 2015); available at: <http://www.forbes.com/sites/realspin/2015/09/23/how-government-set-licensing-killed-the-music-industry/#23d7a29cf988>;

annually.⁶⁴ This company-specific industrial policy places one incumbent service at a fundamentally unfair advantage over other legitimate music services, which do not receive this enormous discount that was never intended by the legislative drafters, and instead negotiate commercial licenses with rights holders.

*The recording industry loses approximately **\$650 million to \$1 billion annually** from the distortion caused by the safe harbor provisions.*

In the United States, the copyright safe harbor regime was established pursuant to the Digital Millennium Copyright Act (DMCA). The expansion of the DMCA safe harbors has far exceeded its original intent and has resulted in a substantial barrier to the growth of legitimate services that are forced to compete with unlicensed services that use the safe harbors as a shield. Unfair competition impedes the marketplace. Here, unfair competition comes in two forms: completely unlicensed services; and services that negotiate “in the shadow of the law” to obtain below market rates. This distortion in the market stifles investment and ultimately reduces innovation and diversity of services and business models.

The following provides a summary of the music industry’s concerns with respect to the DMCA safe harbor regime, including the strong opposition to exporting these problematic aspects in U.S. digital trade policy. Visitors to www.valuethemusic.com will learn more about the magnitude of the problem and the breadth of support for addressing this problem, including artist testimonials, news, studies and filings.⁶⁵ Likewise, the Commission is also invited to view the video submitted by musicians in February 2017 to the U.S. Copyright Office, expressing their concerns regarding the functioning of the DMCA.⁶⁶ This section provides an overview of the problems with the way the DMCA has worked in practice:

- Court interpretations that encourage user-uploaded content services to turn a blind eye to infringement rather than providing incentives for cooperation.

⁶⁴ Beard, T. Randolph; Ford, George S.; and Stern, Michael; *Safe Harbors and the Evolution of Music Retailing*; Phoenix Center Policy Bulletin No. 41; Phoenix Center for Advanced Legal and Economic Public Policy Studies; March 2017; available at: <http://www.phoenix-center.org/PolicyBulletin/PCPB41Final.pdf>.

⁶⁵ See <http://www.valuethemusic.com/index.html>.

⁶⁶ See Levine, Robert; “YouTube Can Do Better”: Cee Lo, Evanescence, Rush Among Artists Calling for DMCA Action”; BillboardBiz; February 23, 2017; available at: <http://www.billboard.com/biz/articles/news/7701856/youtube-can-do-better-cee-lo-evanescence-rush-among-artists-calling-for>.

- A mindset of “use third party copyrighted works first, ask for a license later.”⁶⁷ Consider that Flipagram, YouTube and SoundCloud all claimed safe harbor status in their early years while relying on music for their growth, and only sought licenses for music after they had obtained substantial audiences.
- Rogue services design and engineer their systems to make the DMCA irrelevant and ineffective in stopping their ongoing infringement. Consider Grooveshark, which profited from its infringing activity for years under the color of the DMCA safe harbor before ultimately being found liable for willful copyright infringement.⁶⁸

Several factors have contributed to the failure of the DMCA to fulfill its purpose. To start, Congress enacted the DMCA in 1998 when dial-up Internet speeds and static web sites predominated. Soon thereafter, individuals could be worldwide publishers of content on peer-to-peer networks and service providers began to distribute massive amounts of content uploaded to their servers. Then came more sophisticated search engines, social networks, and an explosion of smartphones and other mobile Internet access devices. The rules for service providers and tools for content creators set forth in the DMCA proved unsuitable for this new world.

Given all of these fundamental changes, a law that might have made sense in 1998 is now not only obsolete but actually harmful. The problem is compounded by the fact that, courts, too, have struggled to apply this outdated law for the present day, further shifting the DMCA from its original intent through a series of judicial rulings to strip away adequate protection for content owners.

Courts have expanded application of the safe harbors well beyond the passive service providers of 1998 to more active distributors of music that compete directly with services that must obtain licenses. The result: a Hobson’s Choice for content owners, either to license content for much less than it’s worth, or have the broken notice-and-takedown system as the only recourse.⁶⁹

1. Negative Impacts on Copyright, Including Digital Licensing

⁶⁷ See Kurt Wagner, *Why Aren’t More People Talking About Flipagram? (Q&A)*, RECODE.NET (Mar. 13, 2016), (quoting the CEO of Flipagram as saying, “we kind of just did it and [decided] we’d ask for permission after”); available at: <http://recode.net/2016/03/13/why-arent-more-people-talking-about-flipagram-qa/>.

⁶⁸ *Capitol Records, LLC v. Escape Media Group, Inc.*, 2014 U.S. Dist. LEXIS 183098, *76-79 (S.D.N.Y. May 28, 2014), *adopted* 2015 U.S. Dist. LEXIS 38007, *18-19, 30-32 (S.D.N.Y. Mar. 25, 2015) (“*Grooveshark*”).

⁶⁹ Cary Sherman, *Valuing Music In a Digital World*, FORBES (Sept. 23, 2015); available at: <http://www.forbes.com/sites/realspin/2015/09/23/how-government-set-licensing-killed-the-music-industry/#23d7a29cf988>; see also Cary Sherman, *State of the Music Business: What the Numbers Tells Us*, RIAA (Mar. 22, 2016), <https://medium.com/@RIAA/state-of-the-music-business-what-the-numbers-tell-us-63ce1524b30#wcdv03wso>; RIAA 2015 Year-End Sales & Shipments Data Report, available at <http://www.riaa.com/reports/riaa-2015-year-end-sales-shipments-data-report-riaa/>.

In addition to hampering the growth of other digital music services that choose to partner with the Music Community and license music content, Section 512's limitations on liability for digital service providers have negatively impacted the protection and value of copyrighted works, including licensing markets for such works in a number of ways:

- Overall protections are limited as the safe harbor allows for many variations of unauthorized use with no meaningful remedy, thus depressing the licensing market.
- The shadow of the safe harbor too often leads to a below market rate.
- When service providers decide to exploit music but not license it and instead hide behind the safe harbor wall, no monetary compensation is offered to content owners, who must also expend resources to identify infringements and send takedown notices.

Rather than encouraging cooperation between service providers and content owners to address infringement, the DMCA has led to certain service providers actively avoiding any knowledge of what is occurring on their service, declining to use readily available tools to limit infringements, and using flawed interpretations of the DMCA to avoid ensuring that works that have been noticed as infringing do not reappear on their service. By way of example, unauthorized uses of One Direction's "Drag Me Down" reappeared over 2,700 times on YouTube following the first notice.⁷⁰ The problem is endemic in today's Internet environment. In addition, some social media networks invoke the safe harbors while enabling their users to shield their content from public searching – further impeding the enforcement of copyright rights.

The fact is that, while the technology industry is benefitting from the increased availability of digital music, and profiting from the unprecedented consumption and interest in music, the music community continues to struggle to bridge the value gap. The DMCA has prevented the music industry from receiving its fair share of the significant and growing digital marketplace.⁷¹ If the music industry is to be successful through, creating, investing in, and rewarding music creators, it needs a digital marketplace operating in a free market that properly compensates creators and content owners.

2. Notice and Takedown

Section 512's notice-and-takedown process, as implemented, is impracticable and ineffective on today's Internet. Music trade associations have sent notices of over 280 million infringements to

⁷⁰ IFPI submission on regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy (Dec. 2015).

⁷¹ See David Israelite, *NMPA Head Says "Free" May Work For Pandora But is Devastating to Songwriters: Op-Ed*, BILLBOARD (Sept. 24, 2015); available at: <http://www.billboard.com/articles/business/6707834/nmpa-david-israelite-oped-pandora-songwriter-payments>.

Google alone.⁷² Individuals and small-businesses which cannot afford such an undertaking are left without even this minimal protection under the DMCA against digital piracy.⁷³ These issues are exacerbated by the “whack-a-mole” nature of the notice-and-takedown process.

Certain service providers have been known to contribute to this problem by ignoring the rampant infringing activity occurring on their sites, and waiting to act until they receive copyright-owner notifications.⁷⁴ These notifications may never come because of content owners’ unawareness of infringement, or may only come once the infringement has gone viral.⁷⁵ The DMCA was not intended to enable or allow service providers to profit from such widespread and repeat infringement, while shielding themselves from liability; yet it is doing just that.

Music has been particularly hard hit. To get a sense of the scope of the problem, consider that since 2012, RIAA alone has noticed over 175 million infringements of music. In just the short period between the Grammy nominations (December 7, 2015) and the Grammy awards (February 16, 2016), nearly 4,000 unique infringing links were noticed to digital services for just the five nominated “Record of the Year” tracks.⁷⁶ In addition, there has also been 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.⁷⁷ In these circumstances, the infringement is particularly damaging as it hits before the music has been released commercially to the public.

With that understanding of the scope of the problem, consider the ineffectiveness of the DMCA. In 2014, RIAA noticed over 278,000 instances of music infringement to just one site that claims to comply with the DMCA Section 512(c) safe harbors, 4shared.com, a cyberlocker and file

⁷² Source: Google Copyright Transparency Report for infringements noticed by RIAA, BPI, and IFPI.

