



November 13, 2013

Via Electronic Mail

The Honorable Teresa Stanek Rea
Deputy Under Secretary of Commerce for Intellectual Property and
Deputy Director of the U.S. Patent and Trademark Office
United States Patent and Trademark Office
600 Dulany Street
Alexandria, VA 22314

**Re: Request for Comments on the Department of Commerce’s Green Paper on
Copyright Policy, Creativity and Innovation in the Digital Economy - Docket No.
130927852-3852-01**

Dear Deputy Under Secretary Rea:

The Digital Media Association (“DiMA”)¹ appreciates the opportunity to respond to the request for written submissions issued by the Department of Commerce’s Internet Policy Taskforce (“Taskforce”) on the subject of *Copyright Policy, Creativity and Innovation in the Digital Economy* (“Green Paper”). See 78 Fed. Reg. 61,337 (October 3, 2013).

DiMA is a nationally recognized trade association that represents several of America’s leading online distributors of digital content. Our member companies operate a series of business models - including online music stores, music and video streaming services, music video hosting services and retail sales of electronic books – that allow our customers to locate and access the content of their choosing.

¹ A sampling of DiMA’s members include: Apple’s iTunes, Google Play, Amazon, Rhapsody Inc, Microsoft’s Xbox Music, and YouTube. A full list of members is available at <http://www.digmedia.org/about-dima/members>.

The marketplace of competitive innovative services that DiMA members have worked diligently to create represents a major victory for content creators, consumers and a nascent, yet growing, marketplace for online content. For content creators, our efforts guarantee the development of new revenue streams that properly reward rights holders for their creative endeavors. For online consumers, our member companies provide new, flexible, and most importantly, *legal* ways of accessing online content that reduce unwanted acts of piracy.

Ultimately, our unique positioning in the online ecosystem provides us with an unmatched perspective on the needs of a modern day copyright system that works for creators, distributors and those consumers who increasingly turn to the Internet to access legitimate content online. It is from this perspective that we offer the following comments and recommendations.

I. Ensuring an Efficient and Robust Marketplace of Legitimate Online Content

The Department of Commerce's focus on promoting an efficient and robust marketplace of legitimate online content is well placed.² Over the course of the past few years, the amount of legitimate content that has been made available for online consumption has grown exponentially. However, more remains to be done to foster a legal and business environment under which services can sufficiently respond to the growing demands of consumers who increasingly desire to access content when and where they want - and on the device of their choosing.

With this in mind, DiMA is extremely pleased to learn of the Taskforce's interest in this subject. Streamlining the licensing process to make more content legally available for online distribution has been the primary focus of DiMA throughout its decade-plus history. It's an issue that often unites online distributors with consumer groups who are regularly looking for the creation of more affordable ways to access professionally produced content for individual consumption.

The following section offers a couple of recommendations for achieving this objective. Admittedly, implementation of the specific reforms referenced below would require congressional approval; however there's still an important role for the Taskforce to play along the way. For example, the Taskforce could publicly endorse each of the outlined proposals³; and in the context of Section 115 reform, in particular, the Taskforce could convene a series of roundtable discussions – similar to those envisioned concerning the DMCA notice and takedown system – to discuss the possibility of streamlining the mechanical license. In years past, similar

² USPTO & NTIA, Copyright Policy, Creativity, and Innovation in the Internet Economy , 77 (July 2013) available at <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf>

³ As noted in the Green Paper, the Administration has already publicly endorsed changes in U.S. copyright law that the Taskforce is exploring.

roundtables were held on this topic and they proved to be quite helpful in identifying the key issues at stake.

A. Unleashing the Full Potential of Internet Radio by Reforming the Section 114 Compulsory License

In a relatively short period, non-interactive Internet radio service providers have revolutionized the way recording artists are discovered and rewarded for their creative endeavors. In 2012 alone, non-interactive webcasters paid more than \$250 million in performance royalties to SoundExchange for their use of sound recordings.⁴ This figure represents more than a 75% growth in performance royalties contributed in the preceding year,⁵ and represents approximately 50% of the total fees collected by SoundExchange in 2012.⁶

However, the growth of Internet radio hasn't come without substantial challenges. Namely, a rate-setting standard that places it at a considerable disadvantage in comparison to its leading rivals – cable and satellite radio.

