Written Submission of the Recording Industry Association of America (RIAA) before the United States International Trade Commission

Global Digital Trade 3: The Business-to-Consumer Market, Key Foreign Trade Restrictions, and U.S. Competitiveness

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, many of which are small-to-medium-sized enterprises (SMEs) distributed by larger record labels.

The RIAA welcomes the opportunity to provide this written submission to the United States International Trade Commission (the Commission) in response to 83 Fed. Reg. 3185 (January 23, 2018) with respect to Investigation No. 332-563, *Global Digital Trade 3: The Business-to-Consumer Market, Key Foreign Trade Restrictions, and U.S. Competitiveness*, for the purpose of preparing the second and third 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 addition to providing information responding to Parts 2 and 3 of the Commission's investigation specifically, this written submission updates various aspect of the RIAA written submission, including the latest available data as well as analysis reflecting developments following RIAA's filing with the Commission for its investigation no. 332-561, *Global Digital Trade I: Market Opportunities and Key Foreign Trade Restrictions*.

Specifically, in this submission RIAA will provide information on the issues identified by the Commission for Parts 2 and 3 of the Commission's investigation, including:

- Measures in key foreign markets – i.e., European Union (EU), China, Russia, Brazil, India, and Indonesia as well as other top ten recorded music markets, i.e., Australia, Canada, Japan, South Korea, France, Germany and the United Kingdom, and other priority markets such as Mexico – that affect the ability of U.S. firms to develop and/or supply business-to-business and business-to-consumer digital products and services abroad;

- The impact of these measures on the competitiveness of U.S. recording industry as well as on international trade and investment flows associated with digital products and services related to significant business-to-business and business-to-consumer technologies.

- In addition, RIAA will also address issues raised in Part 1 of its investigation, including:

- Regulatory and policy measures currently in force in important markets abroad that may significantly impede digital trade. Such measures affecting digital trade might include:

    - restrictions on foreign direct investment and other means of market access;

    - limitations on cross-border data flows; and

    - regulations on Internet service providers (ISPs), including limitations on ISPs intended to protect intellectual property rights; rules determining liability for third-party content; and intellectual property rights enforcement.

Introduction

The American recording industry is a driving force in global digital trade. Our industry is digitally intensive and technologically innovative. Record companies 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).[1] Likewise, sound recordings are digital products that fuel digital growth through a diverse array of online and cloud-based music services, including increasingly streaming. In fact, the music industry is the leader in terms of sectors for which e-commerce is the dominant channel for trade.[2] We have become a pioneer in the provision of digital products and services through both B2B (mostly) and B2C channels and work closely with our digital partners to promote digital growth.

The recording industry is at the cutting edge of digital trade, including with respect to streaming. Driven by fans' engagement with streaming – especially paid subscription audio streaming – digital revenues now account for more than half (i.e., 54 percent) of the global recorded music market. In fact, global growth in streaming revenue for recorded music was 41.1 percent in 2017, and for the first time became the industry's single largest revenue source. After 15 years of decline – i.e., 54 percent from 1999 to 2015 – the recorded industry has recorded three

[1] *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%).)

[2] Van Heel, Bas; *et al*; "Cross-Border E-Commerce Makes the World Flatter"; Exhibit 1.

consecutive years of growth driven by streaming. However, to put this recovery in context, total industry revenues for 2017 were still just 68.4 percent of the market's peak in 1999.[3] For this recovery to continue and be sustainable, the digital marketplace must be fair. It is critical to address the massive disparity between the value created by some digital platforms from their use of music and what they pay those creating and investing in it.

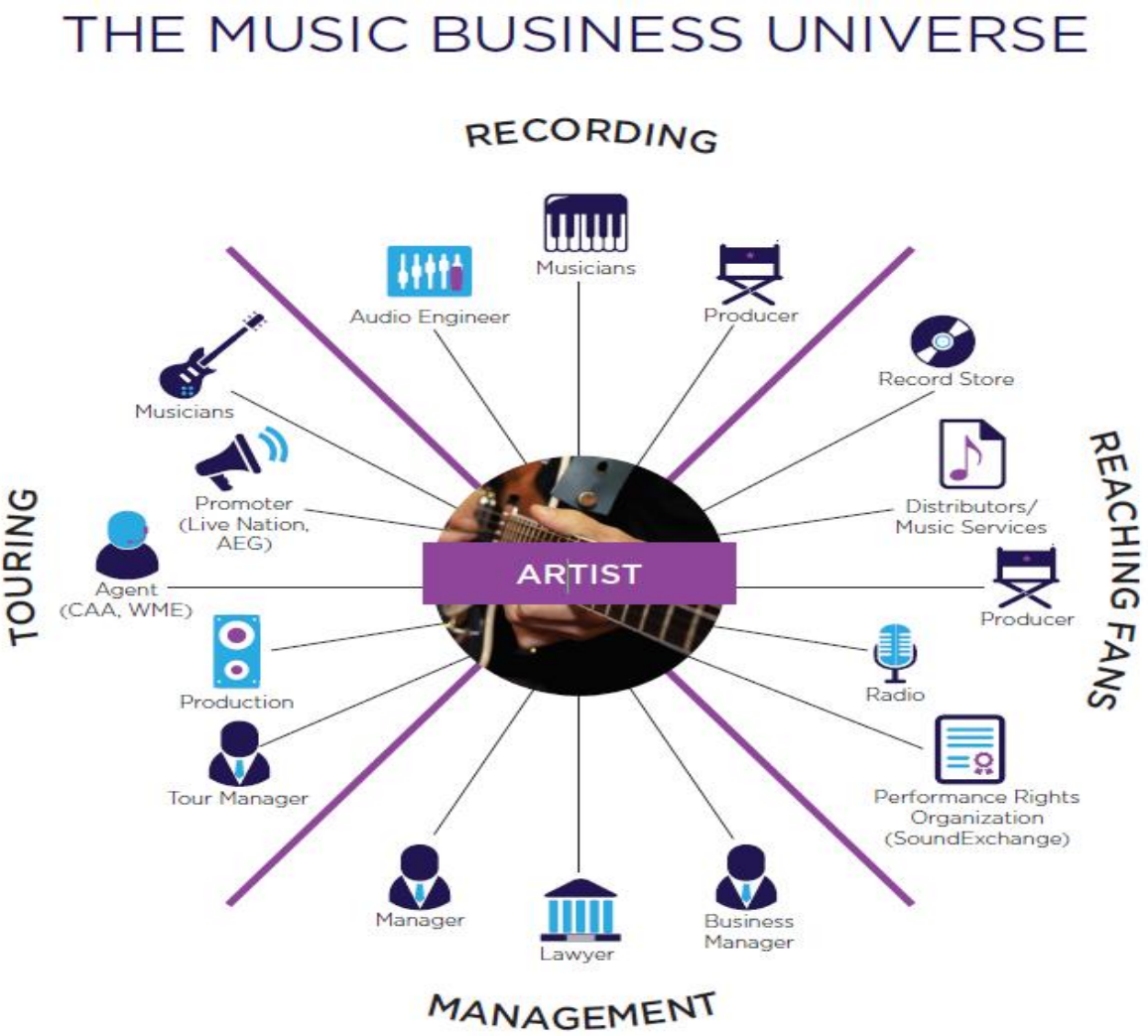
Streaming is also emerging as a critical component of the U.S. economy that offers tremendous potential to deliver U.S. economic growth, to grow high-quality American jobs, and to enhance U.S. trade competitiveness. To realize the full potential of the streaming economy, it is vital that the U.S. government take active steps to ensure that its policies, both domestically and internationally, reflect today's streaming economy and ensure tomorrow's streaming future for all Americans. An agenda for promoting a streaming economy that is legitimate and sustainable consists of high-quality consumer-oriented digital products and services in an ecosystem that advances creativity and innovation through strong copyright protection and enforcement, powers digital trade through licensing music, secures market access for digital products and services, promotes fair competition between content delivery services, ensures digital platform responsibility, and ensuring the freedom of contract.

*The **music industry** contributed **$143 billion annually** in value to the U.S. economy in 2016, and created, directly and indirectly, **$1.9 billion jobs** across a very wide variety of fields.*

The digital products and services of the U.S. recording industry help fuel digitalization at home and around the world. 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. For example, a 2018 study found that the music industry contributed $143 billion annually in value to the U.S. economy in 2016. The music industry created, directly or indirectly, 1.9 million U.S. jobs across a very wide variety of fields (see *Music Business Universe* below).[4] Likewise, a 2016 study found that copyright-intensive industries, including the music industry, contributed $1.2 trillion to the U.S. economy, and grew at an aggregate annual rate of 4.81 percent from 2012 to 2015, compared with average annual growth rate of 2.11 percent for the U.S. economy generally.[5]

[3] IFPI; *Global Music Report (2018): Music Consumption Exploding Worldwide*; pp. 6-8; available at: http://www.ifpi.org/downloads/GMR2018.pdf.
[4] Siwek, Stephen; *The U.S. Music Industry: Jobs & Benefits*; April 2018; pp. 5, 7,
[5] 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:

Likewise, copyright-intensive industries supplied 5.6 million jobs in 2015,[6] 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.[7]



