

## **GIPC Music Licensing Comments**

The U.S. Chamber of Commerce appreciates the opportunity to provide our comments on these important issues. We also appreciate the leadership of the U.S. Copyright Office in its thoughtful consideration of copyright policy issues and we support its efforts and desires for modernization so as to better serve businesses that produce valuable copyrighted works, businesses that help deliver those works to the public, and consumers who benefit from both.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

The Global Intellectual Property Center (GIPC) was established in 2007 as an affiliate of the U.S. Chamber of Commerce. Today, the GIPC is leading a worldwide effort to champion intellectual property rights and safeguard U.S. leadership in cutting-edge technologies as vital to creating jobs, saving lives, advancing global economic growth, and generating breakthrough solutions to global challenges.

### **I. Introduction**

Music is one of the most elemental forms of human communication; it is older than recorded history and bridges language and culture. Musical instruments have been in use for at least six millennia. Musical compositions date back almost three

millennia and many of the great European composers still celebrated today lived centuries ago.

The advent of recorded sound changed the course of music forever, opening opportunities for citizen composers and performers to create music that supports entire industries and defines generations. Likewise, music enjoyment became much more affordable to consumers, who could now enjoy professional music in their own homes.

Thomas Edison brought us recorded sound, and his vision in 1878 as to the potential uses for his invention is nothing short of breathtaking:

1. Letter writing and all kinds of dictation without the aid of a stenographer.
2. Phonographic books, which will speak to blind people without effort on their part.
3. The teaching of elocution.
4. Reproduction of music.
5. The "Family Record"--a registry of sayings, reminiscences, etc., by members of a family in their own voices, and of the last words of dying persons.
6. Music-boxes and toys.
7. Clocks that should announce in articulate speech the time for going home, going to meals, etc.
8. The preservation of languages by exact reproduction of the manner of pronouncing.
9. Educational purposes; such as preserving the explanations made by a teacher, so that the pupil can refer to them at any moment, and spelling or other lessons placed upon the phonograph for convenience in committing to memory.
10. Connection with the telephone, so as to make that instrument an auxiliary in the transmission of permanent and invaluable records, instead of being the recipient of momentary and fleeting communication.<sup>1</sup>

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<sup>1</sup> <http://memory.loc.gov/ammem/edhtml/edcyldr.html>

Many of these uses are not only still in use today, they are subjects of continuing innovation. Those uses have presented and continue to present cutting-edge issues in copyright law.

Musical compositions were first protected under the Copyright Act in 1831, and the first statutory license for music was enacted as part of the 1909 Act. Sound recordings were originally protected under state laws, and those created before February 15, 1972, remain protected under state laws. Sound recordings created on or after February 15, 1972, enjoy Federal copyright protection, although they lack a full public performance right. Copyright protection has been a key ingredient in the amazing success of the American music industry.

## II. Legitimate Online Music is Flourishing

Today, thanks in part to a vibrant copyright system, consumers have more music to choose from, more ways to enjoy it, and more opportunities to join in the creativity than ever before.

In the United States, there are 37 million songs available across more than 70 direct-licensed interactive streaming or digital download services that deliver music through a variety of services, such as Spotify and on platforms like the Xbox. There are also over 2,000 non-interactive streaming services that operate under a statutory license. For those services, and platforms, SoundExchange facilitates the collection and payment of licensing royalties and to date has paid out over \$2 billion to recording artists and right holders.

On the musical composition side of the business, the Harry Fox Agency offers limited quantity licenses for on demand streams for a single cent per stream through its Songfile service, which provides online search and licensing features. ASCAP offers licensing of its catalog of over 9 million works for qualifying websites and mobile apps in three simple steps for a mere \$240 a year through its PLAY MUSIC. BMI

provides BMI Mobile, a universal app that allows authors to search and manage their account and catalog.

Additionally, of course, broadcasters, cable systems, and satellite services offer music to consumers through a variety of technologies and services.

This brief survey of innovative offerings barely scratches the surface of what is available today, much less what is coming in the near future. We've come a long way from Edison's gramophone and foil cylinders.

### III. Piracy Remains a Tremendous Challenge

The music industry was the first to be hit by the massive piracy of the digital age. And for all the progress that has been made in the legitimate marketplace, there remains a huge challenge with regard to piracy of music.

A study published by the Institute for Policy Innovation found that piracy of sound recordings costs the United States economy over 71,000 jobs, \$2.7 billion in lost wages, and a reduction in national output of a staggering \$12.5 billion.<sup>2</sup>

According to the Recording Industry Association of America, between 1999, when Napster became massively used, and 2013, recorded music revenues in the U.S. were cut in half. From 2004-09, nearly 30 billion songs were illegally downloaded.<sup>3</sup>

The problem of sheet music piracy has received less, but certainly some public attention,<sup>4</sup> and in principle is no less unfair or harmful.