⁷³ See also Nelson Granados, *How Online Piracy Hurts Emerging Artists*, FORBES (Feb. 1, 2016); (explaining that Kimberly James, President of indie label CBM, says that within two hours of releasing music, that often costs thousands of dollars to produce, she has found it illegally downloaded on hundreds of websites. Once the music has been uploaded, it’s a massive battle to get it taken down, one that most emerging artists cannot afford; a conservative estimate puts 10 percent of music royalties as lost to piracy.); available at: <http://www.forbes.com/sites/nelsongranados/2016/02/01/how-online-piracy-hurts-emerging-artists/#488ccf0a7fa2>.

⁷⁴ See *Veoh Networks*, 586 F. Supp. 2d 1132; *Viacom II*, 676 F. 3d at 32-34.

⁷⁵ Brief for Recording Indus. of America Assoc. et al. as Amici Curiae, p. 5, *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500 (S.D.N.Y. 2013).

⁷⁶ This did not include notices for those links to search engines, and includes a period months after the commercial release of these songs.

⁷⁷ See Stephen Witt, *The Man Who Broke the Music Business*, THE NEW YORKER (Apr. 27, 2015); (describing some of the history of online infringement of pre-release music); available at:

<http://www.newyorker.com/magazine/2015/04/27/the-man-who-broke-the-music-business>; see also Stephen Witt, *How Music Got Free: The End of an Industry, the Turn of the Century, and the Patent Zero of Piracy*, (Viking Pres, 2015); Andre Yoskowitz, *FBI Takes Down Pre-Release Music Piracy Site Share Beast*, NEWS BY AFTERDAWN (Sept. 16, 2015); (describing ShareBeast, a rogue cyberlocker shut down by the Department of Justice in 2015 that trafficked in pre-release music); available at: <http://www.afterdawn.com/news/article.cfm/2015/09/16/fbi-takes-down-pre-release-music-piracy-site-sharebeast>.

sharing hub. Of those, 97 percent were for repeat infringements of a previously noticed sound recording. In the five months prior to Grooveshark being shut down for willful copyright infringement, RIAA sent the service nearly 300,000 infringement notices; 94 percent were for repeat infringements of a previously noticed track.

In 2014, RIAA noticed over 278,000 instances of music infringement to just one site that claims to comply with the DMCA Section 512(c) safe harbors. Of those, 97 percent were for repeat infringements of a previously noticed sound recording.

This problem with repeat infringement of the same track on the same site is not limited to a particular class of service provider. IFPI, an international music trade association, reported that infringements of One Direction’s “Drag Me Down” reappeared over 2,700 times on YouTube (an on-demand, audio-visual service) following the first notice, infringements of Mark Ronson’s “Uptown Funk” reappeared over 3,000 times on SoundCloud (an on-demand, music streaming service) following the first notice.⁷⁸

Copyright owners should not be required to engage in the endless game of sending repeat takedown notices to protect their works, simply because another or the same infringement of the initially noticed work appears at a marginally different URL than the first time. The current standard of “URL by URL” takedown does not make sense in a world where there is an infinite supply of URLs. As described in the response to Question 15, technologies exist to identify content that is reposted on a digital service after it is removed, services of all sizes have implemented them, and they should be deployed as a standard industry practice.

We see very similar inefficiencies with search engines, who claim safe harbor status, and the way they continue to index known, infringing sites. Consider the example of the Mp3Skull site, found at various domains in 2015, and the numbers of infringements continually indexed by Google to that infringer. This site jumped to a new domain every time Google demoted the old domain, and that switch to the new domain allowed them to reappear prominently in Google search results.

⁷⁸ IFPI submission on regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy (Dec. 2015).

Another major inefficiency in the DMCA, as implemented in today’s environment, is the lack of clarity about what is meant by “expeditious” takedown⁷⁹, and the ability of services to game the system under the veneer of protecting their user base. “Expeditious” takedown must be interpreted to be commensurate with the speed at which infringing material can be uploaded, indexed and disseminated over the Internet.⁸⁰ Google touts that it removes noticed infringing URLs from its system within six hours, but fails to provide transparency about the speed by which it indexes those infringing sites. Six hours on its own is a meaningless statistic in thinking about what “expeditious” means without an understanding of Google’s capabilities and speed in indexing infringing services in the first place. This can be a particularly crucial window of time in the case of works that have not yet been commercially released.

Another service recently announced, supposedly for the benefit of its users, that it would institute a 48-hour rule before taking down infringing content that has been the subject of a DMCA notice.⁸¹ That guarantees for this service, and its users, the ability to continue to benefit from the infringement during this period. If a service wants to institute such a policy to keep the alleged infringement up after notice for whatever reason, that is a business risk it can take, but it should not be permitted to continue to avail itself of the safe harbors for any activity on its service. The law must be clarified to reflect this.

In thinking about the problem of repeat infringements, prominent scholars have advocated that recalibration is necessary, and suggested that a return to more traditional tort principles would help solve this concern.⁸² This proposal should be seriously considered.

Section 512’s notice-and-takedown system is unduly inefficient and burdensome for a number of reasons, including the whack-a-mole nature of the problem and the lack of a serious “take down-and-stay down” component.

As a general matter, the DMCA, as currently interpreted by some service providers, requires content owners to survey every link on the Internet, worldwide, twenty-four hours a day, seven days a week, three hundred and sixty-five days a year, while service providers take advantage of

⁷⁹ 17 U.S.C. § 512(c)(1)(A)(iii) (“upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material”) and 17 U.S.C. § 512(d)(1)(C) (“upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material”).

⁸⁰ For example, as noted in response to Question 9, last year YouTube CEO Susan Wojcicki announced that over 400 hours of video were being uploaded onto YouTube per minute.

⁸¹ See *A Fair DMCA Policy for Creators*, PATREONBLOG (Feb. 22, 2016), <http://blog.patreon.com/a-fair-dmca-policy-for-creators/>.

⁸² 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). See also Bruce Boyden, *The Failure of the DMCA Notice and Takedown System*, CENTER FOR THE PROTECTION OF INTELLECTUAL PROPERTY (Dec. 2013), available at <http://cpip.gmu.edu/wp-content/uploads/2013/08/Bruce-Boyden-The-Failure-of-the-DMCA-Notice-and-Takedown-System1.pdf> for a discussion of other solutions to address the repeat infringement problem.

the DMCA to profit from the infringing activity. Even with large-scale content owners with a large back office and significant resources, these efforts are only minimally effective. Smaller copyright owners – like songwriters, indie artists, indie labels and publishers – cannot even engage in these minimally effective efforts and have no remedy at all.

B. Overbroad Copyright Exceptions and Limitations

Copyright exceptions and limitations do not exist in a vacuum. In the United States, such exceptions and limitations exist in the context of strong affirmative copyright protections, as well as a well-established intellectual property rights system, history of respect and reliance on such rights, and a strong mechanism for the enforcement of such rights. While a strong copyright ecosystem does exist in many of our trading partners, this is not necessarily the case with respect to each and every country with which the United States engages globally.

Too often, efforts to address exceptions and limitations in other countries do not proceed from the starting point of a strong foundation of copyright protection and enforcement. Frequently, these exceptions threaten to swallow the rule – in terms of the law and practice of some U.S. trading partners – to the detriment not only of the U.S. music industry and creative industries, generally, but also of creators in those economies. In turn, these developments impose profound and negative systemic impacts on the digital potential of that country to drive economic growth and development as well as on the legitimacy and sustainability of global digital trade as a whole.

Moreover, copyright exceptions and limitations are subject to international norms, including the three-step test. This fundamental norm is woven tightly into the fabric of international copyright law, including the Berne Convention, the WIPO Internet Treaties, and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights. Whether our trading partners have not acceded to or ratified these agreements, are endeavoring to expand the scope of this exception and limitation, or are implementing their own laws in a manner inconsistent with the three-step test, preserving the integrity of the boundaries of the three-step test is critical.

In light of the above, efforts to export fair use are particularly troubling. Fundamentally, fair use creates uncertainty out of the U.S. context. The fair use doctrine provides for open-ended exceptions, setting out principles which should be considered by the courts when determining whether a use of copyright material is “fair” and, therefore, permitted. Even in the United States, where a very substantial body of case law examining the parameters of fair use has developed over many years, the scope of fair use is uncertain.

The inherent uncertainty of the scope of fair use creates an uneasy and complicated relationship

to the first requirement of the three-step-test, which is limited to “certain special cases”. That is particularly true when fair use is implemented without the benefit of the 150 years of case law on which U.S. fair use is based. The dependence of fair use on judicial interpretation also highlights that introducing fair use in civil jurisdictions may be particularly problematic.

The digital music market offers tremendous potential for commercial and cultural growth. However, much of this potential is lost due to uncertainties about legal responsibility, resulting in an uneven playing field between those “excused” to exploit cultural content and those investing in creating it. Fair use would add further uncertainty into an environment that demands greater certainty for businesses and users alike. Fair use offers the potential of erecting further barriers to digital trade, including with respect to digital copyright licensing services, rather than enabling its growth and sustainability.

Additionally, it is unclear that there is a need for fair use in foreign jurisdictions. Fair copyright systems have facilitated the creation of new and innovative ways of giving consumers access to music, driving economic growth. Innovation happens with or without fair use. Some of the most successful global digital music services were developed and launched in countries that do not have fair use provisions, including Spotify (Sweden), Tidal/WiMP (Norway), SoundCloud (Germany) and Deezer (France). To the extent that the above digital music services that license music on commercial terms are forced to compete unfairly with other Internet services that do not have to license music on such terms as a result of fair use, this exceptions amounts to an effective subsidy and even a company-specific industrial policy that distorts competition, devalues copyright-intensive creativity, and threatens legitimate and sustainable global digital trade.