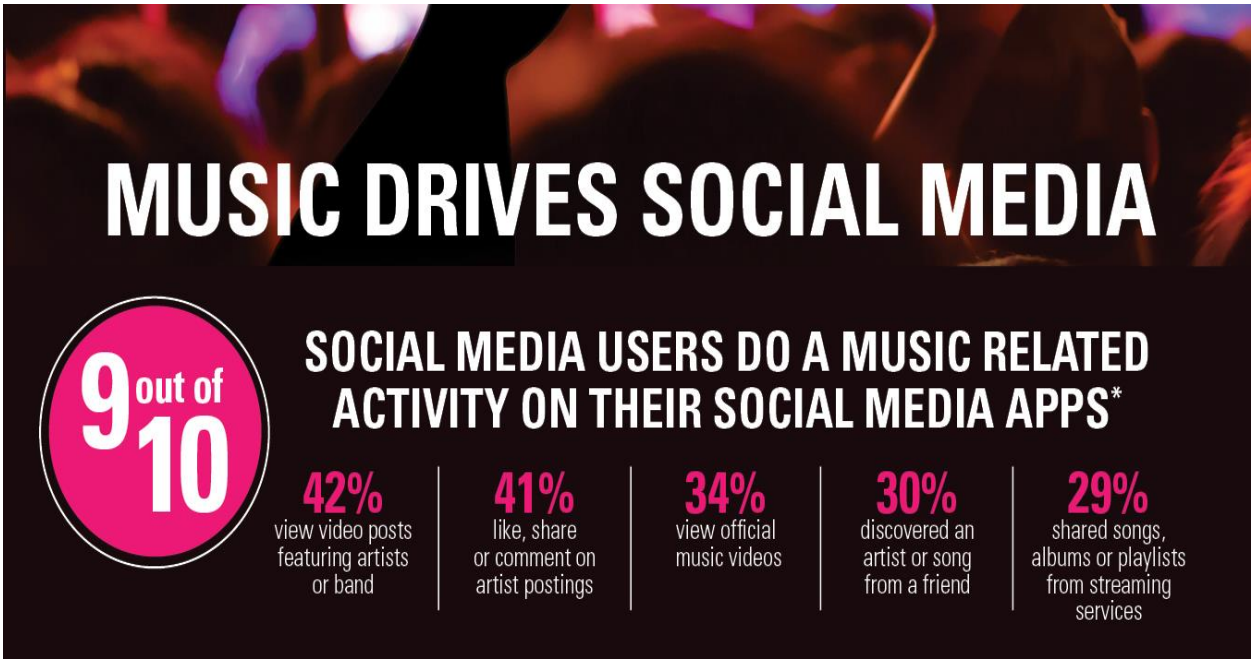
The contributions of the sound recording industry to the digital economy are significant. Music populates the Internet and brings users online generally. For example, visitors to

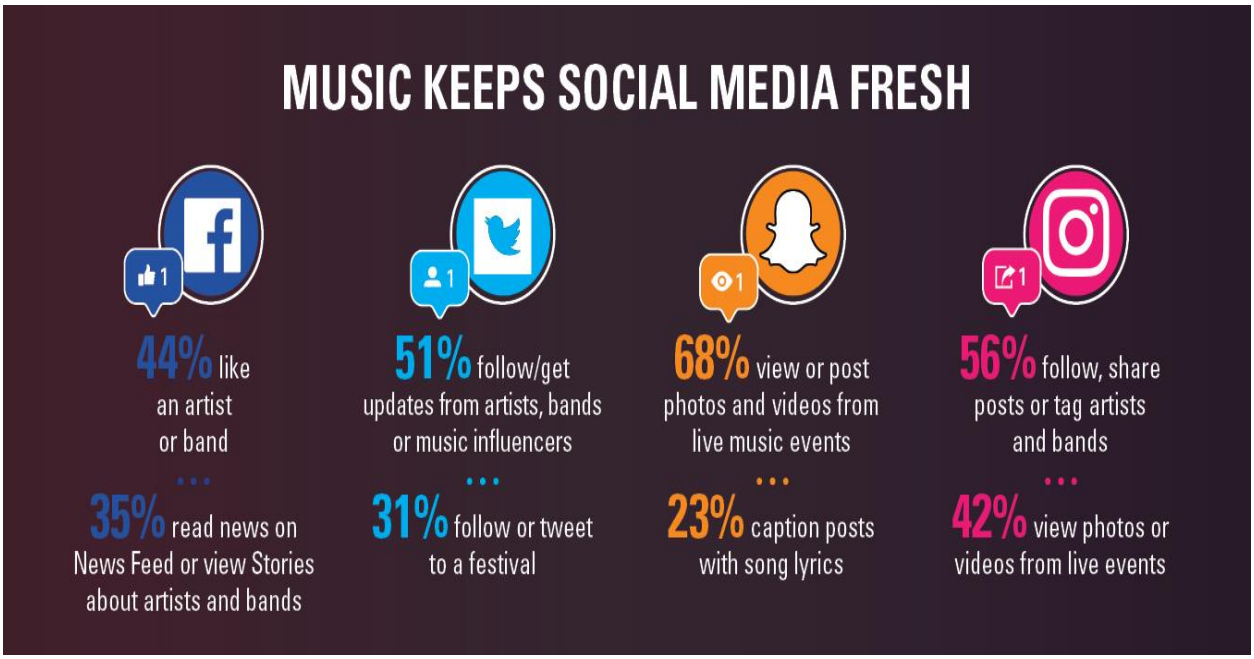
http://www.iipawebsite.com/copyright_us_economy.html. The 2018 update to this report is currently under development, but was not available at the time of this filing.

[6] 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.

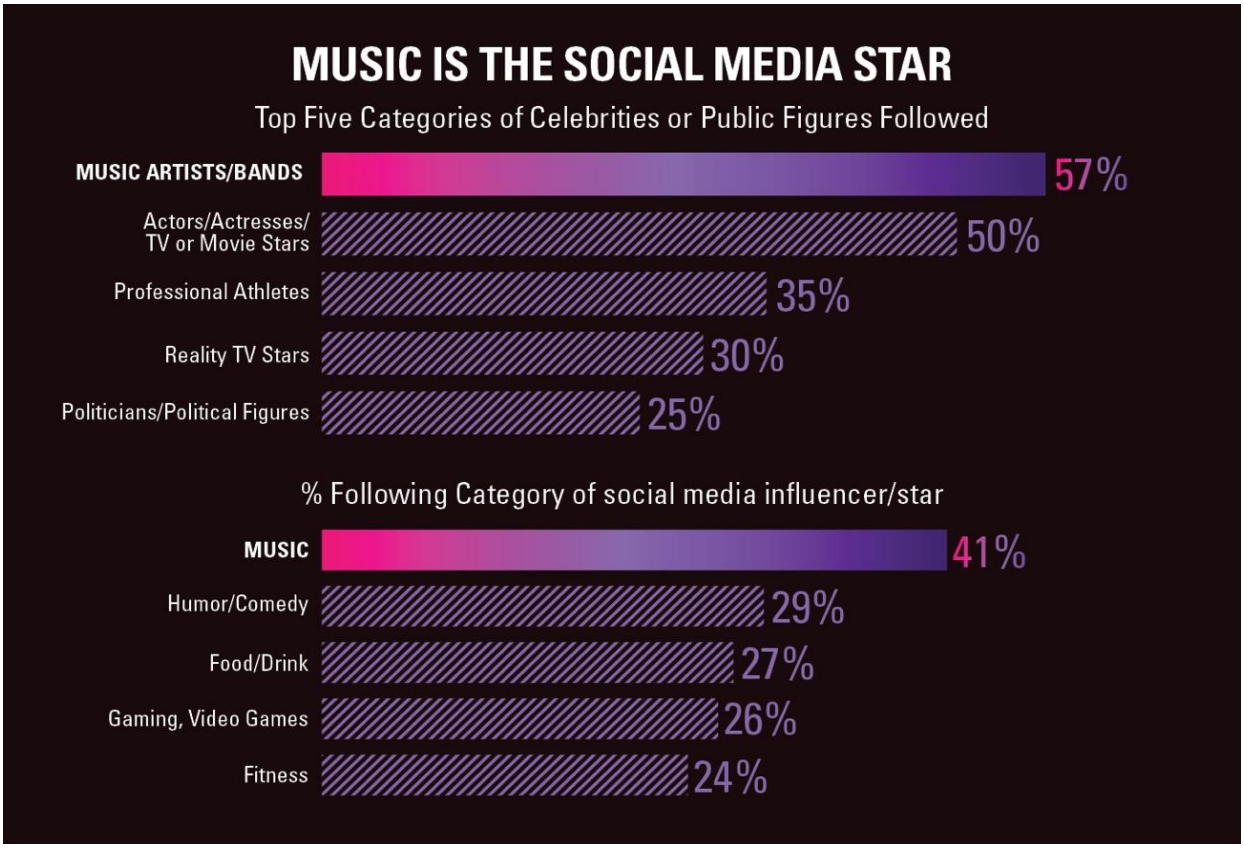
[7] Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2016 Report*; p. 2.

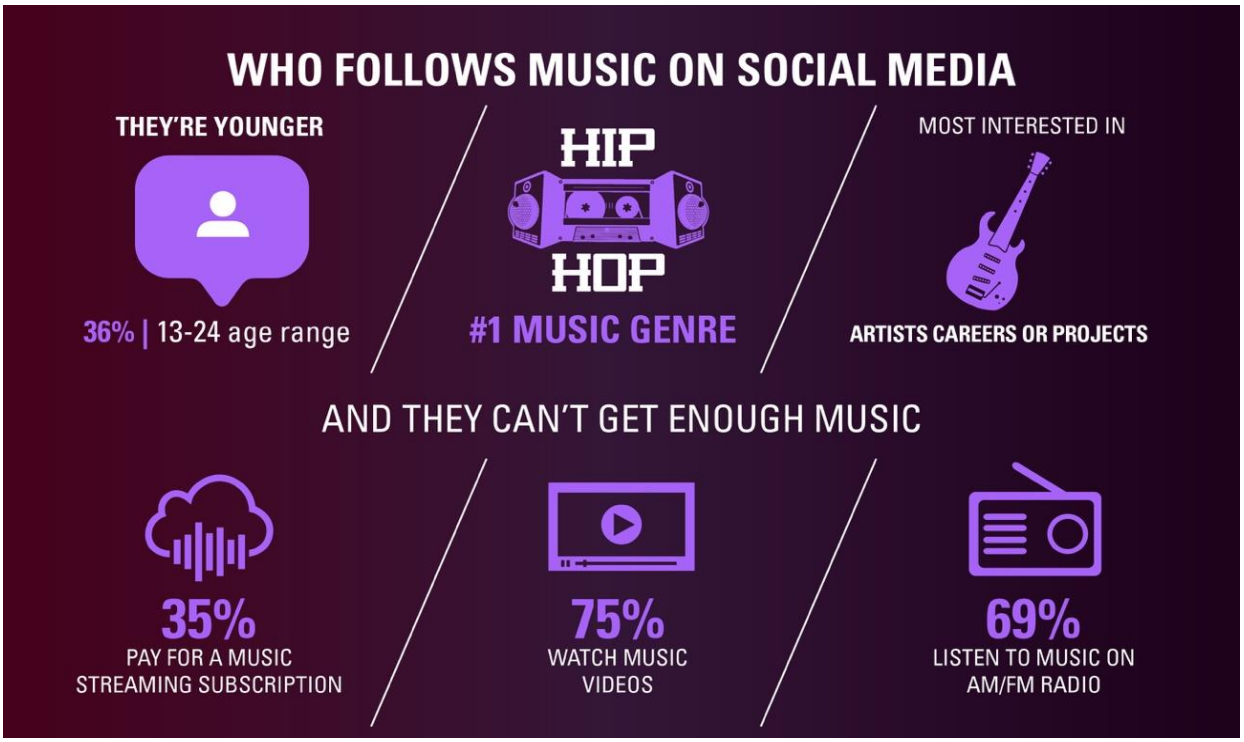
www.musicfuels.com can see how musicians are some of the key drivers of social media worldwide, making up nearly all of the top ten most-followed individuals on Facebook, Instagram, Twitter and YouTube.[8] (See *Music Drives Social Media* below).[9]