Under the current rate-setting rules, performance royalties for cable and satellite radio are established under a four-factor test outlined in section 801(b) of title 17 of the United States

⁴ Catherine Yang, Streaming Is the New Hit in Music Industry, Epoch Times, (October 2013) available at <http://www.theepochtimes.com/n3/331858-streaming-is-the-new-hit-in-music-industry/print.php>

⁵ Glenn Peoples, Pandora Accounts for a Huge Share of SoundExchange Collections, Billboard, (April 2012) available at <http://www.billboard.com/biz/articles/news/1098001/business-matters-pandora-accounts-for-a-huge-share-of-soundexchange>

⁶ SoundExchange Annual Report for 2012 Provided Pursuant to 37 C.F.R. § 370.5(c)

Code;⁷ while Internet radio is the only medium under which royalties are determined under a more stringent “willing buyer – willing seller” standard.⁸

The difference in standards has resulted in wildly disproportionate rates.⁹ Rates that have made it virtually impossible for any Internet radio service provider to maintain and operate a profitable business. Indeed, the exorbitant rates resulting from the “willing buyer – willing seller” standard have motivated many service providers to suspend their streaming operations.

To address this problem, and guarantee the future prosperity of Internet radio, Taskforce members should work with congressional leaders to ensure the harmonization of rate-setting procedures under the ‘801(b)’ standard.

B. Streamlining the Section 115 ‘Mechanical’ License to Promote Greater Innovation

The numerous obstacles that digital music services encounter when trying to license the right to reproduce and distribute tens of millions of nondramatic musical works – i.e. music downloads - are well documented.¹⁰ The main problem stems from a lack of publicly available

⁷ See 17 U.S.C. § 114(f)(1)(B) which references 17 U.S.C. § 801(b)(1). The 801(b) provision directs Copyright Royalty Judges to establish performance royalties for cable and satellite radio based upon the following four objectives:

- 1) To maximize the availability of creative works to the public;
- 2) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions;
- 3) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication; and
- 4) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

⁸ See 17 U.S.C. § 114(f)(2)(B). This provision directs Copyright Royalty Judges to establish performance royalties for Internet radio based upon a hypothetical “willing buyer and willing seller” marketplace.

⁹ For example, cable and satellite radio providers generally only pay SoundExchange 8-15% of their revenues, as compared to Internet radio providers who generally pay over 50% of revenue.

¹⁰ See generally Music Licensing Reform: Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary, 109th Cong. 15 (July 12, 2005) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office), available at <http://www.copyright.gov/docs/regstat071205.html>. See also Daniel S. Park, Jennifer Lynch & Jennifer Urban Streamlining Music Licensing to Facilitate Digital Music Delivery, Samuelson Law, Technology & Public Policy Clinic (March 2011) available at <http://www.publicknowledge.org/files/docs/crastreetingmusiclicensing.pdf>.

accurate, reliable and comprehensive music publisher ownership data; thereby making it impossible for licensees to identify and locate agents authorized to act on behalf of all music composition creators and owners.

As the Register of Copyrights noted in her statement to Congress on digital music licensing in 2005, “Online music services that wish to obtain licenses to make available as many nondramatic musical works as possible find it impossible to obtain the necessary reproduction and distribution rights.”¹¹ The same problems observed then still exist now, ensuring that music licensing remains unduly burdensome in the digital age. The lack of robust collective administration for mechanical licenses requires prospective licensees to seek separate licenses for each nondramatic musical work they wish to use, making the first challenge for digital music rights licensees simply trying to identify, locate, and negotiate with the holders of mechanical rights in millions of compositions. Further complicating the vast landscape of individual compositions to be identified and licensed is the fact that the rights to a particular composition may be further divided among multiple songwriters and representatives – many of whom cannot identify or will not license on behalf of each other. This is an ever-increasing circumstance, under which even if a diligent licensee manages to find a single owner to a copyrighted composition, the path to ultimately clearing the use of that composition may very well be far from over.

Admittedly, the Harry Fox Agency (“HFA”), which is itself a private business that was developed as an all but essential alternative to navigating the actual statutory license process under Section 115, is authorized to license the mechanical rights of a relatively large number of copyright owners, but the remaining number of works that they either do not have complete rights to or that are not included in their catalog at all is quite substantial. Because the 115 compulsory mechanical license is not usable in the absence of publicly available ownership data for each of the compositions for which licenses are sought, it is effectively broken - and there is no practicable alternative way to license the millions of musical compositions that are not included in any HFA license.