C. Copyright Piracy and TPM Circumvention

While the digital economy offers many opportunities to U.S. creative industries, online copyright piracy continues to impose a massive distortive impact on legitimate and sustainable digital commerce. As the 2016 Special 301 Report explained:

The increased availability of broadband Internet connections around the world, combined with increasingly accessible and sophisticated mobile technology, is generating significant benefits, ranging from economic activity based on new business models to greater access to information. However, these technological developments have also made the Internet an extremely efficient vehicle for disseminating infringing content and for supplanting legitimate opportunities for copyright holders and online platforms that deliver licensed content.⁸³

⁸³ Office of the United States Trade Representative; 2016 Special 301 Report; April 2016; p. 19; available at: <http://photos.state.gov/libraries/paraguay/231771/PDFs/USTR-2016-Special-301-Report.pdf>.

Data flows and a free and open Internet alone are not enough. U.S. digital trade policy must promote legitimate and sustainable digitalization entailing cross-border e-commerce that is inclusive, secure, trusted and fueled by creativity enabled by strong IPR protection. Therefore, combatting piracy is both critical to protecting the digitally-intensive U.S. creative sector as well as vital to securing the long-term viability of the global digital economy.

For the music industry, services engaging in the unlicensed sale, streaming and/or distribution/downloading of sound recordings significantly harm U.S. artists, record labels, and music publishing companies by:

- Disseminating music without authorization and without providing any compensation to the creators and owners of the music; and
- Artificially distorting the market value of the music, thereby reducing the compensation to the creators and owners from licensed services.

In an increasingly digital, online and mobile marketplace, the scale of and damage caused by piracy is massive, although the full costs of copyright piracy are difficult to quantify. For example, according to RIAA analysis, in 2016 there were over 137.3 billion visits globally to websites dedicated to copyright infringement. Some were visits to torrent sites like thepiratebay, KickAssTorrents and rapidgator that provide access to infringing downloads of a wide array of copyright-protected content – music, movies, games and software – and others are sites like youtube-mp3 and mp3juices that specialize in infringing downloads of music files. Likewise, according to the IFPI, in 2015, an estimated 24 billion individual tracks were illegally downloaded via BitTorrent; 5.5 billion tracks via cyberlockers and 2.5 billion via stream ripping services.⁸⁴

*In 2016, there were over **137.3 billion visits globally** to websites dedicated to copyright infringement.*

Another recent report estimated very conservatively that the commercial value of digital piracy in the music industry was \$29 billion in 2015, explaining “it is most likely that the value of total digital piracy exceeds our estimates by a considerable amount.”⁸⁵ An earlier study estimated that

⁸⁴ See <http://www.ifpi.org/>.

⁸⁵ Frontier Economics; *The Economic Impacts of Counterfeiting and Piracy*, A Report Prepared for BASCAP and INTA; February 2017; pp. 23-39, available at: <http://www.inta.org/Communications/Pages/Impact-Studies.asp>.

cybercrime costs the global economy some \$400 billion in annual losses through consumer data breaches, financial crimes, market manipulation, and theft of intellectual property.⁸⁶

*According to one study, the commercial value of digital piracy to the music industry was **\$29 billion** in 2015.*

While the music industry has fundamentally changed its business model to adapt to and begin to thrive in the digital economy, Internet piracy continues to pose significant challenges. For example, one consumer survey finds that over one third (35 percent) of all Internet users access infringing music, with 30 percent of internet users using stream ripping services (see below), which rises to 49 percent of Internet users using such services among 16-24 year olds.⁸⁷

The role of search engines in global piracy presents an enormous and pervasive problem. Search engines continue to channel significant numbers of Internet users to unlicensed music sites, such as those described below, enumerated in RIAA's submission for the 2016 Out-Of-Cycle Review of Notorious Markets,⁸⁸ and reported in USTR's 2016 Out-Of-Cycle Review of Notorious Markets.⁸⁹ For example, 23 percent of Internet users used Google to search for "free" music, of which 66 percent explicitly search for pirated content. This search rate is particularly high in Mexico, Brazil and the United States, where almost three-quarters of those who search for "free" music on Google are searching for infringing websites.⁹⁰

The massive economic harm of piracy, when combined with its devastating impacts on creativity and innovation, pose a monumental and systemic threat to U.S. digital trade competitiveness, where copyright licensing is a key driver of the U.S. digital services surplus. Combatting the following forms of copyright piracy is critical for promoting U.S. economic growth and security, the creation and maintenance of good well-paying jobs, and driving the U.S. trade digital services trade surplus.

1. Stream-Ripping Sites

⁸⁶ *Net Losses: Estimating the Global Cost of Cybercrime*; Center for Strategic and International Studies and McAfee; June 2014; available at: <https://www.mcafee.com/us/resources/reports/rp-economic-impact-cybercrime2.pdf>.

⁸⁷ *Music Consumer Insight Report 2016*; p.14.

⁸⁸ RIAA; 2016 Notorious Markets Submission; October 7, 2016; available at: <https://www.regulations.gov/document?D=USTR-2016-0013-0012>.

⁸⁹ *2016 Out-Of-Cycle Review of Notorious Markets*; Office of the United States Trade Representative; December 2016; available at: <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>.

⁹⁰ *Music Consumer Insight Report 2016*; p.15.

A major development in the music copyright infringement world has been the emergence of sites that engage in the unauthorized reproduction and distribution of the popular copyrighted music that appears on YouTube and other licensed music streaming services. These illegal sites violate YouTube's terms of use, and circumvent the technological protection measures that YouTube and other licensed services employ to prevent copying and distribution of music streamed through their service. These stream-ripping sites allow free downloads of these music files copied from streaming services and monetize their infringing activity through advertising.⁹¹

The distribution of permanent downloads of files from streaming services deprives the record companies and artists of streaming revenue by eliminating the need for users to return to YouTube and other licensed services every time they listen to the music. At the same time, these services damage pay-for-download sites like iTunes, Google Play and Amazon by offering the tracks for free. The overall popularity of these sites and the staggering volume of traffic they attract is evidence of the enormous damage being inflicted on the U.S. record industry.

2. Search-and-Download Sites

This class of sites directly or indirectly offers unauthorized on-demand streaming and/or downloading of our members' music, including their most popular and valuable content. Several of these sites go further, providing unauthorized downloading of pre-release music, i.e., albums slated for commercial release that have not yet been commercially available to the public. As noted above, such infringing activity clearly 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.

3. BitTorrent Indexing and Tracker Sites

BitTorrent services are typically referred to as indexing sites or tracker sites. Indexing sites provide a searchable index of links to content which can be downloaded from subscribers running the appropriate client software. Trackers help facilitate the download of content from the subscribers' computers but do not have any form of graphical user interface or other user-focused interface. Indexing services can, and usually do, generate revenue from advertising and/or user donations. The particular financial model, structure and approach vary from site to site.

⁹¹ See *2016 Out-Of-Cycle Review of Notorious Markets*; p.5 (Describing stream-ripping in the report's Issue Focus as "...an emerging trend in digital copyright infringement that is increasingly causing substantial economic harm to music creators and undermining legitimate services.").

Some bittorrent indexing services, although not all, respond to notices from copyright owners requesting infringing material be taken down from the site. However, in practice, these takedown requests are of little use in addressing the problem of piracy, and many site operators rely on the takedown process to create an appearance of legitimacy while operating services that are designed and overwhelmingly used for the distribution of infringing materials.

One of the principal problems with the use of takedown notices for bittorrent indexing sites is that the same infringing material can easily be, and usually is, very quickly reposted to the site. As a result, copyright owners are forced into an endless “cat and mouse” game, which requires considerable resources to be devoted to chasing infringing content, only for that same infringing content to continually reappear. Moreover, most bittorrent index sites demonstrate they are dedicated to infringement by the way they organize and display files they index. Files are typically organized into categories of movie, music, software and games with files names clearly and unmistakably describing content in a way that the operators know full well they are distributing torrents for copyright protected content.

Increasingly, bittorrent sites are registering multiple domains in order to mitigate the problem of their sites going offline if one of their domains is seized, and to work around search engine demotion algorithms. A simple change in the county code or other top-level domain allows the site to reappear in top search results. In addition, more sites are now employing the services of Cloudflare, a content delivery network and distributed domain name server service. BitTorrent sites, like many other pirate sites, are increasingly turning to Cloudflare because routing their site through Cloudflare obfuscates the IP address of the actual hosting provider, masking the location of the site. The use of Cloudflare’s services can also act to frustrate site-blocking orders because multiple non-infringing sites may share a Cloudflare IP address with the infringing site.

4. Cyberlockers

A “cyberlocker,” also known as a one-click file host, typically refers to a type of website which enables users to upload, store and distribute digital files on a dedicated storage infrastructure on the Internet that is controlled, managed and maintained by the website’s operator.

Although on first glance there appears to be some similarity between cyberlockers and legitimate cloud storage services (as they both allow users to upload files to servers which can then be shared), their business models are strikingly different. The business model for legitimate storage services is principally based around personal file storage, whereas the business model for cyberlockers is based on the distribution of unlicensed content.

Cyberlockers that allow for public sharing of files are of particular concern for the music industry. Download links are widely disseminated, including on third-party websites such as social networks and blogs. They also appear in search engine results and there are websites dedicated to providing indexes of URLs to enable the download of files from cyberlockers. In this way, these cyberlockers are not lockers at all since they lack the essential component of being “locked,” and instead merely serve as file-sharing services, or as hubs for the distribution of infringing content. For many of these services, there would be no economic viability in the absence of engaging in piracy.