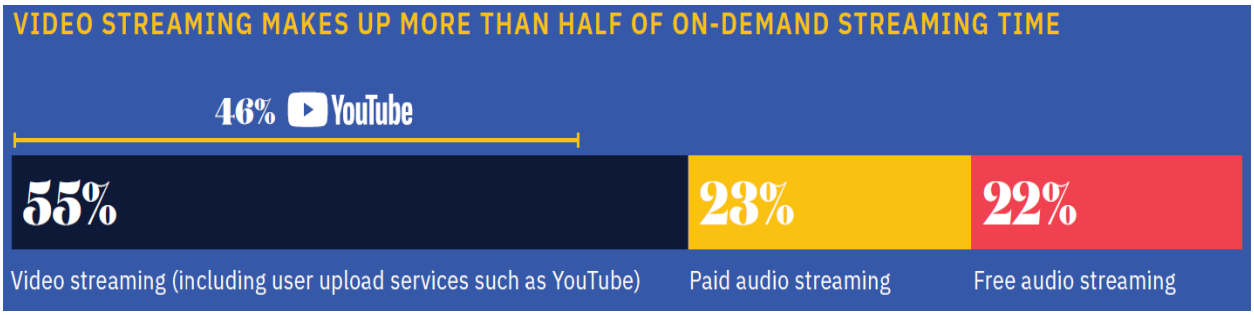


[8] *See* http://www.musicfuels.com/.
[9] Music Watch; *Music & Social Media Study*; 2018.


MUSIC IS THE SOCIAL MEDIA STAR
Top Five Categories of Celebrities or Public Figures Followed
MUSIC ARTISTS/BANDS
57%
Actors/Actresses/ TV or Movie Stars
50%
Professional Athletes
35%
Reality TV Stars
30%
Politicians/Political Figures
25%
% Following Category of social media influencer/star
MUSIC
41%
Humor/Comedy
29%
Food/Drink
27%
Gaming, Video Games
26%
Fitness
24%


WHO FOLLOWS MUSIC ON SOCIAL MEDIA
THEY'RE YOUNGER
36% | 13-24 age range
HIP HOP
#1 MUSIC GENRE
MOST INTERESTED IN
ARTISTS CAREERS OR PROJECTS
AND THEY CAN'T GET ENOUGH MUSIC
35%
PAY FOR A MUSIC STREAMING SUBSCRIPTION
75%
WATCH MUSIC VIDEOS
69%
LISTEN TO MUSIC ON AM/FM RADIO

In terms of video, 28 of the top 30 most watched on YouTube are music videos.[10] In fact, music video streaming makes up more than half (i.e., 55 percent) of on-demand music streaming time. Notably, YouTube accounts for 46 percent of all on-demand music streaming time (see *Video Streaming Makes Up More Than Half of the On-Demand Streaming Time* below).[11] However, while the estimated annual revenue per user on Spotify is $20, the annual revenue per user on YouTube is estimated to be less than $1.[12] According to RIAA research, it takes 58 hours of streaming of a music video on YouTube for the creator to earn $1.



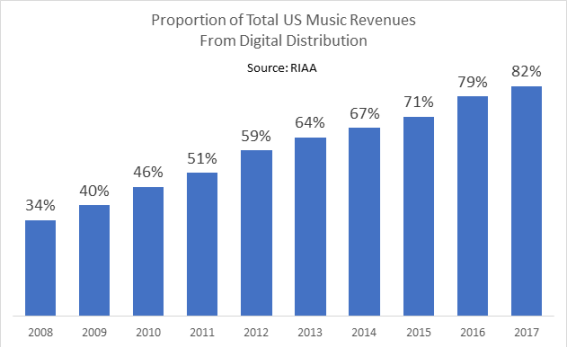
Music companies license over 43 million sound recordings to over 360 digital music services worldwide. Our ability to license our content on commercial terms to our digital partners contributes to U.S. digital services exports, which help power the U.S. digital services trade surplus. Enabled by strong 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. IPR licensing, therefore, has become 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. Such licensing is, therefore, a vital feature of the digital B2B landscape and a crucial component of legitimate and sustainable digital trade.

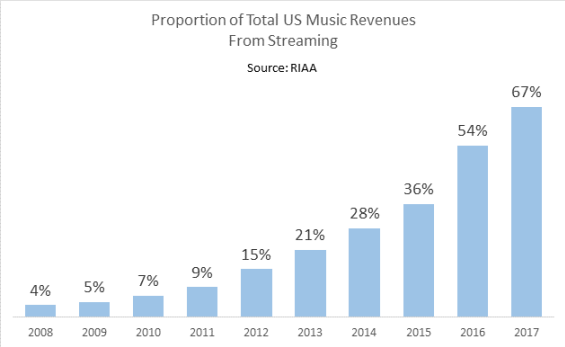
*Music companies license **43 million sound recordings to over 360 digital music services** worldwide.*

Likewise, online copyright protection is critical to the recording industry as part of its provision of B2C digital products and services. Over 82 percent of the sound recording industry's U.S.

[10] RIAA research.
[11] *Global Music Report 2018*; IFPI; p. 27; available at: http://www.ifpi.org/downloads/GMR2018.pdf.
[12] *Global Music Report 2018*; IFPI; p. 27; available at: http://www.ifpi.org/downloads/GMR2018.pdf.

revenues in the United States are digital, with nearly 67 percent of its U.S. revenues derived from streaming. 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.





*Over **82 percent** of the sound recording industry's U.S. **revenues are digital** with nearly **67 percent of its U.S. revenues** derived from **streaming** across a very wide variety of fields.*

The profound importance of the provision of such services to the U.S. economy is exemplified by the considerable contributions of IPR to the U.S. digital services trade surplus. According to a January 2018 report by the U.S. Department of Commerce, entitled *Digital Trade in North* America, the U.S. digital services trade surplus[13] was $159.5 billion or 64 percent of the total U.S. services trade surplus in 2016.[14] This report found that IPR licensing (i.e., charges for the use of intellectual property), is a key driver of the U.S. digital services trade surplus. In 2016, IPR licensing generated an $80.0 digital services trade surplus, exceeding all services categories in the report – i.e., financial, insurance, telecommunications, computer and information services, and government goods and services – with the exception of travel services. As part of IPR

[13] The study defines these services as those that can be traded remotely using the Internet or some other digital network, i.e., potentially information and communications technology-enabled (PICTE) services.
[14] Nicholson, Jessica; U.S. Department of Commerce, Economics and Statistics Administration, Office of the Chief Economist; *Digital Trade in North America*; pp. 3-4; January 5, 2018; available at: https://www.commerce.gov/sites/commerce.gov/files/media/files/2018/digital-trade-in-north-america.pdf

licensing, the report also found that copyright licensing for audio-visual and related products, including sound recordings, accounted for a U.S. digital trade surplus of $10.3 billion in 2016.[15]

*In 2016, IPR licensing generated an **$80 billion digital services trade surplus**, exceeding all services categories except travel services.*

The critical importance of IPR to the U.S. economy and to digital trade specifically is further reflected in the December 2017 National Security Strategy of the United States. The Strategy identifies four national security pillars, enumerating IPR protection as a priority action under Pillar II: Promote American Prosperity.[16] Under that pillar, the Strategy ranks trade agreements at the top of the list with respect to Promoting Free, Fair, and Reciprocal Economic Relationships, stating:

> **ADOPT NEW TRADE AND INVESTMENT AGREEMENTS AND MODERNIZE EXISTING ONES:** The United States will pursue bilateral trade and investment agreements with countries that commit to fair and reciprocal trade and will modernize existing agreements to ensure they are consistent with those principles. Agreements must adhere to high standards in intellectual property, digital trade, agriculture, labor, and the environment.[17]

Likewise, on April 26, 2018, in a World Intellectual Property Day proclamation, the President underscored the critical importance of intellectual property rights to U.S. economic strength and prosperity as well as national security, stating:

> On World Intellectual Property Day, we not only celebrate invention and innovation, but also we recognize how integral intellectual property rights are to our Nation's economic competitiveness. Intellectual property rights support the arts, sciences, and technology. They also create the framework for a competitive market that leads to higher wages and more jobs for everyone. The United States is committed to protecting the

[15] Nicholson, Jessica; U.S. Department of Commerce, Economics and Statistics Administration, Office of the Chief Economist; *Digital Trade in North America*; pp. 3-4; January 5, 2018; available at: https://www.commerce.gov/sites/commerce.gov/files/media/files/2018/digital-trade-in-north-america.pdf
[16] *Nation Security Strategy of the United States*; December 2017; p. 4 and 7; available at: http://nssarchive.us/wp-content/uploads/2017/12/2017.pdf.
[17] Nation Security Strategy of the United States; December 2017; p. 20; (emphasis added); available at: http://nssarchive.us/wp-content/uploads/2017/12/2017.pdf.