More importantly, which works HFA can and cannot license is a constantly moving target that even they are unsure of, at any given time. This uncertainty about complete licensing, coupled with the significant potential damages (discussed in Sect. II) below makes launching digital music delivery services a difficult and always frightening endeavor. This situation forces music services to make the untenable choice of launching with either (i) incomplete catalogs of

¹¹ See Music Licensing Reform: Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary, 109th Cong. 15 (July 12, 2005) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

music, or (ii) the risk of substantial copyright liability even where they are eager to pay royalties owed under the statute.

The lack of a central agent (or agents) to license the mechanical rights on behalf of all composers and publishers of musical works stands in stark contrast to the manner and ease by which the PROs have historically licensed the public performance rights of musical compositions. It's also the reason that many have advocated for the creation of a collective licensing regime that would offer blanket licenses covering both the mechanical and performance rights needed to digitally transmit musical works online.¹²

If properly implemented, a streamlined licensing system would go a long way towards providing digital music services with a framework to efficiently clear the necessary rights to make a large number of musical works publicly available and to make timely and efficient payment for their distribution.

Of course, certain conditions would also have to be imposed on any newly created 'management rights organizations' that might be established, to ensure that they lived up to their full potential. For example, in addition to requiring such organizations to offer blanket licenses for the reproduction, distribution and public performance rights associated with digital music delivery; they should also be required to:

- adhere to reasonable and nondiscriminatory licensing terms;
- maintain comprehensive databases of works available to be licensed and to share such data with potential licensees *in bulk* (not just one song look- up at a time);
- provide a way to either license or provide a safe harbor in connection with the use of the "residual" compositions, those for which the owners are not identified in the database, and
- be subject to some type of oversight to ensure compliance with the aforementioned requirements.

Needless to say, these do not constitute an exhaustive list of concerns that would have to be addressed, but merely highlight the need to consider how to ensure that any endeavors to facilitate music licensing do not ultimately result in greater complexity or unfairness.

C. Making Content More Readily Available for Online Consumption Benefits Creators, Distributors and Fans of Digitally Produced Entertainment

¹² Id.

By working with digital media service providers to make content more readily available for lawful online consumption, the Taskforce will unleash a new wave of innovation that benefits creators, distributors and fans of digitally produced entertainment. Reforming Section 114, in particular, will guarantee that up-and-coming recording artists will continue to have access to a music platform (i.e. Internet radio) that provides a level of promotional value that no other form of radio can claim to match.

Section 115 reform, in comparison, will engender a significant reduction in duplicative transaction costs that will benefit songwriters as well as digital music service providers.¹³ For service providers, Section 115 reform will lead to a reduction in the amount of time and administrative burden distributors experience when trying to license the right to reproduce and distribute musical compositions. For songwriters, a streamlined mechanical license will lead to an increase in the amount of mechanical royalties received – via more transparent licensing, increased licensed use of musical compositions and the consolidation of licensing agents who currently deduct administrative expenses as part of individual royalty processing systems.

The ultimate benefit of all of the aforementioned reforms, however, is a reduction in unwanted acts associated with online infringement. By now it's widely accepted that legitimate distributors of online content play an integral role in reducing online infringement:

- An academic study of NBC's temporary withdrawal from the iTunes store revealed an immediate uptick in infringing activity, suggesting that consumers prefer a legitimate online source over illegal sources.¹⁴
- A survey commissioned by the Swedish music industry shows that the number of people who downloaded music illegally in Sweden fell by more than 25% between 2009 and 2011, largely as a result of the greater availability of legal services.¹⁵

¹³ See Reforming Section 115 of the Copyright Act for the Digital Age: Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary, 110th Cong. 14 (March 22, 2007) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office), available at <http://www.copyright.gov/docs/regstat032207-1.html>. (“Under a blanket license system, there are economies of scale that reduce the administrative costs associated with the collection and distribution of the royalties). See also Mary Beth Peters, *supra* note vii, at 7 (“...it seems inefficient to require a licensee to seek out two separate licenses from two separate sources in order to compensate the same copyright owners for the right to engage in a single transmission of a single work).