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<sup>2</sup> [http://www.ipi.org/ipi\\_issues/detail/the-true-cost-of-sound-recording-piracy-to-the-us-economy](http://www.ipi.org/ipi_issues/detail/the-true-cost-of-sound-recording-piracy-to-the-us-economy)

<sup>3</sup> [http://www.riaa.com/physicalpiracy.php?content\\_selector=piracy-online-scope-of-the-problem](http://www.riaa.com/physicalpiracy.php?content_selector=piracy-online-scope-of-the-problem)

<sup>4</sup> <http://thetrichordist.com/2014/02/02/old-wine-in-a-new-bottle-annotated-lyric-sites-are-not-fair-users-of-others-music-guest-post-by-thomas-d-sydnor-ii/>

The Copyright Office is already well aware of these and other piracy problems. We recite these facts here both as a general reminder and also to urge that as the Office considers the detailed questions it has posed in the Notice of Inquiry, it keeps in mind the imperative to address the problem of piracy so that legitimate services aren't required to continue competing against free.

#### IV. Core Principles for the Future of Music Licensing

The Global IP Center is well aware of the complex nature of the legal structure, administration, and licensing of rights in the context of music. Many commenters have provided detailed views concerning the current system and potential changes. We write to offer suggested core principles that we hope will guide the Copyright Office in its consideration of these important issues.

##### **A. Level Playing Field**

To the extent that copyrighted works are subjected to some form of statutory license, perhaps the most fundamental aspect of fairness raised is the royalty paid to the right holder. Often, such licenses have been accused of providing inadequate compensation. In other cases, and sometimes in the same case, the users of the license have alleged that the royalty rate is so high that it is harmful to their business. A variety of formulations have been set forth as appropriate. It is not our purpose in this comment to support or oppose any particular royalty proposal. Rather, we urge that the Copyright Office place the highest priority on the principle that in every case, the right holder deserves a royalty that is equal to the value of the work for the use in question.

The source of many of the competing royalty proposals is the current Copyright Act, itself. With varying language for determining royalties, and correspondingly different rates, even between music services that compete directly, the current law

has created an inequitable situation that favors one business over another. Again, it is not our purpose to support or oppose any of the approaches to royalties currently found in the law, or which may be proposed. Rather, we urge that the Copyright Office also place a high priority on creating a level playing field, especially among competing services.

The one instance in which we do take a position on a rate is the current equivalent of a zero royalty rate for the over-the-air broadcast of sound recordings. This is wrong. Broadcast radio competes with music offered through cable systems, satellite companies, and online services. Consistent with our position that there should be a level playing field, particularly among competing services, we restate our support for a full right of public performance of sound recordings.

Some argue that the market power of certain organizations interferes with a competitive free market. Some go so far as to apparently argue that the mere existence of copyright protection equate to a monopoly. The latter proposition, at least, is simply false. If there are market power abuses in some areas, as some claim, the solution is not a calcified music licensing system that inhibits the development of new services throughout the industry. The proper resolution of allegations of anti-competitive behavior is found in the laws dedicated to that subject.

## **B. Clarity**

Another guiding principle is that certainty is good for business and consumers. There are provisions in the current Copyright Act that suffer from unclear drafting. In such cases, and without prejudice to the policy outcomes, we urge the Copyright Office to seek improved clarity for the sake of creators, publishers, collecting societies, delivery services, and consumers alike.

## **C. Efficiency**

Inefficiency serves no one. The markets for music are currently hindered by a variety of legal structures that long predate modern technology and business models. Creative and innovative industries have done their best to provide what consumers want, how and when they want it. But there can be little doubt that what has been achieved has happened in spite of certain aspects of the legal system.

For years the music industry as a whole has been smeared for not adapting to new technology and consumer demands fast enough. Such accusations gave little or no consideration to the tightly regulated marketplace of statutory licenses, consent decrees, and government-set royalties.

We urge the Copyright Office to keep in mind issues of efficiency in the marketplace so as to facilitate new, licensed services.

#### **D. Global Leadership**

A modern, efficient system for the licensing of musical works and sound recordings would be a benefit to everyone. It also would bolster the United States' standing as the leader in the marketplace and in government policies to promote the creation and distribution of creative works. As we work around the globe to improve intellectual property protection, it is critical to demonstrate through our own actions that the failure to protect and administer intellectual property adequately is short sighted and self-defeating.

This is precisely why it is important that the United States holds itself to the highest standards, including compliance with international norms. Yet, it has been nearly a decade and a half since the World Trade Organization found that the amendments made by Congress in 1998 to section 110(5) of the Copyright Act are inconsistent with TRIPS and the three-step test. While the panel also found that the economic significance of that provision was minor, we know from experience that it is used disproportionately to undermine United States policy abroad. It is past the time

when this provision should be repealed, bringing the United States back into compliance with TRIPS.

## V. Conclusion

The fundamentals of our Copyright Act and copyright system are sound, and that is as true for the music industry as it is generally. It is the particular management of this market into which the law wades so deeply that needs updating and improvement. Throughout, we must always remember the need to stay vigilant on enforcement, lest the illegal threaten to overrun the legitimate, as it did just a short time ago.

The GIPC appreciates the opportunity to offer these comments and stands ready to assist the Copyright Office any way it can.