> intellectual property rights of our companies and ensuring a level playing field in the world economy for our Nation's creators, inventors, and entrepreneurs.[18]

The 2018 Special 301 Report crystalizes the dual nature of digital trade for the sound recording industry and the U.S. copyright-intensive sector generally as offering both tremendous potential and serious challenges. As the Report explains:

> The increased availability of broadband Internet connections around the world, combined with increasingly accessible and sophisticated mobile technology, has been a boon to the U.S. economy and trade. One key area of economic growth for the United States has been the development of legitimate digital platforms for distribution of copyrighted content, so that consumers around the world can enjoy the latest movies, television, music, books, and other copyrighted content from the United States. However, technological developments have also made the Internet an extremely efficient vehicle for disseminating infringing content, thus competing unfairly with legitimate e-commerce and distribution services that copyright holders and online platforms use to deliver licensed content.[19]

U.S. digital trade policy therefore must address this duality. It should advance the positive promise of digital trade, while tackling the challenges. Digital trade policy must combat digital mercantilism, and must reject beggar-thy-neighbor policies, such as broad copyright loopholes, sought by some so that they may unjustly enrich themselves in foreign markets using American creativity at the expense of American creators. Such a policy must ensure that all digital stake holders, including the American creative industries, are adequately and effectively consulted. That digital trade policy should be developed in a transparent and inclusive manner in consultation with a broad set of stakeholders, and not simply with a select few companies from single economic sector. Such policy should not promote the interests of some technology companies at the expense of other stake holders.

U.S. digital trade policy should promote American creators online and the copyright protection and enforcement that they rely on and need to sustain their contributions to the U.S. economy, jobs, and trade competitiveness as well as American culture. That policy should promote legitimate digital trade, including through the streaming economy, and should combat piracy and other forms of infringing or illegal activity, including stream-ripping. Likewise, such policy

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[18] *President Donald J. Trump Proclaims April 26, 2018, as World Intellectual Property Day*, available at: https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-proclaims-april-26-2018-world-intellectual-property-day/

[19] Office of the United States Trade Representative; 2018 Special 301 Report; p. 24; available at: https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf.

should be designed and implemented in a manner that dismantles barriers to digital trade that exist in foreign markets. Whether at the outset of policy development or in its implementation, U.S. digital policy should rest on a threshold inquiry – how does this policy promote U.S. creative industries and their contributions to U.S. economic growth, employment and trade?

Measures that Affect the Ability of U.S. Sound Recording Industry to Develop and Supply Digital Products and Services Abroad, Including with Respect to Competitiveness, International Trade and Investment Flows

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 2018 Special 301 Report, the following identifies an illustrative list of key barriers that significantly impede digital trade for the music industry, in particular, and that 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 Copyright Protection and Enforcement.

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.106.[20] 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.

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

- 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

[20] *United States International Trade Commission*; "Digital Trade in the U.S. and Global Economies, Part 2"

products. As part of its digital trade policy, the United States should ensure that such duties are not applied to streaming.

- Discrimination. 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. As with duties above, discrimination with respect to streaming should also be prohibited.

- Contractual Freedom Limitations. 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.

- 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.[21] U.S. digital trade policy should continue to ensure digital market access through commitments on investment & cross-border services, including digital delivery.

- Security Concerns. Where the Internet is not secure, digital trade cannot thrive. Protecting digital environment against cybercrime, which comprises criminal copyright infringement

[21] *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.

(see Article 10 of the Budapest Convention on Cybercrime), should remain a key priority, including to ensure that copyright infringement crimes are prosecuted and 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. (See also section *EU General Data Protection Regulation* below regarding the importance of public access to WHOIS data in the context of the EU GDPR and ICANN).

- Insufficient 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.

- Lack of Platform Responsibility. Platform responsibility should be a central feature of U.S. digital trade policy. As acknowledged in the 2018 Special 301 Report, while the Internet presents opportunity for legitimate commerce, there are also significant and copious challenges to such commerce. Such challenges include illicit content, whether copyright infringing or other illegal content, but is not limited to such content. Many other threats to U.S. economic and national security as well as individual security and our democratic institutions also proliferate in the digital ecosystem.

  Internet platforms must take more responsibility and do a better job in ensuring that their platforms are not used for infringing or other illegal activity. The argument that someone else initiated the illegal activity should not absolve platforms from the reality that, but for their services, the third party may not have been able to engage in the illegal act in the first place.

  Digital trade policy should not automatically promote safe harbors and platform immunities as the *sine qua non* for Internet growth. This is particularly true of trade agreement provisions, which often are simply incapable of fully reflecting the complexity, extent and nuance of U.S. law on safe harbors, including its jurisprudence, and where the drafting of such provisions present a significant risk that they will be implemented or interpreted in a manner inconsistent with U.S. law.

  Rather, governments should reflect and analyze the positive and negative consequences of the various safe harbors and immunities, and consider what adjustments should be made to

> ensure a safe, lawful and vibrant Internet. In our view, safe harbors should only apply to innocent intermediaries who are truly passive and neutral in the operation of the service, which is consistent with the original intent of Congress.[22] Once the service changes to having a more active role or engagement with third-party content, the risk allocation must shift as well.[23]

Copyright 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.[24] 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 Trade Policy Agenda.[25] 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

[22] *See*, e.g., Music Community Submissions to U.S. Copyright Office request for comments regarding Section 512 Study, available at: https://www.riaa.com/wp-content/uploads/2016/03/Music-Community-Submission-in-re-DMCA-512-FINAL-7559445.pdf.
[23] *See*, e.g., Music Community Submissions to U.S. Copyright Office request for comments regarding Section 512 Study, available at: https://www.riaa.com/wp-content/uploads/2016/03/Music-Community-Submission-in-re-DMCA-512-FINAL-7559445.pdf.
[24] 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.
[25] 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).

> life for the entire U.S. population.[26] 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.[27]

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."[28] 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."[29] 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 generating significant employment, wealth, and trade."[30]

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

- Making Available Right. Likewise, the exclusive making available right is the essential right underpinning all online commerce in content. Record companies have successfully licensed

[26] Gordon, Robert; *The Rise and Fall of American Growth: The U.S. Standard of Living Since the Civil War*. Princeton University Press; 2016.
[27] U.S. Economics and Statistics Administration, and U.S. Patent and Trademark Office; *Intellectual Property and the U.S. Economy: 2016 Update*.
[28] 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.
[29] 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.
[30] *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/.

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 any transmissions that entail an element of interactivity.

- 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.

- TPMs. Increasingly, technological protections measures (TPM), which are protected by a separate right under U.S. law and WIPO treaties, 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, which offer licensed content. 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. Strong protections against TPM circumvention is also important in order to give effect to contractual agreements whereby companies such as music producers license content to various online music services for particular territories and uses. The practical effectiveness of such contracts often depends on the effectiveness of TPMs, which are applied by the services to fulfil the terms of the license contract.

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.

- Primary and Secondary Liability. A strong copyright enforcement framework is predicated upon clear legal basis for liability, including both primary and secondary civil liability, such as contributory and vicarious infringement as well as inducing infringement, and for aiding and abetting criminal infringement. Depending on the legal system involved, liability should apply to user upload content services and 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 online service providers (OSPs), 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. Website blocking orders provide a vital tool for addressing piracy by way of orders to OSPs to deny access to foreign infringing websites. Given that a local OSP cannot "take down" infringing content based on such websites, because such content is not hosted on that OSP's servers, a number of countries around the world have adopted a legal basis to require local OSPs to prevent their subscribers from accessing specific foreign websites or enabling the grant of such orders. OSPs 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.[31] The costs for implementing such orders to deny access to infringing websites should be borne by OSPs because these costs are minimal for them and are part of an OSPs' costs of running its business. Regarding legal costs, if the OSP choses 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. Concluding that website blocking should be part of the U.S. anti-piracy toolbox, one 2018 article states, "[s]tudies show that blocking regimes that target these large scale piracy sites (not sites that accidentally host pirated material) are an effective tool in reducing piracy and increasing the consumption of legal content and services."[32]

[31] 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. See also Danaher, Brett; Smith, Michael D.; and Telang, Rahul; "Copyright Enforcement in the Digital Age: Empirical Evidence and Policy Implications"; *Communications of the ACM*; Vol. 60 No. 2; February 2017; pp. 73-75; available at: https://cacm.acm.org/magazines/2017/2/212432-copyright-enforcement-in-the-digital-age/fulltext.

[32] Cory, Nigel; "The Normalization of Website Blocking Around the World in the Fight Against Piracy Online"; *Innovation Files*; Information Technology & Innovation Foundation; June 12, 2018; available at: https://itif.org/publications/2018/06/12/normalization-website-blocking-around-world-fight-against-piracy-online.

- 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 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 respect for the presumption of copyright 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. Overall, in many markets, especially in certain civil law countries, it is evident from experience that civil and criminal procedure codes and court practices have not been adequately updated for the realities of the digital age. In particular, basic procedural steps, such as serving notice or the circumstances when the burden of proof passes to the defendant should be kept up to date with the realities of online operations and what might or might not be available to the claimant or the law enforcement authorities. Note that the music industry's enforcement priorities with respect to online service provider (OSP) 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 and other digital products from the creative sector. As noted in the U.S. National Trade Estimate of 2018, "[t]rade barriers elude fixed definitions, but may be broadly defined as government laws, regulations, policies, or practices that either protect domestic goods and services from foreign competition, artificially stimulate exports of particular domestic goods and services, or fail to provide adequate and effective protection of intellectual property rights."[33] Such IPR-related trade barriers include:

- Flawed Provisions that Facilitate the Misapplication of Online Service Provider (OSP) Safe Harbors with respect to Copyright Infringement, in a Manner Inconsistent with their Original Intent;

[33] Office of the United States Trade Representative; 2018 National Trade Estimate; p. 1; available at: https://ustr.gov/sites/default/files/files/Press/Reports/2018%20National%20Trade%20Estimate%20Report.pdf

- Overbroad Application of Copyright Exceptions and Limitations; and

- Copyright Piracy, including Illegal TPM Circumvention.