¹⁴ Brett Dannaher, Michael D. Smith et al., *Converting Pirates Without Cannibalizing Purchasers: The Impact of Digital Distribution on Physical Sales and Internet Piracy* (March 3, 2010), available at <http://ssrn.com/abstract=1381827>.

¹⁵ *Adventures in the Netherlands: Spotify, Piracy and the new Dutch Experience* (2013), available at <http://press.spotify.com/us/2013/07/17/adventures-in-netherlands/>.

➤ A study by the NPD Group found that 40% of consumers in the U.S. who had illegally downloaded music in 2011 reported that they had stopped or downloaded less music from illegal networks.¹⁶

The key to helping digital media service providers be as successful as possible in this regard is through licensing reforms that not only provide for timely and reliable access to content – but also allow for flexibility to respond to changes in consumer demand.¹⁷

As Taskforce members consider legislative reforms to carry-out these objectives, we hope they will also be open to pursuing private sector initiatives that can help streamline the overarching licensing process.

II. Promoting a Statutory Damages Regime that Doesn't Chill Innovation

Historically, statutory damages have proven useful in cases where aggrieved parties have found it difficult to establish actual damages. Recently, however, commentators have increasingly highlighted the arbitrary and inconsistent manner by which such damages are awarded.¹⁸ The unbalanced and severe specter of potential statutory damages is unfortunate because it often chills innovation and discourages investment in new and promising offerings that consumers might otherwise enjoy.

As part of its Green Paper, the Taskforce correctly notes that there have already been instances where the prospect of large statutory damage awards for copyright infringement has deterred people from making use of orphan works.¹⁹ The Green Paper also focuses on problems

¹⁶ See NPD Group Press Release available at <https://www.npd.com/wps/portal/npd/us/news/press-releases/the-npd-group-music-file-sharing-declined-significantly-in-2012/>.

¹⁷ Mary Madden, *The State of Music Online: Ten Years After Napster* (2009), Pew Internet & American Life Project, at 4, available at <http://pewinternet.org/Reports/2009/9-The-State-of-Music-Online-Ten-Years-After-Napster.aspx>.

¹⁸ See, Pamela Samuelson & Tara Wheatland, *Copyright Statutory Damages: A Remedy in Need of Reform*, 51 *Wm. & Mary L. Rev.* 439 (2009) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1375604. See also, Pamela Samuelson, Phil Hall and Tara Wheatland, *Statutory Damages: A Rarity in Copyright Laws Internationally, But for How Long?*, 60 *J. Copyright Society U.S.A.* __ (2013) available at http://cyber.law.harvard.edu/people/tfisher/IP/Samuelson_SDs_2013.pdf.

¹⁹ See Green Paper, *supra* note 2, at 51.

related to secondary liability for online service providers who by the very nature of their business (i.e. the making available of large volumes of works) can potentially expose themselves to rather huge statutory damage awards.²⁰ In light of this fact, the Green Paper suggests that some type of ‘recalibration’ in this area may be appropriate.²¹

It should be noted before going any further that the inherent problems associated with the existing statutory damage regime are not limited to service providers who face potential claims of secondary liability for copyright infringement. Similar concerns exist with regard to direct liability claims of copyright infringement that might be leveled against service providers who also distribute large volumes of works online. Recent legal disputes such as *Cartoon Network LP v. CSC Holdings, Inc.* (“Cablevision”)²², *United States v. American Society of Composers, Authors & Publishers*²³ and *In re Cellco Partnership*²⁴ all carried with them the looming specter of potentially huge damages that were not necessarily reflective of the types of uses and claims being litigated. As such, any reforms in this area should apply with equal force regardless of whether they involve claims of direct or secondary liability.

In order to avoid such outcomes from occurring in the future, policymakers should consider at a minimum enacting mandatory guidelines that would outline the proper factors that courts should consider when imposing statutory damage awards. Among some of the factors that could be considered under such a scheme include:

- whether the defendant acted with good or bad faith that her use of a particular copyrighted work was fair or otherwise non-infringing;
- whether the case involved a novel question of law; and
- a careful examination of the nature of the relationship between the plaintiff and defendant. For example, does the nature of the legal dispute arise over a particular interpretation of a license? Or as a last negotiating tactic, while parties have been seeking agreement, in good faith?

²⁰ Id at 52.

²¹ Id.

²² 536 F.3d 121 (2d Cir. 2008).

²³ 627 F.3d 64 (2d Cir. 2010) (interpreting the meaning of the Transmit Clause in the context of music downloads).