To a limited extent, rights holders can attempt to tackle these infringements by sending takedown notices to the locker. However, this entails monitoring thousands of third-party link resources – blogs, forum sites and search engines – to locate the information that is needed to notify the locker of infringements occurring on their own services. There are efficient and reasonable technological solutions available that would assist in this. Some cyberlocker services, for example Mediafire and Depositfiles, have employed such technology.

5. Unlicensed Pay-for-Download Sites

There are a dozen or so websites based in Russia and the Ukraine that engage in the unlicensed sale of singles and albums at a fraction of the cost found on licensed services. The fact that they pay no royalties to copyright owners allows them to completely undercut legitimate licensed services. The sites look professional utilizing official album art and selling all of the latest releases, and popular older catalog works.

6. Digital Obfuscation and Evasion

In addition to the above forms of piracy, several practices and services can further perpetuate and exacerbate the problem of online copyright infringement. It is exceedingly difficult to track, enforce against, and accurately associate various notorious websites because of one or more of the following practices:

- Domain Hopping. When sites are demoted in search engine search results, the sites often engage in domain hopping to a new top-level domain to reappear at the top of search results and/or get around certain court-ordered blocks;
- Reverse Proxy Services. To hide the actual hosting ISP, pirate sites frequently employ reverse proxy services like Cloudflare to obfuscate their IP address, creating obstacles to enforcement against such sites;

- Privacy Protected Domain Name Registration. Operators of pirate sites typically hide their identity behind privacy/proxy services or appear to submit false or incomplete registrant information, further creating obstacles to enforcement against these sites.

7. Digital Trade and Physical Goods Piracy

Finally, physical CD sales still account for a substantial portion of U.S. record company revenues. There is, however, a distinct movement from sales at brick-and-mortar record stores to sales through prominent e-commerce platforms. These platforms have become the ideal outlet for unauthorized counterfeit physical products being manufactured and sold from China and Russia. The counterfeiting involves new front line releases, as well as popular back catalog and “greatest hits” albums.

The counterfeits are sold to third-party sellers on e-commerce platforms who may or may not know they are even buying and reselling counterfeits. These counterfeits are often sold at or near full retail price. Therefore, every sale of a counterfeit disc results in a straight one-for-one displacement of a legitimate sale. Unlike the legitimate product, the sale of these counterfeits results in no compensation to rights holders or creators.

The economic impact of physical goods counterfeiting and piracy remains a considerable concern. One recent OECD study found that international trade in counterfeit and pirated goods represented up to 2.5 percent of world trade, valued at as much as \$461 billion, in 2013. As the study concludes:

Trade in counterfeit and pirated goods is a major challenge in an innovation driven global economy. These practices have negative effects on the sales and provides of affected firms, while also having adverse revenue, economic, health, safety and security effects for governments, businesses and consumers.⁹²

Ensuring that digital trade is a tool to combat e-commerce in counterfeit and pirated goods, rather than a channel to amplify the misgivings of the physical world, including the negative effects described above, remains a high priority for the music industry.

⁹² *Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact*; Organization for Economic Cooperation and Development and the European Union Intellectual Property Office; April 2016; p.5; available at: <http://www.oecd.org/gov/risk/trade-in-counterfeit-and-pirated-goods-9789264252653-en.htm>.

*International trade in counterfeit and pirated goods represented up to 2.5 percent of world trade, valued at as much as **\$461 billion**, in 2013.*

Key Digital Markets

The global market for legitimate music has changed fundamentally from one dominated by physical goods and associated services. Today, the global music market is driven by digitalization. The following provides an illustrative set of market-specific data regarding top music markets to demonstrate the importance of copyright-intensive industries, including the music industry, to U.S. digital trade competitiveness globally, and to affirm the priority our industry continues to place on intensive U.S. government engagement with our trading partners to open markets and dismantle barriers to the digital goods and services of the U.S. recording industry.⁹³

Asia and Pacific

In 2014, U.S. exports of potentially ICT-enabled services, including IPR licensing, to the Asia Pacific region was valued at \$93.0 billion, and the United States had a \$35.2 billion trade surplus in ICT services and potentially ICT-enabled services with that region. From 2006 to 2014, U.S. exports of potentially ICT-enabled services, including IPR licensing, to this region almost doubled, growing from nearly \$50 billion to \$93 billion.⁹⁴

China

In 2015, China was the fourteenth largest music market in world, and grew by 63.8 percent over 2014. China ranked second among the top contributors to global growth of the recorded music industry in 2015, having accounted for 14.4 percent of that growth. It was ranked ninth globally for digital music sales, with such sales accounting for 89 percent of that market, and was also the fifteenth largest contributor to global streaming growth, responsible for two percent of such growth. China is also first among 19 countries with more than 50 percent digital share of total music revenues. China was ranked twenty-fifth in the world for global physical music sales, with physical sales responsible for 10 percent of music sales there.⁹⁵

⁹³ For a detailed assessment of specific trading partners and the protection and enforcement they provide with respect to copyright-intensive digital products, including sound recordings, RIAA also refers the Commission to the submission of the International Intellectual Property Alliance for the 2017 Special 301 Report, which is available at: <http://www.iipawebsite.com/special301.html>.

⁹⁴ Grimm, Alexis; p. 8, 10, and 12.

⁹⁵ *Global Music Report*; pp. 45-46, 48, 50-51, and 96.

*In 2015, **China** was the **fourteenth largest music market** in world, and grew by **63.8 percent** over 2014.*

Regarding digital services trade generally, China was the seventh largest digital services export market in 2014, for potentially ICT-enabled services exports from the United States, with U.S. IPR licensing services exports to that country amounting to \$6.8 billion. China also had compound annual average growth in potentially ICT-enabled services exports of 18.0 percent from 2006 to 2014. United States had a \$6.5 billion surplus in IPR licensing services exports with China in 2014, with a compound annual average growth rate for potentially ICT-enabled services of 17.9 percent from 2006 to 2014.⁹⁶

While the digital music market in China offers tremendous potential, it continues to face serious challenges. With the largest internet population in the world, China should be one of the top five recorded music markets, closer in value to the United States and Japan. Yet, China has not reached its potential, ranked fourteenth in the world by revenues to the music industry and artists, which is behind much smaller markets such as South Korea and Sweden. Revenues remain a small fraction of what they should be even when compared to revenues seen in comparably developed markets. Likewise, digital music access offers a great opportunity for China. In 2015, for example, 89 percent of the market revenues were digital, with significant numbers of consumers using licensed services. Yet, significant numbers are also using unlicensed services side by side with legal offerings. Furthermore, online music piracy sites and hard goods exports from China continue to negatively affect foreign markets in the region, e.g., Hong Kong, Taiwan, Japan, Singapore, and Malaysia, among others, as well as globally.

Key priorities for the U.S. music industry in China include improvements to both copyright protection and to enforcement. With regard to copyright protection, China should enact comprehensive copyright law reform as “first tier” legislation, including to clarify ISP safe harbor requirements, to adopt a proper broadcasting right for sound recordings, and to provide a term of protection consistent with the international trend.

Regarding ISP safe harbors, China should ensure that all services which actively engage with copyrighted content, including services that provide access to content uploaded by their users (i.e., user uploaded content), cannot avoid liability by claiming to qualify for ISP safe harbors. These issues should be addressed as part of the 3rd copyright amendment process by clarifying that the ISP safe harbors only apply to technical, automatic and passive online intermediaries

⁹⁶ Grimm, Alexis; p. 11 and 17.

Copyright reform legislation in China should also address two additional digital trade barriers. First, China should introduce sound recording performance rights, so that music producers and performers are paid whenever their recordings are used in broadcasting or other public performance, including digitally as is the case in the United States. Second, China should extend protection of recordings to 70 years from publication, in line with the new international standard adopted in the United States, Canada Europe, Latin America, as well as parts of Australasia (e.g., Australia, Singapore, South Korea, etc.).

Beyond copyright protection, copyright enforcement remains a perpetual challenge in China that impedes the realization of the full potential of digital trade. The ability of the American music industry to compete in China is undermined substantially by the insufficient action against commercial scale copyright infringement online and offline. While China has made important and positive steps, including the 2015 “Sword Net” anti-piracy campaign focused on cracking down on unlicensed music, Chinese authorities should enhance the consistency and efficacy of their enforcement actions and increase their efforts to stop unfair competition by unlicensed sites, apps and other pirate services, especially stream ripping services. These actions should also include preventing the supply of high quality counterfeits and box sets to online market places.

Other important measures that would assist in dismantling barriers to digital music trade in China include requirements on ISPs to prevent their subscribers from accessing foreign websites. One of the main challenges in China is addressing piracy from websites based outside the jurisdiction, since local ISPs in China cannot “take down” the infringing material, as it is not hosted on their servers. So far, at least 21 countries worldwide have implemented means and processes for restricting or disabling access to these foreign pirate sites from within their borders, with orders to implement action having been issued in respect of more than 1000 sites.