A. OSP Safe Harbors and the Value Gap

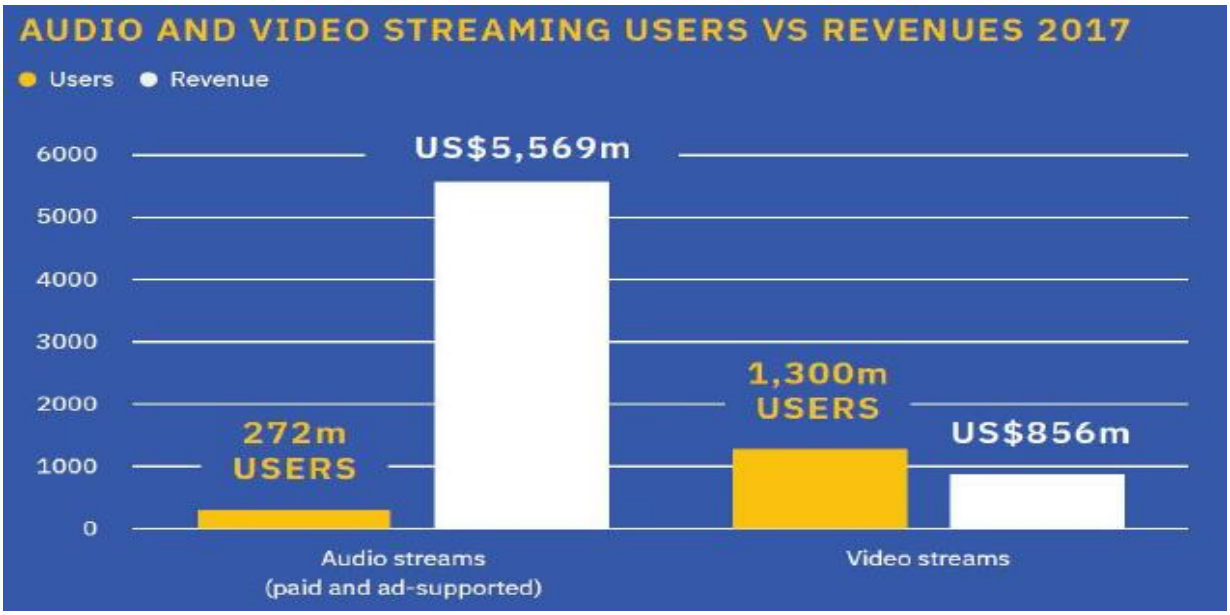
As a threshold matter, OSP safe harbors with respect to copyright infringement cannot exist in a vacuum. Instead, strong and clear primary and secondary liability for such infringement must be a condition precedent in the laws of our digital trading partners. This sequenced approach, which relies fundamentally on building a strong foundation first before subsequent articulation of exceptions to liability 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 OSP safe harbors, while under-implementing foundational copyright protections.

With that baseline, and turning to OSP safe harbors themselves, overbroad OSP 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. For example, 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 at market rates with the largest and most-used global music service, which has over 1 billion users, 82 percent of which use it for music.[34] It also creates a market failure as it produces a situation where holders of exclusive rights (copyrights) are not in practice able to effectively assert the exclusivity aspect of those rights and thus their bargaining position in commercial negotiations with certain online services (usually, UUC platforms) is significantly weakened.

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,

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

juxtaposing subscription and ad-supported revenues versus users in 2017.[35]



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, 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.[36]

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

[35] *Global Music Report 2018*; IFPI; p. 27; available at: http://www.ifpi.org/downloads/GMR2018.pdf.
[36] *Global Music Report (2016): Music Consumption Exploding Worldwide*; IFPI; p. 23; available at: http://www.ifpi.org/downloads/GMR2016.pdf

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.[37]

- 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 annually.[38] 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.*

[37] 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;

[38] 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.

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.[39] 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.[40] 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.

- A mindset of "use third party copyrighted works first, ask for a license later."[41] 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.[42]

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[39] *See* http://www.valuethemusic.com/index.html.
[40] 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.
[41] *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/.
[42] *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*").

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 or exploiters 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 is worth, or have the broken notice-and-takedown system as the only recourse.[43]

1. Negative Impacts on Copyright, Including Digital Licensing

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.

[43] 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/.

- 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.[44] 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.[45] 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 Google alone.[46] Individuals and small-businesses which cannot afford such an undertaking are left without even this minimal protection under the DMCA against digital piracy.[47] These issues are exacerbated by the "whack-a-mole" nature of the notice-and-takedown process.

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

[45] *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.

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

[47] *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.

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.[48] These notifications may never come because of content owners' unawareness of infringement, or may only come once the infringement has gone viral.[49] 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.[50] 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.[51] 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 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***

[48] *See Veoh Networks*, 586 F. Supp. 2d 1132; *Viacom II*, 676 F. 3d at 32-34.
[49] 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).
[50] This did not include notices for those links to search engines, and includes a period months after the commercial release of these songs.
[51] *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.

***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.[52]

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.

Another major inefficiency in the DMCA, as implemented in today's environment, is the lack of clarity about what is meant by "expeditious" takedown[53], 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.[54] 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

[52] IFPI submission on regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy (Dec. 2015).
[53] 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").
[54] 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.

notice.[55] 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.[56] 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 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 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.

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

[56] *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.

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. legal system 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, there is no clear evidence of 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.

Finally, the alleged economic benefits of fair use asserted by some have been largely unsupported and un-sustained. As one study states, "Searching for some economic justification for liberal application of fair use, advocates often claim that highly permissive fair use policies stimulate economic activity. Yet, no evidence exists to support such claims; all attempts to demonstrate such effects have been riddled with numerous and fatal errors."[57] For example, while the Computer & Communications Industry Association claims that fair use is responsible for 16 percent of U.S. GDP, that claim rests precariously on the assertion that all of "…the jobs, value added, and sales in broad economic sectors are claimed to depend *entirely* on fair use."[58] In fact, the economic literature suggests a very different conclusion – i.e., fair use is not responsible for the positive economic contributions some have alleged, and may have significant negative economic impacts.[59]

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:

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[57] Ford, George S.; "Fair Use and the Economy: A Review of CCIA's Estimate"; *Perspectives*; Phoenix Center for Advanced Legal & Economic Public Policy Studies; June 27, 2018; p. 1; available at: http://phoenix-center.org/perspectives/Perspective18-05Final.pdf. *See also See, e.g.*, G.S. Ford, *The Vanishing Benefits of Fair Use: A Review of the Flynn-Palmedo Study on "User Rights" in Copyright Law*, Phoenix Center Policy Perspective No. 17-12; December 18, 2017; available at: https://ssrn.com/abstract=3138855; Ford, George S.; *The Lisbon Council's 2015 Intellectual Property and Economic Growth Index: A Showcase of Methodological Blunder*; Phoenix Center Policy Perspectives No. 15-03; June 29, 2015; available at: https://ssrn.com/abstract=2837319);

[58] Ford, George S.; "Fair Use and the Economy: A Review of CCIA's Estimate"; *Perspectives*; Phoenix Center for Advanced Legal & Economic Public Policy Studies; June 27, 2018; p. 2; available at: http://phoenix-center.org/perspectives/Perspective18-05Final.pdf.

[59] *See e.g.* PWC; *The Expected Impact of the 'Fair Use' Provisions and Exceptions for Education in the Copyright Amendment Bill on the South African Publishing Industry;* July 2017; available at: www.publishsa.co.za/file/1501662149slp-pwcreportonthecopyrightbill2017.pdf; *See e.g.*, PWC, *Understanding the Costs and Benefits of Introducing a 'Fair Use' Exception*; February 2016; available at: https://static-copyright-com-au.s3.amazonaws.com/uploads/2016/02/R01501-PwC-FairDealing-CBA.pdf; *See e.g.*, Ford, George S., *The Economic Impact of Expanding Fair Use in Singapore: More Junk Science for Copyright Reform*, Phoenix Center Policy Perspectives; No. 16-01; February 16, 2016; available at: https://ssrn.com/abstract=2837315.

> 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.[60]

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 2017, recording industry associations around the world sent **infringement notices listing hundreds of millions of infringing URLs** to search engines, websites and hosting OSPs.*

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, in 2017, RIAA, IFPI and the British Phonogram Industry (BPI) as well as other recording industry associations around the world sent infringement notices listing hundreds of millions of infringing URLs to search engines, websites and hosting OSPs. Some were visits to torrent sites like thepiratebay that provide access to infringing downloads of a wide array of copyright-protected content – music, movies, games and software – and others are sites like

[60] 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.

nippyspace, mp3juices, flvto.biz and others that specialize in stream ripping and/or infringing downloads of music files. Likewise, according to the IFPI, in 2017, an estimated 17 billion individual tracks were illegally downloaded via BitTorrent; 3.2 billion tracks via cyberlockers and 2.5 billion via stream ripping services.[61]

*In 2017, an estimated **22.7 billion tracks were illegally downloaded** via stream ripping, BitTorrent, and cyberlockers.*

Another recent report estimated very conservatively that the commercial value of digital piracy in the music industry was $29 billion in 2013 and forecast to be between $53 and 117 billion in 2022, explaining "it is most likely that the value of total digital piracy exceeds our estimates by a considerable amount."[62] An earlier study estimated that cybercrime costs the global economy some $400 billion in annual losses through consumer data breaches, financial crimes, market manipulation, and theft of intellectual property.[63]

*The commercial value of **digital piracy to the music industry** was **$29 billion** in 2013, and forecast to be between **$53 and 117 billion** in 2022.*

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 roughly one third (32 percent) of all Internet users accessed infringing music via stream-ripping in the past three months, which rises to 47 percent of Internet users using such services among 16-24 year olds.[64] Piracy rates are significantly higher in certain countries, i.e., Brazil (65 percent of those surveyed accessed pirated music in the past three months); Argentina (56.5 percent); Mexico (54.8 percent); South Africa (54.7

[61] *See* http://www.ifpi.org/.
[62] 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.
[63] *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.
[64] IFPI; *Music Consumer Study 2018: Global Report*; (1,000 consumers were surveyed in Argentina, Australia, Canada, China, France, Germany, India, Italy, Japan, Mexico, Netherlands, Poland, Russia, South Africa, South Korea, Spain, Sweden, the United Kingdom, and the United States, and 2,000 consumers were surveyed in Brazil, China and India).

percent); Russia (53.0 percent); Spain (46.6 percent); Poland (40.5 percent); Italy (34.9 percent); Canada (32.6 percent); and South Korea (31.8 percent).[65]

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

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 terms of use of the licensed sites, and circumvent the technological protection measures that YouTube and other licensed service employ to prevent copying and distribution of music streamed through their service. These stream-ripping sites provide the service of creating free downloads of these music files copied from streaming services and often monetize their infringing activity through advertising.[66]

Stream-ripping has become a predominant form of digital piracy and poses a considerable threat to legitimate digital trade in music. While overall traffic to pirate sites remains enormous, the focus of the recording industry in 2017 has been on what are known as ripper sites. These sites take music videos legal made available for streaming on YouTube and other services and rip the audio portion of the file as a free download. Unlike other pirate sites that deal in a range of copyrighted content (movies, television, games and software in addition to music) the ripper sites are designed to illegally extract and distribute music files.