²⁴ 663 F. Supp. 2d 363 (S.D.N.Y. 2009) (interpreting the meaning of the Transmit Clause in the context of cellphone ringtones).

Needless to say, the aforementioned list is not exhaustive. It's merely offered as a starting point for ways to eliminate the arbitrariness that is necessarily a product of strict statutory damages regulations, which has been witnessed in recent years; and to ensure that future damage awards are not grossly out of proportion with the actual actions of the parties.

III. Revisiting the DMCA Notice & Takedown Process

Another issue the Green Paper seeks comment on is possible ways to improve the current operation of the DMCA notice and takedown system.

Enacted more than fifteen years ago, the DMCA safe harbor was created to provide service providers with “more certainty...in order to attract the substantial investments necessary to continue the expansion and upgrading of the Internet”.²⁵ Since its enactment, the safe harbor has fueled a tremendous amount of innovation that has benefited several parts of the U.S. economy.

The key structure of the safe harbor relies upon a system of incentives that encourage copyright owners and service providers to work together to detect and take down infringing works found online.²⁶ This approach has value and as noted by the Taskforce is utilized by many of the United States major trading partners.²⁷

Notwithstanding the safe harbor's undeniable success, in recent years, copyright owners and service providers alike have increasingly expressed concerns about the operation of the current system. Copyright owners, in particular, have complained about the need to send repeated notices about infringing content that may be taken down, only to reappear a short time later. Service providers, in comparison, have expressed concerns about the high number of erroneous claims of infringement often received; which are triggered by automated systems.

In trying to develop a solution to address these concerns, the Taskforce acknowledged that a legislative remedy could be enacted but expressed a greater preference for relying on voluntary initiatives spearheaded by the private sector.²⁸

²⁵ CRS Report RL32037, Safe Harbor for Service Providers under the Digital Millennium Copyright Act, by Brian Yeh and Robin Jeweler (January 9, 2004).

²⁶ *Id.*

²⁷ *See* Green Paper, *supra* note 2, at 53.

²⁸ *Id.* at 56 (“While such a system could be imposed via legislation, implementation would raise a number of technical and legal challenges. Voluntary cooperation between ISPs and right holders would offer a more flexible way of addressing this problem.”).

Relying on voluntary initiatives that stay within the existing DMCA framework is the most appropriate way to go for a couple of reasons. First and foremost, the provisions of the DMCA safe harbor have been interpreted by federal courts over a fifteen year history and any legislative revisions carried out now would only inject greater uncertainty into the existing requirements of the notice and takedown process.²⁹ Second, as pointed out by the Taskforce, voluntary initiatives can provide stakeholders with a more flexible way of addressing the problem.³⁰

Going forward, the key to the Taskforce's success in this regard will rest in its ability to establish a stakeholder process that is truly voluntary – yet encourages the widest participation from the largest number of stakeholders possible. The former can be accomplished by guaranteeing that the government doesn't directly (or indirectly) exert pressure on private parties to participate in the stakeholder process. Meanwhile, the latter can be accomplished by surveying those stakeholders – beyond those representing copyright owners – to see if there is a list of additional discussion items that could be added to the agenda that would engender greater widespread, voluntary participation.

IV. Examining the Relevance and Scope of the First Sale Doctrine in the Digital Environment

The possible expansion of the first sale doctrine to cover some (or all) digital transmissions raises several complex legal and policy questions that warrant further discussion and review. At the present time, DiMA isn't prepared to comment on this subject except to acknowledge that any potential changes to the current first sale doctrine would engender a host of issues that are of considerable importance to our membership.

Should conversations continue to develop around this topic, we fully plan to share our observations at the appropriate time.

²⁹ See *Corbis Corp. v. Amazon.com Inc.*, 351 F. Supp. 2d 1090, 1108 (W.D. Wash. 2004) (interpreting the DMCA's 'red flag' awareness standard); *UMG Recordings, Inc. v. Veoh Networks, Inc.* 665 F. Supp. 2d 1099, 1116 (C.D. Cal. 2009) (evaluating the adequacy of a service provider's termination policies); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F. 3d 1022, 1041 (9th Cir. 2011) (evaluating a service provider's right and ability to control infringing activity).

³⁰ See Green Paper, *supra* note 2, at 56.

Respectfully submitted,

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