Hard goods piracy in China imposes additional barriers to digital trade globally. Counterfeit CD manufacturing and distribution in China is a further concern that negatively impacts e-commerce channels for the music industry. For example, test purchases conducted by RIAA on Amazon and eBay have revealed a large number of counterfeit offerings that we have traced back to a CD manufacturing plant in China. We suspect that the plant in China is simply filling orders made by Chinese suppliers who in turn sell the CDs to retail sellers on e-commerce platforms. The Chinese counterfeit CDs and packaging are very high quality. The artwork, packaging and inserts are carefully copied in fine detail. The untrained eye would not even be able to identifying them as counterfeits. We have been able to identify the source plant using forensic matching of discs to known plants in China. We have also been able to identify them as counterfeit based on very slight deviations in commercial markings on the discs themselves.

This research is confirmed by a recent OECD report entitled *Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact*, which finds that Hong Kong and China are the number

one and number two “provenance countries” from which counterfeit and pirated goods originate.⁹⁷ To address the negative impacts of hard goods piracy on e-commerce and digital trade, China should re-introduce an effective audit program of all optical disc production plants to stop the production of high quality counterfeits (HQC) CDs, DVDs and unauthorized box sets. Additionally, China should implement improved customs searches to prevent the mass shipment of disc sets and box sets out of China.

Beyond copyright protection and enforcement *per se*, China should also address concerns regarding the protection and enforcement of technological protection measures (TPMs), which are technologies – such as encryption and password protection – that are critical to securing digital trade, including online payment services, cloud-based services, and copyright-protected content services. As with copyright, effective TPM protection in China will require legislative as well as enforcement action.

With respect to legislation addressing TPMs, China should clarify its Copyright Law to ensure adequate and effective enforcement against apps that facilitate unauthorized access to copyrighted works. The draft amendments to the Copyright Law should clarify that the right of “communication over information networks” clearly permits action against an app that makes available content to users without authorization, regardless of where the content is stored. Furthermore, the draft amendments should provide that liability should attach where an app circumvents TPMs used by legitimate rights holders to prevent unauthorized access to their content (again, regardless of where that content is stored).

Specifically, Article 48(6) of China’s Copyright Law should be clarified to ensure liability for app developers who circumvent TPMs that control access to content, without the need to prove a copyright infringement occurred. To the extent current law on the right of “communication over information networks” and access controls does not clearly permit action against apps that facilitate unauthorized access to copyrighted works, the amendments should address these deficiencies, and judicial interpretations should be issued to provide clear guidance to the judiciary.

Regarding enforcement against TPM circumvention, the Chinese piracy app ecosystem – which facilitates piracy on a range of devices – has been expanding at an alarming rate. App websites provide a portal allowing users to download an app to their device, giving them access to pirated content, including music. While the actions of NCAC and other enforcement authorities have made some progress against infringing websites, the Chinese government has only recently begun to prioritize the growing problem of infringing apps. Notwithstanding NCAC’s

⁹⁷ *Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact*; Organization for Economic Cooperation and Development and the European Union Intellectual Property Office; April 2016; p.60; available at: <http://www.oecd.org/gov/risk/trade-in-counterfeit-and-pirated-goods-9789264252653-en.htm>.

announced focus on combatting piracy apps, NCAC should improve efforts in 2017 against the piracy app ecosystem.

Australia

In 2015, Australia was the sixth largest music market in world, and grew by 6.1 percent over 2014. Australia ranked ninth among the top contributors to global growth of the recorded music industry in 2015, having accounted for 4.3 percent of that growth. It was ranked sixth globally for digital music sales, with such sales accounting for 57 percent of that market, and was also the sixth largest contributor to global streaming growth, responsible for four percent of such growth. Australia is also 13th among 19 countries with more than 50 percent digital share of total music revenues. Australia was ranked eighth in the world for global physical music sales, accounting for six percent of total global physical sales, with physical sales responsible for 29 percent of music sales there.⁹⁸

*In 2015, **Australia** was the **sixth largest music market** in world, and grew by 6.1 percent over 2014.*

Regarding digital services trade generally, Australia was the tenth largest digital services export market in 2014, for potentially ICT-enabled services exports from the United States, with IPR licensing services exports amounting to \$2.9 billion. Australia also had compound annual average growth in potentially ICT-enabled services exports of 11.0 percent from 2006 to 2014. United States had a \$2.3 billion surplus in IPR licensing services exports with Australia in 2014, with a compound annual average growth rate for potentially ICT-enabled services of 14.9 percent from 2006 to 2014.⁹⁹

Regarding specific digital trade priorities in Australia, the music industry continues to oppose any expansion of ISP safe harbors with respect to copyright infringement. Such an expansion would profoundly and negatively impact the digital music market in Australia, including by: depriving creators and right holders of the ability to commercially license, and to be paid for the use of, their content online; diminishing the value of content and of the investment that goes into it; and distorting competition to the advantage of a singular music service to the detriment of many other services that do not exploit overbroad safe harbors.

In an extremely positive development in this respect, on March 23, 2017, the Government of Australia removed a provision in the pending Copyright Amendment Bill of 2017 that would

⁹⁸ *Global Music Report*; pp. 45-46, 48, 50-51, 54, and 107.

⁹⁹ Grimm, Alexis; p. 11 and 17.

have expanded the safe harbor for ISPs. This provision would have seriously undermined the sustainability of the digital music economy in Australia, and the music industry welcomes the important and positive step taken by the Australian Government in removing this provision, which, if adopted, would have significantly expanded the value gap in that market by relieving services providers of liability for negotiating commercial licenses for copyright-protected music that was uploaded by users of such service. Expansion of the ISP safe harbor was recommended by the Australian Government's Productivity Commission in a report released on December 16, 2016. This report also included a series of other IPR-related recommendations, including the introduction of a fair use exception to copyright. For the reasons explained above (see *B. Copyright Exception and Limitations*), the music industry strongly opposes the introduction of a fair use exception in Australia.

Finally the recording industry burdened by an unfair broadcast royalty cap, which limits royalties paid by radio broadcasters to a maximum one percent of radios' turnover. The cap has been found distorting competition and no longer justified by several government reports, yet successive governments have failed to repeal it.

Japan

In 2015, Japan was the second largest music market in the world after the United States, and grew by three percent over 2014. Japan is also first in its contributions to global growth of the recorded music industry in 2015, accounting for 15.6 percent of total growth. Japan is ranked third globally for digital music sales, with such digital sales representing 18 percent of music sales in that market. Japan accounted for 32 percent of global physical music sales – ranking sixth in the top ten for global vinyl sales – with the physical goods responsible for 75 percent of music sales in that market.¹⁰⁰

*In 2015, **Japan** was the **second largest music market** in the world after the United States, and grew by three percent over 2014.*

Regarding digital services trade generally, Japan was the fourth largest digital services export market in 2014, for potentially ICT-enabled services exports from the United States, with IPR licensing services exports amounting to \$8.7 billion. Japan also had compound annual average growth in potentially ICT-enabled services exports of 2.5 percent from 2006 to 2014. United States had a \$3.7 billion deficit in IPR licensing services exports with Japan in 2014, with a

¹⁰⁰ *Global Music Report*; pp. 45, 48, 54-55, 100.

compound annual average growth rate for potentially ICT-enabled services of negative 1.5 percent from 2006 to 2014.¹⁰¹

Several improvements in Japan would enhance the competitiveness of the American music industry in that market. Such improvements would include the extension of the copyright term for sound recording to 70 years after publication, consistent with the prevailing international consensus. Such an extension had been agreed to between the United States and Japan, and adopted by the Japanese Diet, although the entry into force of this extension remains in doubt. Likewise, copyright term extension for sound recordings is also at issue in the EU-Japan FTA negotiations. Japan should also introduce a public performance right for sound recordings. Notably, if the EU is successful in securing a public performance rights for sound recordings for terrestrial broadcasts in its FTA with Japan, the United States should press Japan for national treatment with respect to public performance rights for sound recordings.

The music industry further supports the introduction in Japan of injunctive relief to secure orders to ISPs to deny access to foreign infringing websites. Given that a local ISP cannot “take down” infringing content based on foreign websites, because such content is not hosted on that ISP’s servers, a number of countries around the world have adopted a legal basis to require local ISPs to prevent their subscribers from accessing specific foreign websites (see *Foreign Infringing Websites* above). In addition, as explained above, we remain concerned about potential proposals to provide for open-ended exceptions and limitations, including fair use, in Japan that will dilute copyright protection in the digital marketplace and undermine the digital music economy in Japan (see *B. Copyright Exceptions and Limitations*).

South Korea

In 2015, South Korea was the eighth largest music market in world, and grew by 12.4 percent over 2014. South Korea ranked sixth among the top contributors to global growth of the recorded music industry in 2015, having accounted for 6.8 percent of that growth. It was ranked eighth globally for digital music sales, with such sales accounting for 62 percent of that market, and was also the seventh largest contributor to global streaming growth, responsible for three percent of such growth. South Korea is also eleventh among 19 countries with more than 50 percent digital share of total music revenues. South Korea was ranked ninth in the world for global physical music sales, accounting for two percent of total global physical sales, with physical sales responsible for 31 percent of music sales there.¹⁰²

¹⁰¹ Grimm, Alexis; p. 11 and 17.

¹⁰² *Global Music Report*; pp. 45-46, 48, 50-51, 54, and 107.

In 2015, South Korea was the eighth largest music market in world, and grew by 12.4 percent over 2014.