[65] IFPI; *Music Consumer Study 2018: Global Report*; (1,000 consumers were surveyed in Argentina, Australia, Canada, China, France, Germany, India, Italy, Japan, Mexico, Netherlands, Poland, Russia, South Africa, South Korea, Spain, Sweden, the United Kingdom, and the United States, and 2,000 consumers were surveyed in Brazil, China and India).

[66] *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.").

*In 2017, there were **17.5 billion visits globally** to music ripper sites.*

In 2017, there were 17.5 billion visits globally to music ripper sites where illegal downloads not only undermine the sale of music files, but also harm subscription streaming services where saving files for offline playback is an important feature of premium services. One study found that 32 percent of 21,000 consumers surveyed across 18 countries downloaded music through stream ripping.[67] IFPI research has found that 2.5 billion infringing tracks were stream-ripped between July 2016 and December 2017.

__2.5 billion infringing tracks__ were stream-ripped between July 2016 and December 2017.

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; they also undermine the key features of the paid-for service tiers such as availability of content for offline listening. 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.

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

[67] IFPI; *Music Consumer Study 2018: Global Report*; (1,000 consumers were surveyed in Argentina, Australia, Canada, China, France, Germany, India, Italy, Japan, Mexico, Netherlands, Poland, Russia, South Africa, South Korea, Spain, Sweden, the United Kingdom, and the United States, and 2,000 consumers were surveyed in Brazil, China and India).

to open markets and dismantle barriers to the digital goods and services of the U.S. recording industry.[68]

Asia and Pacific

In 2017, revenues for the recorded music industry in Asia and Australasia grew by 5.4 percent.[69] Regarding digital trade, 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.[70]

Australia

In 2017, Australia was the eighth largest music market in world, and grew by 13.4 percent over 2016. It was ranked eighth globally for digital music sales, with such sales accounting for 68 percent of that market, placing Australia at 15th among the 31 countries with more than 50 percent digital share of total music revenues. It was also ranked sixth among countries where streaming made the highest contributions to the total recorded music market, (i.e., 49.5 percent), and was ranked 32nd of the 35 countries where streaming was more than 50 percent (i.e., 56.8 percent) of total sales in 2017. It accounts for three percent of the total global streaming revenues for recording music, ranking eighth behind the United States, the United Kingdom, Germany, South Korea, France, Japan, and China. Australia was ranked ninth in the world for global physical music sales – ranking tenth in the top ten for global vinyl sales (with such sales accounting for 18 percent of physical music sales in Australia) – accounting for one percent of total global physical sales, with physical sales responsible for 19 percent of total music sales there. Finally, the Australian market has among the highest revenue per capita for recorded music at $17.77.[71]

> *In 2017, **Australia** was the **eighth largest music market** in world, and grew by 13.4 percent over 2016.*

Regarding digital services trade generally, Australia was the tenth largest digital services export

[68] 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 2018 Special 301 Report, which is available at: https://iipa.org/files/uploads/2018/02/2018_SPECIAL_301.pdf
[69] *Global Music Report 2018*; p. 71.
[70] Grimm, Alexis; p. 8, 10, and 12.
[71] *Global Music Report 2018*; pp.49-50, 54, 56, 59, 63, and 79.

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.[72]

Regarding specific digital trade priorities in Australia, the music industry strongly supports the outcome of the Copyright Amendment (Service Providers) Bill with respect to its limited extension of copyright infringement safe harbors to Internet service providers. On 27 June 2018, the Bill passed the Australian House of Representatives after previously passing the Senate. This Bill extends safe harbors to a narrow category of service providers – disability organizations, education providers and cultural institutions. Importantly, it does not broadly extend safe harbors to all online service providers and UUC services (which was proposed in an earlier draft of the Bill). Within these confines, the Bill fully implements Australia's commitments under the limitations for liability for service providers provisions of the U.S.-Australia Free Trade Agreement.

The sound recording industry strongly opposed efforts to expand OSP safe harbors in Australia beyond the narrow category of service providers included in the final law. Such an expansion, which is hopefully no longer planned, 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.

The availability of website blocking in Australia represents a further positive feature of the digital music trade landscape in that market. Both film and music companies filed individual website blocking cases in respect of The Pirate Bay, Kickasstorrents and other sites following amendments to the Copyright Act which came into effect in June 2015. The Act introduced a judicial procedure whereby right holders can apply for injunctive relief against OSPs in respect of "online locations" (e.g. websites) outside Australia whose primary purpose is to infringe, or to facilitate the infringement of copyright. The court may take a number of factors into account before issuing the injunction, including the flagrancy of the infringements and whether blocking is a proportionate response in the circumstances, and it may order that the parties establish a landing page to inform subscribers as to the reason why the site has been blocked. The Law also

[72] Grimm, Alexis; p. 11 and 17.

addresses the allocation of costs – OSPs will not be liable for the right holders' legal costs in bringing the blocking proceedings unless the OSPs elect to appear in court and contest the application (in which case, liability for legal costs would be at the court's discretion). Regarding the costs of implementing the order, the Explanatory Memorandum clarifies that it will be open to the court to give appropriate directions.

In November 2016, the Federal Court in Australia issued a judgment in two cases making orders requiring OSPs to block access to 59 individual URLs associated with The Pirate Bay, Torrentz, Torrenthound, Isohunt, and the film streaming site Solarmovie. In April 2017, the Federal Court in Australia also ordered OSPs to block access to Kickasstorrents and related proxy sites in a case coordinated by music right holders. The Court followed the previous decision in the film companies' case and ordered the Applicants to pay the OSP's costs in complying with the order (but excluding set-up/capital costs and the cost of the optional landing page to which the relevant domains could redirect), assessed at the rate of AUD 50 per blocked domain. In addition, the applicants were ordered to pay the OSPs legal costs incurred in relation to the compliance costs issue. Further cases have been filed since then and are still pending.

Most recently, on April 27 2018, the Australian Federal Court granted a blocking application, brought by various right holders including film studios (*Roadshow v Telstra 2018*). The decision is positive, in particular there was no order as to legal costs – in previous cases right holders were ordered to contribute to OSPs' legal costs. The order required OSPs to block access to 16 domain names enabling access to infringing content.

The IP addresses reached by these domain names did not host websites: they were specific online locations from which users could stream content without a license. The addresses were accessible via three apps installed and operated through the Android operating system on the television smart box. The apps connected the smartbox to the Internet. The basis for the order was that the online locations identified by these domain names enabled users to stream content through the smart box without right holder consent, thereby facilitating copyright infringement. In this respect the case is different from previous blocking cases, which related to websites. The applicants were ordered to pay OSPs' compliance costs calculated at a rate of AUD 50 per domain.

Regarding the negative effect of over-broad copyright exceptions on digital trade, the U.S. sound recording industry is closely following the copyright modernization consultations in Australia. Specifically, on 19 March 2018 the Department of Communications and the Arts released a Copyright Modernization Consultation Paper regarding proposals for the reform of Australia's copyright laws and regulations. The Department requested submissions regarding, among other

issues, flexible exceptions to copyright infringement. In particular, these consultations query whether an open-ended fair use exception similar to that in the United States should be introduced in Australia or, alternatively, if the existing list of fair dealing exceptions should be amended. The Australian Productivity Commission previously recommended the introduction of fair use in that market. For the reasons explained above in Section B *Overbroad Copyright Exceptions and Limitations*, the U.S. sound recording industry strongly opposes the introduction of fair use 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, thereby offering to the Australian broadcast industry a *de facto* subsidy at the expense of music right holders.

China

In 2017, China was the 10th largest music market in world, and grew by 35.3 percent over 2016. It was ranked ninth globally for digital music sales, with such sales accounting for 90 percent of the Chinese market, placing China at third among the 32 countries with more than 50 percent digital share of total music revenues. It was also ranked second among countries where streaming made the highest contributions to the total recorded music market, (i.e., 70 percent), and was ranked 19th of the 35 countries where streaming was more than 50 percent (i.e., 75.7 percent) of total sales in 2017. It accounts for three percent of the total global streaming revenues for recording music, ranking seventh behind the United States, the United Kingdom, Germany, South Korea, France, and Japan. China was ranked 34th in the world for global physical music sales, with physical sales responsible for three percent of music sales there. Finally, the Chinese market has among the lowest revenue per capita for recorded music at $0.21.[73]

*In 2017, **China** was the **10th largest music market** in world, and grew by 35.3 percent over 2016 and by 68 percent between 2015 and 2106.*

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

[73] *Global Music Report 2018*; pp. 49-50, 54, 56, 63, and 89.

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.[74]

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 word 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 and also compared with consumer spending habits in other parts of the entertainment sector in China. 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 and the largest UUC site in China is not licensed for music videos. 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 OSP safe harbor requirements, to adopt a proper broadcasting right for sound recordings, and to provide a term of protection consistent with the international standard, which is reflected in U.S. trade agreements.

Regarding OSP 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 OSP safe harbors. These issues should be addressed as part of the 3rd copyright amendment process by clarifying that the OSP safe harbors only apply to technical, automatic and passive online intermediaries. Important clarifications can also be issued as judicial guidance.

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

[74] Grimm, Alexis; p. 11 and 17.

down on unlicensed music, Chinese authorities should enhance the consistency and efficacy of their enforcement actions (including through "stay down" obligations with respect to removed content) 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 OSPs 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 OSPs 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.[75] 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

[75] *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.

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

India

In 2017, India was the 19th largest music market in world, and grew by 13.6 percent over 2016. It was ranked 14th globally for digital music sales, with such sales accounting for 78 percent of that market, placing Australia at ninth among the 31 countries with more than 50 percent digital share of total music revenues. It was also ranked 13th of the 35 countries where streaming was more than 50 percent (i.e., 78.5 percent) of total sales in 2017. India was ranked 31st in the world for global physical music sales, accounting for less than one percent of total global physical sales, with physical sales responsible for seven percent of music sales there. Finally, the

Australian market has among the lowest revenue per capita for recorded music at $0.10.[76]

*In 2017, **India** was the **19th largest music market** in world, and grew by 13.6 percent over 2016.*

Regarding digital services trade generally, India was the 20th largest digital services export market in 2014, for potentially ICT-enabled services exports from the United States, with IPR licensing services exports amounting to $1.1 billion. India also had compound annual average growth in potentially ICT-enabled services exports of 13.4 percent from 2006 to 2014. United States had a $744 million surplus in IPR licensing services exports with Australia in 2014, with a compound annual average growth rate for potentially ICT-enabled services of 18.2 percent from 2006 to 2014.[77]

The U.S. recording industry is particularly concerned by a 2016 memorandum from the Copyright Section of the Department of Industrial Policy and Promotion within the Indian Ministry of Commerce and Industry. This troubling memorandum interprets Article 31D of the Indian Copyright Act, finding that online transmissions fall of that scope of that article. Article 31D provides that a statutory license – i.e., a royalty rate set by an Indian government tribunal – applies to the broad casting of sound recordings (and literary and musical works). The effect of the memorandum would be that digital music services that are currently licensed individually on free market terms all around the world would operate on the basis of a statutory license in India.

This interpretation is inconsistent with the drafting and original intent of Article 31D itself, which limited the scope of the statutory license to non-interactive radio and television broadcasters, and was not intended to cover interactive Internet music streaming services. Moreover, the underlying policy position adopted in the 2016 memorandum was included at the request of Internet companies, without proper consultation with copyright-intensive industries, including from the music industry, which are directly and negatively impacted by this measure. Unlike radio and television broadcasters, which claim financial challenges with respect to licensing, the digital music streaming services operating in India are doing extremely well by all metrics (e.g., number of users, revenues, low licensing payments that are far below international standards), thereby falling further outside of the purported rationale for Article 31D.

[76] *Global Music Report 2018*; pp. 49-50, 54, 56, 63, and 102.

[77] Grimm, Alexis; p. 11 and 17.

By including Internet music streaming services within the scope of broadcasting, the memorandum is also inconsistent with U.S. and international copyright law. The scope of broadcasting is well established and clearly defined in international law, including in the Berne Convention and WIPO Internet Treaties. There is no ambiguity in these treaties that broadcasting excludes interactive music streaming services. Likewise, India is departing from worldwide commercial practice were digital music services are licensed individually on free market terms.

The Indian government should withdraw the 2016 memorandum. The alternative – i.e., the Copyright Board, as the authority administering the statutory license – is not a solution. Interactive music streaming services should not be covered by the statutory license, and by subjecting such services to the Copyright Board's statutory license determinations, India will be exacerbating rather than resolving our problem by replacing commercially negotiated licenses with government-imposed license fees to the detriment of the Indian music industry as well as our own.

Indonesia

In 2017, Indonesia was the 32nd largest music market in world, and grew by 10.6 percent over 2016. It was ranked 26th globally for digital music sales, with such sales accounting for 93 percent of that market, placing Indonesia second among the 31 countries with more than 50 percent digital share of total music revenues. It was also ranked 34th globally for streaming music sales, accounting for less than one percent of global streaming revenues. Indonesia was ranked 44th in the world for global physical music sales, accounting for less than one percent of total global physical sales, with physical sales responsible for three percent of music sales there. Finally, the Indonesian market has among the lowest revenue per capita for recorded music at $0.17.[78]

*In 2017, **Indonesia** was the **32nd largest music market** in world, and grew by 10.6 percent over 2016.*

Regarding digital services trade generally, Indonesia was the 32nd largest digital services export market in 2014, for potentially ICT-enabled services exports from the United States, with IPR licensing services exports amounting to $286 million. Australia also had compound annual average growth in potentially ICT-enabled services exports of 9.1 percent from 2006 to 2014.

[78] *Global Music Report 2018*; pp. 49-50, 54, 63, and 103.

United States had a $284 billion surplus in IPR licensing services exports with Indonesia in 2014, with a compound annual average growth rate for potentially ICT-enabled services of 10.8 percent from 2006 to 2014.[79]

Despite the importance and growth of the legitimate digital music market in Indonesia, piracy remains a serious threat to the digital ecosystem.[80] According to the Indonesian Recording Industry Association (ASIRI), as of November 2016, over 2.8 billion illegal song downloads annually with estimated losses $1.05 billion annually.[81] Likewise, creative industry representatives in Indonesia have found that 18 million copies of infringing music, movies and software are circulating in that market each month, principally on the Internet, but also as hard copies in markets and shopping centers.[82]

Piracy also appears to be increasing in Indonesia, particularly as a result of "domain hopping" – i.e., whereby users seeking to access infringing sites are redirected to similar domains to evade site-blocking efforts. For example, *planetlagu.info*, which was the most popular infringing website in Indonesia in 2017, was blocked in the second half of that year, resulting in a significant decline in traffic to the site – i.e., a 97 percent drop from its height of 36 million monthly visits. However, the operators simply switched domain names, to *planetlagu.site*, and then to *planetlagu.name*, and then to *planetlagu.blog*. The recording industry has identified tens of thousands of URLs containing infringing content every year, with many examples of domain-hoping – e.g., *planetlagu.info* also reappeared as *laguaz.net* and *lagu123.net*. To address systemic threat to the digital music ecosystem, Indonesia should amend Regulations Nos. 14 and 26 of 2015 on site blocking to prevent domain hopping by providing that additional domains, URLs or IP addresses that resolve to "materially the same website" as one already approved for blocking can be added to the blocking list quickly and easily.

The Indonesia Government has taken important steps to address digital piracy. Working with ASIRI and the movie industry, the Indonesia Government disable access to hundreds of primarily infringing domains between 2015-2017, as part of its implementation of Regulations Nos. 14 and 26 of 2015. 391 infringing domains related to the film sector have been verified for blocking as of December 2017. The Governments enforcement actions to disable access to these domains have resulted in a significant reduction of music as well as movie and tv piracy in Indonesia on the websites involved. As a demonstration of the effectiveness of website blocking

[79] Grimm, Alexis; p. 11 and 17.
[80] See more detailed discussion in IIPA, 2018 Special 301 Report on Copyright Protection and Enforcement; February 8, 2018; pp. 129-139. available at: https://iipa.org/files/uploads/2018/02/2018_SPECIAL_301.pdf
[81] See "Rampant Piracy Paralyzes Indonesian Music Industry*,"* Jakarta Post; November 30, 2016; available at: http://www.thejakartapost.com/news/2016/11/30/rampant-piracy-paralyzes-indonesian-music-industry.html.
[82]See "*Filmmakers, musicians join forces with police*," Jakarta Post (September 19, 2015), http://www.thejakartapost.com/news/2015/09/19/filmmakers-musicians-join-forces-with-police.html.

in Indonesia, traffic to the specific sites blocked has been reduced by 74-94 percent when measured six months after access was disabled.

Regarding legislation, the recoding industry also supports additional amendments to Indonesia law. For example, Articles 18 and 30 of the Indonesian Copyright Law – providing that the rights in music and performances transferred by sale revert back to the author or performer after 25 years – should be repealed. Indonesia should also join the international consensus with respect to copyright term, and extend the term of protection of sound recordings to at least 70 years.

Japan

In 2017, Japan was the second largest music market in the world after the United States, and although recorded music revenues declined by three percent since 2016. Japan is ranked third globally for digital music sales, with such digital sales representing 21 percent of music sales in that market. Japan was ranked 15th among markets where streaming contributed to total recorded music market globally, accounting for 9.7 percent of the global market. It accounts for four percent of the total global streaming revenues for recording music, ranking sixth behind the United States, the United Kingdom, Germany, South Korea, and France. Japan also accounted for 38 percent of global physical music sales – ranking fifth in the top ten for global vinyl sales – with the physical goods responsible for 72 percent of music sales in that market. Finally, the Japanese market has among the highest revenue per capita for recorded music at $21.57.[83]

*In 2017, **Japan** was the **second largest music market** in the world after the United States.*

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 compound annual average growth rate for potentially ICT-enabled services of negative 1.5 percent from 2006 to 2014.[84]

[83] *Global Music Report 2018*; pp. 49-50, 56, 59, 63, and 106.
[84] Grimm, Alexis; p. 11 and 17.

Several improvements in Japan would enhance the competitiveness of the American music industry in that market. Japan should also introduce a public performance right for sound recordings.

The music industry further supports the introduction in Japan of injunctive relief to secure orders to OSPs to deny access to foreign infringing websites. Given that a local OSP cannot "take down" infringing content based on foreign websites, because such content is not hosted on that OSP's servers, a number of countries around the world have adopted a legal basis to require local OSPs 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 2017, South Korea was the sixth largest music market in world, and grew by 45.8 percent over 2014. It was ranked sixth globally for digital music sales, with such sales accounting for 59 percent of that market, placing South Korea as the 23rd among 31 countries with more than 50 percent digital share of total music revenues. It was also ranked fourth among the top 15 markets where streaming contributes to the total recorded music revenues in the market (56.9 percent), and ranked 30th of the 35 countries where streaming was more than 50 percent (i.e., 78.5 percent) of total sales in 2017. It accounts for four percent of the total global streaming revenues for recording music, ranking fourth behind the United States, the United Kingdom, and Germany. South Korea was ranked sixth in the world for global physical music sales – ranking ninth in the top ten for global vinyl sales (with such sales accounting for 11 percent of physical sales in that market) – accounting for four percent of total global physical sales, with physical sales responsible for 37 percent of music sales there. Finally, the South Korean market ranks fourth in the Asia and Pacific region for revenue per capita for recorded music at $9.66, behind Japan, Australia and New Zealand.[85]

*In 2017, **South Korea** was the **sixth largest music market** in world, and grew by 45.8 percent over 2016.*

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

[85] *Global Music Report 2018*; pp. 49-50, 54, 59, 63, and 120.