Regarding digital services trade generally, South Korea was the fourteenth largest digital services export market in 2014, for potentially ICT-enabled services exports from the United States, with IPR licensing services exports amounting to \$6.1 billion. South Korea also had compound annual average growth in potentially ICT-enabled services exports of 9.8 percent from 2006 to 2014. United States had a \$5.9 billion surplus in IPR licensing services exports with South Korea in 2014, with a compound annual average growth rate for potentially ICT-enabled services of negative 10.2 percent from 2006 to 2014.¹⁰³

Two significant obstacles undermine the ability of the American music industry to fully realize the potential of the digital music market in South Korea. First, the Ministry of Culture, Sports and Tourism (“MCST”) and the Korea Copyright Commission (“KCC”) are considering imposing a usage rate for collecting societies in relation to interactive digital music services. This change would seriously diminish the scope of copyright protection for the American music industry in South Korea, and raises serious questions with respect to South Korea’s obligations under Article 14 of the WPPT to provide that “[p]roducers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.” Here, it is critical to distinguish the interactive digital music services that would be covered by the South Korean usage rate from the non-interactive digital music services covered by the U.S. statutory license regime provided for in Section 114 of the U.S. Copyright Act.

Second, South Korean law includes overly-broad exceptions (provided under Article 29(2) of the Copyright Act) to the public performance right for sound recordings (provided under Article 83(2) of the Copyright Act). Under this system, the public performance right for sound recordings only apply in situations enumerated in a Presidential decree. This exemption has sweeping implications with respect to the breadth of venues excluded from coverage under the public performance right for producers, i.e., music companies.

Europe

In 2014, U.S. exports of potentially ICT-enabled services exports, including IPR licensing, to Europe was valued at \$183.7 billion, and the United States had a \$76.7 billion trade surplus in potentially ICT-enabled services with Latin America. From 2006 to 2014, U.S. exports of

¹⁰³ Grimm, Alexis; p. 11 and 17.

potentially ICT-enabled services, including IPR licensing, to this region grew from roughly \$110 billion to \$183.7 billion.¹⁰⁴

European Union

EU Member States

Many European Union (EU) member states rank among the top export markets for U.S. potentially ICT-enabled services.¹⁰⁵ For example:

- In 2015, the **United Kingdom** was the third largest music market in the world, and grew by 0.6 percent over 2014. The United Kingdom ranked second globally for digital music sales and fourth for physical music sales, and accounted for 1.6 percent of global music industry growth in 2015. Significantly, the United Kingdom ranked second among the top contributors to global streaming growth in 2015, having accounted for 10 percent of that growth. The digital segment accounted for 75 percent of music sales in the United Kingdom in 2015. The United Kingdom was ranked fourth in the world for global physical music sales (as well as second in the world for global vinyl sales), accounting for eight percent of total global physical sales, with physical sales responsible for 35 percent of music sales there.¹⁰⁶

*In 2015, the **United Kingdom** was the **third largest music market** in the world, and grew by 0.6 percent over 2014.*

Regarding digital services trade generally, the United Kingdom was the top destination for digital services exports in 2014, with U.S. IPR licensing services exports to that country amounting to \$9.7 billion. The United Kingdom also had compound annual average growth in potentially ICT-enabled services exports of 2.5 percent from 2006 to 2014. Regarding the U.S. trade surplus with the United Kingdom, the United States had a \$5.7 billion surplus in IPR licensing services exports, with a compound annual average growth rate for potentially ICT-enabled services of 1.5 percent from 2006 to 2014.¹⁰⁷

- In 2015, **Germany** was the fourth largest music market in the world, having declined by 0.3 percent over 2014. Germany ranked fourth globally for digital music sales, with such sales

¹⁰⁴ Grimm, Alexis; p. 8, 10, and 12.

¹⁰⁵ Grimm, Alexis; p. 11 and 17.

¹⁰⁶ *Global Music Report*; pp. 45-46, 48, 50, 54-55, and 95.

¹⁰⁷ Grimm, Alexis; p. 11 and 17.

accounting for 25 percent of that market. Germany was also the third largest contributor to global streaming growth, responsible for eight percent of such growth. Germany ranked third in the world for global physical music sales (as well as third in the world for global vinyl sales), accounting for 14 percent of total global physical sales, with physical sales responsible for 60 percent of music sales there.¹⁰⁸

*In 2015, **Germany** was the **fourth largest music market** in the world.*

Regarding digital services trade generally, Germany was the sixth largest digital services export market for U.S. potentially ICT-enabled services in 2014, with U.S. IPR licensing services exports to that country amounting to \$5.9 billion. The U.S. trade surplus with Germany for IPR licensing services exports was \$1.7 billion in 2014.¹⁰⁹

- In 2015, **France** was the fifth largest music market in world, having declined by 2.2 percent over 2014. France ranked fifth globally for digital music sales, with such sales accounting for 25 percent of that market. France was also the fourth largest contributor to global streaming growth, responsible for five percent of such growth. France was ranked fifth in the world for global physical music sales (as well as seventh in the world for global vinyl sales), accounting for 6 percent of total global physical sales, with physical sales responsible for 42 percent of music sales there.¹¹⁰

*In 2015, **France** was the **fifth largest music market** in the world.*

Regarding digital services trade generally, France was the thirteenth largest digital services export market for U.S. potentially ICT-enabled services in 2014, with U.S. IPR licensing services exports to that country amounting to \$3.2 billion. France also had compound annual average growth in potentially ICT-enabled services exports of 0.6 percent from 2006 to 2014. The U.S. trade surplus with France for IPR licensing services exports was \$815 million in

¹⁰⁸ *Global Music Report*; pp. 45-46, 50, 54-55, and 81.

¹⁰⁹ Grimm, Alexis; p. 11 and 17.

¹¹⁰ *Global Music Report*; pp. 45-46, 50, 54-55, and 80.

2014, with a compound annual average growth rate for potentially ICT-enabled services of 11.6 percent from 2006 to 2014.¹¹¹

- In 2015, *Italy* was the ninth largest music market in the world, and grew by 25.1 percent over 2014. Italy ranked third among the top contributors to global growth of the recorded music industry in 2015, having accounted for 11.6 percent of that growth. It was ranked twelfth globally for digital music sales, with such sales accounting for 31 percent of that market, and was also the eleventh largest contributor to global streaming growth, responsible for two percent of such growth. Italy was ranked seventh in the world for global physical music sales (as well as ninth in the world for global vinyl sales), accounting for two percent of total global physical sales, with physical sales responsible for 44 percent of music sales there.¹¹²

In 2015, Italy was the ninth largest music market in the world, and grew by 25.1 percent over 2014.

Regarding digital services trade generally, Italy was the nineteenth largest digital services export market for U.S. potentially ICT-enabled services in 2014, with U.S. IPR licensing services exports to that country amounting to \$1.6 billion. Italy also had compound annual average growth in potentially ICT-enabled services exports of 0.4 percent from 2006 to 2014. The U.S. trade surplus with Italy for IPR licensing services exports was \$1.4 billion in 2014.¹¹³

- In 2015, *the Netherlands* was the eleventh largest music market in the world, and grew by 10.6 percent over 2014. The Netherlands ranked eighth among the top contributors to global growth of the recorded music industry in 2015, having accounted for 4.6 percent of that growth. It was ranked thirteenth globally for digital music sales, with such sales accounting for 36 percent of that market, and was also the tenth largest contributor to global streaming growth, responsible for two percent of such growth. The Netherlands was ranked tenth in the world for global physical music sales (as well as fourth in the world for global vinyl sales), accounting for one percent of total global physical sales, with physical sales responsible for 32 percent of music sales there.¹¹⁴

¹¹¹ Grimm, Alexis; p. 11 and 17.

¹¹² *Global Music Report*; pp. 45-46, 48, 50, 54, and 85.

¹¹³ Grimm, Alexis; p. 11 and 17.

¹¹⁴ *Global Music Report*; pp. 45-46, 48, 50, 54-55, and 86.

In 2015, the Netherlands was the eleventh largest music market in the world, and grew by 10.6 percent over 2014.

Regarding digital services trade generally, the Netherlands was the eighth largest digital services export market for U.S. potentially ICT-enabled services in 2014, with U.S. IPR licensing services exports to that country amounting to \$4.8 billion. The Netherlands also had compound annual average growth in potentially ICT-enabled services exports of 8.6 percent from 2006 to 2014. The U.S. trade surplus with Netherlands for IPR licensing services exports was \$3.9 billion in 2014, with a compound annual average growth rate for potentially ICT-enabled services of 15.4 percent from 2006 to 2014.¹¹⁵

EU Copyright Directive

On September 14, 2016, the European Commission introduced a proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, as part of the Commission's overall Digital Single Market strategy. The proposed Directive reflects the Commission's recognition that the role of certain Internet platforms in relation to copyright needs to be clarified. The American music industry strongly supports provisions in the European Commission's proposed Directive to address its concerns with respect to the digital sound recording market in the EU as well as the rationale underlying the legislative proposal.

For example, as the European Commission explained in its September 2015 Communication entitled *Toward a Modern, More European Copyright Framework*:

A precondition for a well-functioning market place for copyright is the possibility for right holders to license and be paid for the use of their content, including content distributed online... There is, however, growing concern about whether the current EU copyright rules make sure that the value generated by some of the new forms of online content distribution is fairly shared, especially where right holders cannot set licensing terms and negotiate on a fair basis with potential users. This state of affairs is not compatible with the digital single market's ambition to deliver opportunities for all and to recognise the value of content and of the investment that goes into it. It also means the playing field is not level for different market players engaging in equivalent forms of distribution...

From a copyright perspective, an important aspect is the definition of the rights of communication to the public and of making available. These rights govern the use of copyright-protected content in digital transmissions. *Their definition therefore determines what constitutes an act on the internet over which creators and the creative industries can claim rights and can negotiate licences and remuneration.* There are contentious grey areas and uncertainty about the way these concepts are defined in EU law, in

¹¹⁵ Grimm, Alexis; p. 11 and 17.

particular about which online acts are considered ‘communication to the public’ (and therefore require authorisation by right holders), and under what conditions. *These questions create on the one hand uncertainty in the market and, on the other, put into question the ability of these rights to transpose into the online world the basic principle of copyright that acts of exploitation need to be authorised and remunerated.*¹¹⁶

For the music industry, the questions and concerns expressed by the European Commission’s statement above reflect a critical priority for securing a legitimate and sustainable digital music economy, not only in the EU, but globally. That is, despite the fact that music is more available and widely consumed than ever before, a large share of music consumption today is not fairly remunerating artists and investors in music.

In the European Union, as well as the United States and elsewhere, some commercial music services that use user-uploaded music content to generate massive traffic and turnover, without paying fair rates for the use of music, if they pay at all. Uncertainty as to the correct interpretation of the law has enabled these user-uploaded content services to argue that they are entitled to circumvent the normal rules of music licensing. As a result, right holders have been unable to freely negotiate licenses for the use of their rights. This has caused a significant market distortion that is highly detrimental to right holders, competing digital music services and, ultimately, consumers.

This has resulted in a “Value Gap”, i.e., in a growing mismatch between the value that some digital platforms extract from music and the value returned to rights owners. Today, online platforms have become major distributors of music. User upload content services are a main source of music consumption. In 2015, the main UUC platforms had around 900 million music users, compared with 68 million users for music subscription services. However, when approached by rights holders for licenses, these services argue that it is their users who are making copyright-content available, and that they themselves are nothing more than neutral hosting providers, thus benefiting from “safe harbors”.

This situation has created a major distortion of the marketplace. The legal and commercial uncertainty and the absence of a level-playing field and of a fair negotiation process deprives

¹¹⁶ European Commission; *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions: Toward a Modern, More European Copyright Framework*; COM(2015) 626 final; September 12, 2015, p. 9; (emphasis added); available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-626-EN-F1-1.PDF>. See also European Commission; *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions: A Digital Single Market Strategy for Europe*; COM(2015) 192 final; May 6, 2016; p. 8; available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447773803386&uri=CELEX:52015DC0192>; (where the European Commission expressed its intent to “...clarify[] the rules on the activities of intermediaries in relation to copyright-protected content”).

right holders of revenues and depreciates the value of creative content. It prejudices the entire music sector, including authors and performers. It also creates unfair competition for digital music services, which negotiate licenses with right holders on fair market terms prior to making music available. It also creates unfair competition for any new music services seeking to enter the market after having negotiated proper licenses.

By way of illustration, the user uploaded content platforms have an estimated user base of more than 900 million globally. Yet, the advertising-supported sector they are part of generates revenues of \$634 million. By contrast, a much smaller user base of 68 million users of paid-for subscription audio streaming services, that negotiate licenses with right holders before they launch, and do not seek to rely on the safe harbors, generated far greater revenues of an estimated \$1.9 billion in 2015.

The “safe harbors” were designed to protect only “technical, automatic and passive” intermediaries from copyright liability. However, platforms that engage in the distribution of music, and which organize, promote, and monetize content are not technical, automatic and passive intermediaries, and should therefore fall under copyright. Platforms which are truly passive intermediaries, and which benefit from safe harbors should, as a *quid pro quo*, apply efficient procedures to remove unauthorized content – not just notice and take down of illegal content but rather notice and stay down.

This is a pressing issue not only for the recording industry, but also for other creators, including authors, composers, music publishers and the photographic and press sectors.

In its proposal for a Copyright Directive, published on 14 September 2016, the European Commission introduced clarifications regarding the role of certain platforms in Recital 38 and Article 13 of the proposal. The proposal:

- Confirms that user-uploaded content services are “communicating content to the public”. This is consistent with European Court of Justice case law on the scope and application of this right.¹¹⁷
- Clarifies, consistent with European Court of Justice case law,¹¹⁸ that services playing an “active role” in relation to users’ uploaded content, e.g., by optimizing the presentation of the content or promoting it, are ineligible for the safe harbor in Article 14 of the E-Commerce Directive. This

¹¹⁷ SGAE C-306/05, FAPL C-403/08 and C-429/08, Airfield C-431/09 and C-432/09, Svensson C-466/12, ITV C-607/11, SBS C 325/14, Reha C 117/15, Sanoma C-160/15.

¹¹⁸ L’Oreal /EBay C 324/09.

is essential as the hosting safe harbor was designed to protect only “technical, automatic and passive” intermediaries from copyright liability.

- Provides an obligation on user-uploaded services providing access to large amounts of content to take measures, for instance effective content recognition technologies, to ensure that unauthorized content does not appear on their services. This is vital because when the removal of content is ineffective, large amounts of unauthorized content remains available on certain services and the right holder’s position is weakened when negotiating contracts for their works.

The American music industry strongly urges the U.S. government to support the Commission’s proposal to address the value gap in the EU, which is critical to the success of digital music trade in the region, and which could set a significant precedent globally to redress on of the primary digital trade barriers face by the music industry worldwide.

Russia

In 2015, Russia was the twenty eighth largest music market in the world, and grew by 10.6 percent over 2014. It was ranked twenty sixth globally for digital music sales, with such sales accounting for 45 percent of that market. Russia was ranked thirty-third in the world for global physical music sales, with physical sales responsible for 32 percent of music sales there.¹¹⁹

*In 2015, **Russia** was the **twenty-eight largest music market** in the world, and grew by 10.6 percent over 2014.*

While Russia has taken some concrete steps – including reforms in 2013 and 2104 with respect to infringing websites as well as judicial actions to disable access to infringing websites for users in Russia – to promote a legitimate and sustainable market for digital music trade, its potential continues to be frustrated by several impediments to a legitimate and sustainable market.

In particular, enforcement against online piracy remains a fundamental problem in Russia, including that the Government has not been effective in combatting infringing websites operating inside Russia that target users outside of that market. To address the pervasive barrier that Russian-based piracy creates both in its territory and worldwide, Russia should prioritize online enforcement through effective and deterrent actions against Internet piracy.

¹¹⁹ *Global Music Report*; p. 89.

Such actions should address stream-ripping, streaming services, pay-per-download websites, video game hacking or cheating sites, cyberlockers, BitTorrent sites, and other commercial enterprises that provide services with the clear intent to promote or induce infringement, whether or not the servers are located in Russia. Additionally, Russia should improve its online copyright enforcement framework by enhancing the effectiveness of criminal IPR cases focusing on digital piracy. This includes bringing deterrent criminal actions against organized criminal syndicates as well as against those involved in piracy retail chains that sell pirated music.

Changes and other clarifications of Russian law are also much needed in order to ensure that the American music industry can effectively compete in this market and others. In particular, Part IV of the Civil Code should be amended to encourage responsible ISP digital custodianship, including to:

- Better define the basis for liability for providers of online services that induce or encourage the infringement of copyright, or that facilitate infringement and do not take reasonable steps to prevent such activities; and
- Provide legal norms that create incentives for ISPs to cooperate with rights holders in fighting infringement taking place over their networks (and to clarify that information intermediary services that facilitate the widespread dissemination of unauthorized content cannot benefit from the liability privileges in Article 1253 of the Civil Code).

In addition, Russian law should be modernized to increase the legitimacy, and enhance the integrity, of the digital economy in Russia. For example, the current law with respect to court ordered injunctions and disabling access to infringing sites should be amended to cover clone, proxy and mirror sites, and to ensure that coverage of such enforcement actions applies not only to websites, but also to mobile apps. Likewise, Article 1229 of the Russian Civil Code, as well as the 2009 Presidium Decision, should be amended to provide civil liability for commercial trafficking of circumvention devices (i.e., to prohibit trafficking in devices that circumvent TPMs).

The Russian music market, including with respect to its digital future, is further imperiled by the inability of music rights holders to exercise effective control over how collecting societies license their works in Russia. The collective administration problems that give rise to this systemic problem need to be addressed. Specifically, the music industry remains concerned with the lack of transparency and governance issues in connection with the state accredited collecting societies. To address this concern, regulations on the operation of collecting societies should be implemented that confirm that rights holders have the legal and practical ability to determine

how to exercise their rights, including whether to choose to entrust licensing to any collective, and if so, to choose that entity, and to delineate the rights for such collections.

With respect to hard goods piracy, the music industry remains concerned with a perennial problem in Russia of the manufacturing and distribution of counterfeit CDs. This concern reflects a troubling digital trend with respect to the online sales of counterfeit physical goods on e-commerce platforms. RIAA conducted a test purchasing program on Amazon and eBay, which revealed that Russian-manufactured counterfeits are also finding their way into the hands of resellers. Like the Chinese counterfeits, the Russian counterfeits carefully copy the packaging and artwork and use high grade commercial printing so that they resemble legitimate CDs in outward appearance.

Latin America

In 2014, U.S. exports of potentially ICT-enabled services exports, including IPR licensing, to Latin America was valued at \$66.7 billion, and the United States had a \$20.0 billion trade surplus in potentially ICT-enabled services with Latin America. From 2006 to 2014, U.S. exports of potentially ICT-enabled services, including IPR licensing, to this region doubled, growing from over \$30 billion to \$66.7 billion.¹²⁰

Brazil

In 2015, Brazil was the tenth largest music market in world, having declined by 1.8 percent over 2014. It was ranked eleventh globally for digital music sales, with such sales accounting for 38 percent of that market, and was also the eighth largest contributor to global streaming growth, responsible for three percent of such growth. Brazil was ranked twelfth in the world for global physical music sales, with physical sales responsible for 25 percent of music sales there.¹²¹

*In 2015, **Brazil** was the **tenth largest music market** in the world.*

Regarding digital services trade generally, Brazil was the ninth largest digital services export market in 2014, for potentially ICT-enabled services exports from the United States, with U.S. IPR licensing services exports to that country amounting to \$4.1 billion. Brazil also had compound annual average growth in potentially ICT-enabled services exports of 17.1 percent

¹²⁰ Grimm, Alexis; p. 8, 10, and 12.

¹²¹ *Global Music Report*; pp. 45-46, 50-51, 54, and 110.

from 2006 to 2014. United States had a \$2.8 billion surplus in IPR licensing services exports with Brazil in 2014.¹²²

The digital music market in Brazil shows potential, with legitimate online services continuing to develop. However, this development continues to face serious obstacles, including judicial and legislative impediments as well as insufficient enforcement against piracy – such as the growing problem of “stream ripping” services.

Several concerns with respect to the legitimacy and sustainability of the digital music market arise under Brazilian legal system. Of particular concern is the decision of the Brazilian Superior Court of Justice on February 8, 2017, which found that all digital transmissions (interactive or non-interactive) implicate the “public performance” instead of the “distribution” right thus ruling against the established industry and contractual practice. This decision sets a negative precedent and could have significant negative commercial implications for the music industry, in particular because public performance rights in Brazil are presumed to be subject to collective rights management.

Additional constraints on digital music trade in Brazil arise out of the absence of the ability for rights holder to secure court ordered injunctions to disable access to infringing foreign sites. To remedy this problem, Brazil should follow the emerging international consensus and enact pending legislation to authorize court orders requiring ISPs to disable access to websites operating outside of Brazil dedicated to criminal activity, including criminal copyright infringement. A further impediment to Brazil’s digital economy arises out of the fact that it has yet to accede to or ratify the World Intellectual Property Organization (WIPO) Performers and Phonograms Treaty (WPPT) or the WIPO Copyright Treaty (WCT) (i.e., the WIPO Internet Treaties), which provide the international legal cornerstone for global digital trade in copyright-intensive products and services.

Copyright enforcement challenges raise additional challenges to the digital music industry in Brazil. Key actions Brazil should take include launching additional criminal prosecutions against those engaged in major online piracy activities or knowingly providing the means for doing so, as well as seeking strong penalties in order to raise awareness and foster deterrence. The United States should also urge the Brazilian National Council to Combat Piracy and Intellectual Property Crimes (CNCP) to adopt, fund and implement a strategic plan that prioritizes encouraging cross-industry efforts to combat Internet piracy, and that extends CNCP training and coordination activities to the fight against Internet piracy.

¹²² Grimm, Alexis; p. 11 and 17.

Canada

In 2015, Canada was the seventh largest music market in world, and grew by 8.3 percent over 2014. Canada ranked seventh among the top contributors to global growth of the recorded music industry in 2015, having accounted for 5.6 percent of that growth. It was ranked seventh globally for digital music sales, with such sales accounting for 52 percent of that market, and was also the ninth largest contributor to global streaming growth, responsible for three percent of such growth. Canada was also 18th among 19 countries with more than 50 percent digital share of total music revenues. Canada was ranked sixth in the world for global physical music sales, accounting for two percent of total global physical sales, with physical sales responsible for 35 percent of music sales there.¹²³

*In 2015, **Canada** was the seventh largest music market in the world, and grew by 8.3 percent over 2014.*

Regarding digital services trade generally, the United States had a \$31.2 billion trade surplus in ICT services and potentially ICT-enabled services with Canada in 2014.¹²⁴ Canada was the third largest digital services export market in 2014, for potentially ICT-enabled services exports from the United States, with U.S. IPR licensing services exports to that country amounting to \$8.7 billion. Canada also had compound annual average growth in potentially ICT-enabled services exports of 5.6 percent from 2006 to 2014. United States had a \$7.7 billion surplus in IPR licensing services exports with Canada in 2014, with a compound annual average growth rate for potentially ICT-enabled services of 6.9 percent from 2006 to 2014.¹²⁵

For the music industry, the Canadian digital music market is decidedly mixed. This large and increasingly digital market, continues to face challenges as well as present opportunities for improvement. Changes to Canada's law have failed to provide sufficient incentives for legitimate Internet intermediaries to cooperate with right holders to combat online infringement. Likewise, Canada's "notice and notice" system for addressing pirated music and other content up-loaded by users to online music and other content services has fallen fundamentally short in terms of addressing widespread music piracy in this market.

¹²³ *Global Music Report*; pp. 45-46, 48, 50-51, 54, and 71.

¹²⁴ Grimm, Alexis; p. 8.

¹²⁵ Grimm, Alexis; p. 11 and 17.

In addition, the greatly expanded exceptions to copyright protection that were the hallmark of the Canadian Copyright Modernization Act, in combination with unfavorable decisions of Canadian courts and the Copyright Board, further increase the level of market uncertainty for creative industries in Canada. Making copyright enforcement a priority for police, prosecutors, and courts, and completing the task of harmonizing duration of Canadian copyright protection with that of its major trading partners, are other major pieces of unfinished business.

There are several opportunities to address these and other digital music trade barriers in Canada. For instance, the 2012 *Copyright Act* amendments provided for a review of the Act after five years. This 2017 statutory review, offers an important occasion to address key threats to the legitimacy and sustainability of Canada's digital economy, including with respect to addressing the value gap, combatting piracy, extending copyright term and prioritizing copyright enforcement online.

Of note, the Department of Canadian Heritage released its Canadian Content in a Digital World consultation report on February 21, 2017.¹²⁶ While it was not focused specifically on the music industry, it did include some important conclusions. For example, the report identified “a need to ensure that Canadian creators share in the financial rewards resulting from increased dissemination of cultural content via digital channels.” One of the key themes of the report was “modernizing Canada's legislative framework and national cultural institutions.” According to the report, the *Copyright Act* was one of the institutions that participants said has “not kept pace with the shifting digital environment and should be examined.” The upcoming government-mandated *Copyright Act* review was identified as a vital opportunity for Canada to stand up for creators, noting that “most agreed that changes to IP legislation that divert the flow of revenue back to the hands of the idea generators is essential to the future of the cultural ecosystem in Canada.”

In this respect, the Copyright Act review should advance efforts to:

- Strengthening legal incentives for ISPs, hosting providers, and other intermediaries to cooperate with copyright owners, in accordance with international best practices.
- Ensure that Canada's new or expanded copyright exceptions, including the globally unprecedented user-generated content exception, with regard to market impact and

¹²⁶ IPSOS Public Affairs; *What We Heard Across Canada: Canadian Culture in a Digital World*; Consultation Report; February 21, 2017; available at: http://www.canadiancontentconsultations.ca/system/documents/attachments/82eb44ca377ab94e80535ee617d129c8841dab18/000/005/629/original/PCH-DigiCanCon-Consultation_Report-EN.pdf

conformity with Canada's international obligations.

- Overhaul the Canadian Copyright Board tariff setting process.
- Ensure WPPT compliant broadcast and public performance rights, and remove the royalty cap for radio broadcasters.
- Prioritize enforcement with respect to online piracy and the trafficking in illicit streaming devices and other devices that circumvent TPMs.
- Extend the term of protection for copyright consistent with evolving global norms.

Conclusion

In conclusion, a rising digital tide can raise all boats, but only when digital trade is legitimate and sustainable. At its core, U.S. digital trade policy should combat digital mercantilism of the likes we have enumerated above, and avoid or otherwise undo digital industrial policy, both at home and overseas. In the digital realm, yesterday's disruptor is today's incumbent. U.S. digital trade policy should promote legitimate digital music markets and digital competition between digital music services, and not entrench technologically-outdated pre-Millennium laws, and the business models effectively subsidized by such laws, that distort digital markets, deter fair competition, and diminish disruption.

Copyright protection and market access in the digital realm promote creativity and innovation, which in turn promotes competition and drives trade. Conversely, ineffective copyright protection, and the other impediments to digital trade that we have enumerated in this statement, diminish creativity and innovation, undermine competition, and impede trade. As in the earliest parts of American history, securing safe trade routes means protecting legitimate traders from pirates, including those inadvertently sanctioned by government authorities to engage in unfair competition. Ultimately, U.S. digital trade policy will be critical in determining whether digital trade is either the refuge of piracy and others threatening the viability of digital trade, or whether digital trade is safe and secure, legitimate and sustainable, where creativity, innovation and responsible intermediaries prevail.

RIAA welcomes this opportunity to provide the Commission with this additional submission elaborating on the digital trade intensity of the U.S. recording industry, the barriers we face, and the priorities we have with respect to promoting a legitimate and sustainable global digital economy, where market access and strong IPR protection and enforcement are mutually

reinforcing and contribute to the overall welfare of the U.S. economy, and its businesses, workers and consumers. RIAA looks forward to continuing to work with the Commission on the critical issue of global digital trade.