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.[86]

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") imposed a usage rate for collecting societies in relation to interactive digital music services. This regulation seriously diminishes 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 the WIPO Internet Treaties. More broadly, it represents an unwarranted departure from the principle of contractual freedom and is a restriction on the free market economy. 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 2017, revenues for the recorded music industry in Europe grew by 4.3 percent, with the region being responsible for 33.2 percent of global recorded music revenues. Significantly, in the same year, streaming became the single largest revenue category in Europe, increasing by 30.3 percent, and accounting for 35.5 percent of total industry revenues in the region.[87]

Regarding digital trade, 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 potentially ICT-enabled services, including IPR licensing, to this region grew from roughly $110 billion to $183.7 billion.[88]

[86] Grimm, Alexis; p. 11 and 17.
[87] *Global Music Report 2018*; p. 66.
[88] Grimm, Alexis; p. 8, 10, and 12.

European Union

EU Member States

Many European Union (EU) member states rank among the top export markets for U.S. potentially ICT-enabled services.[89]

France

France was the fifth largest music market in world, and grew by 1.7 percent over 2016. France ranked fifth globally for digital music sales, with such sales accounting for 34 percent of that market. It also thirteenth among the top 15 markets where streaming contributes to the total recorded music revenues in the market (29.1 percent). It accounts for four percent of the total global streaming revenues for recording music, ranking fifth behind the United States, the United Kingdom, Germany and South Korea. France was ranked fifth in the world for global physical music sales – ranking fourth in the top ten for global vinyl sales (with such sales accounting for 11.5 percent of physical sales in that market) – accounting for 6 percent of total global physical sales, with physical sales responsible for 36 percent of music sales there. Finally, the French market ranks ninth in the Europe region for revenue per capita for recorded music at $14.73, behind Norway, Denmark, Sweden, the UK, Iceland, Switzerland, Germany, and the Netherlands.[90]

*In 2017, **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 2014, with a compound annual average growth rate for potentially ICT-enabled services of 11.6 percent from 2006 to 2014.[91]

Like many other European countries and EU law, France also provides for website blocking, which provides an critical means of ensuring a legitimate and sustainable digital music

[89] Grimm, Alexis; p. 11 and 17.
[90] *Global Music Report 2018*; pp. 49-50, 54, 59, 63, and 96.
[91] Grimm, Alexis; p. 11 and 17.

ecosystem. In April 2015, the Paris High Court ordered OSPs to block access to the BitTorrent site T411, and earlier in December 2014 the court required four OSPs to implement all appropriate measures to block access to The Pirate Bay including several proxy and mirror sites. Further sites relating to The Pirate Bay were ordered to be blocked in October 2015.

In July 2016, the Paris High Court ordered access providers to block access to BitTorrent sites Limetorrents.cc, Torrentreactor.com, Torrentfunk.com and Torrenthound.com and to numerous proxy and mirror sites. Most recently in November 2017, a blocking order was obtained in respect of the website Extratorrent and associated mirror sites.

The legal basis for website blocking (Article 8.3 of the EU Copyright Directive) had been previously tested in a case in 2012 regarding Google's auto-complete function, and in a case initiated by the film industry against major French access providers and search engines where the court granted the remedies sought and ordered: (1) OSPs to block access to the 16 streaming sites in question; and (2) search engines to ensure that links to these sites do not appear in search results.

The Paris Court of Appeal confirmed the injunction in March 2016. Unlike the first instance, the Court of Appeal held that OSPs and search engines have to bear the cost of implementing the measures. In July 2017, the Court of Cassation (the highest court in France) confirmed the previous court's decision and ordered OSPs to bear the costs of implementing website blocks in relation to the 16 streaming sites and ordered search engines to bear their costs for delisting the websites.

Germany

In 2017, Germany was the third largest music market in the world, having declined by 1.5 percent over 2016. Germany ranked fourth globally for digital music sales, with such sales accounting for 43 percent of that market. It also fourteenth among the top 15 markets where streaming contributes to the total recorded music revenues in the market (26.8 percent). It accounts for five percent of the total global streaming revenues for recording music, ranking third behind the United States and the United Kingdom. Germany ranked third in the world for global physical music sales – ranking third in the top ten for global vinyl sales (with such sales accounting for 9.1 percent of physical sales in that market) – accounting for 11 percent of total global physical sales, with physical sales responsible for 36 percent of music sales there. Finally, the German market ranks seventh in the Europe region for revenue per capita for recorded music at $16.42, behind Norway, Denmark, Sweden, the UK, Iceland, and Switzerland.[92]

[92] *Global Music Report 2018*; pp. 49-50, 54, 59, 63, and 97.

*In 2017, **Germany** was the **third 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.[93]

The German market provides key legal measures to ensure legitimate digital trade in music. These measures include jurisprudence by the Federal Court of Justice (FCJ) that establishes an increased liability which comes close to a notice-and-stay down obligation (as opposed to notice and take down, whereby infringing content often returns quickly and copiously) with two milestone decisions against Rapidshare ("File-Hosting-Dienst", FCJ, Judgement of August 15, 2013 - I ZR 80/12 – GEMA, and "Alone in the Dark", FCJ, Judgement of July 12, 2012 - I ZR 18/11 – GEMA). When a website is notified of a specific infringement, it has to take pro-active measures to prevent further infringements of the same content. The FCJ has even found monitoring of external linking sites reasonable in the circumstances.

German also provides for website blocking of copyright infringing websites through third party civil injunctions. In November 2015, the FCJ ruled that an access provider can be required to block access to an infringing website, based on general principles of tort law ("Störer" liability), as there is currently no statutory legal basis for website blocking and proceedings for non-implementation of EU law have not been concluded. However, the Court required right holders to make efforts to pursue the site or the hosting provider directly. In February 2018, following an application filed by a local film producer against Vodafone, the court granted a preliminary injunction requiring the OSP to block access to the website kinox.to. Vodafone has filed an appeal.

United Kingdom

In 2017, the United Kingdom was the fourth largest music market in the world, and grew by 9.2 percent over 2016. The United Kingdom ranked second globally for digital music sales, with such sales accounting for 50 percent of that market. It also ranked 11th among the top 15 markets where streaming contributes to the total recorded music revenues in the market (38.2 percent). It accounts for eight percent of the total global streaming revenues for recording music, ranking

[93] Grimm, Alexis; p. 11 and 17.

second behind the United States. The United Kingdom was fourth in the world for global physical music sales – ranking second in the top ten for global vinyl sales (with such sales accounting for 17.7 percent of physical sales in that market) – accounting for eight percent of total global physical sales, with physical sales responsible for 35 percent of music sales there. Finally, the UK market ranks fourth in the Europe region for revenue per capita for recorded music at $19.98, behind Norway, Denmark, and Sweden, and has higher revenue per capita for recorded music than the United States, which is $18.11.[94]

*In 2017, the **United Kingdom** was the **fourth largest music market** in the world, and grew by 9.2 percent over 2016.*

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.[95]

Several aspects of the UK legal regime serve as exemplars for promoting a health digital music ecosystem. For example, the Digital Economy Act 2017 includes several new measures supported by the sound recording industry. These include an increase in criminal penalty for online copyright infringement. The Act increases the maximum sentence for online copyright infringement from two years to ten years to harmonize penalties for online and offline (physical) copyright infringement. The Act requires that a person must either intend to make monetary gain, or know or have reason to believe that their actions will cause loss to the owner of the right.

The United Kingdom also provides for website blocking of copyright infringing websites through third part civil injunctions. Website blocking has been successful in the United Kingdom with 63 music sites being ordered to be blocked following music right holders' initiatives. On average this produces a reduction in the use of those sites by UK users by approximately 75 percent.

[94] *Global Music Report 2018*; pp. 49-50, 54, 59, 63, and 96.
[95] Grimm, Alexis; p. 11 and 17.

In May 2012, British record companies obtained orders for five major ISPs to block access to The Pirate Bay, and a sixth OSP was ordered to do so in June 2012. The OSPs all either consented to or did not oppose the court orders. In December 2012, following a request from the recording industry, the Pirate Party UK agreed to shut down a proxy service which enabled circumvention of the block by OSPs. Recently UK OSPs, have also blocked access to a number of torrent proxy sites.

In February 2013, the record industry obtained orders requiring UK OSPs to block three additional BitTorrent websites: Kat.ph, H33T.com and Fenopy.eu. In October 2013, the High Court ordered the six largest OSPs to block access to 21 more copyright infringing BitTorrent and aggregator sites, and in October 2014, OSPs were ordered to block access to another 21 copyright infringing BitTorrent sites.

In February 2015, music right holders obtained blocking orders in respect of 17 aggregator sites. The OSPs will block via a combination of IP address and DNS blocking. The orders include provision for additional IP addresses and domains to be included if the block is being circumvented. The OSPs must pay their own legal costs and the costs of implementing the blocks.

Most recently, in March 2017, the High Court granted the first "live blocking" order in relation to a case brought by the Football Association Premier League. The order is unique in that it requires six OSPs to block access not to a particular website, but rather to a streaming server that provides unauthorized access to copyright content. The order is "live" in that it only has effect at the time when live Premier League match footage is being broadcast, and only for the duration of the season (i.e., from 18 March 2017 to 22 May 2017). Also, as right holders noted that the streaming servers used to provide access to the unauthorized content routinely change, the order provides for the list of target servers to be "re-set" each match week during the Premier League season.

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 Commissions' 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 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***.[96]

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

[96] 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; 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").

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 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.

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.[97]

- Clarifies, consistent with European Court of Justice case law,[98] that services playing an "active role" in relates 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 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.

EU General Data Protection Regulation

We are concerned that some registrars and registries (as well as some registrant advocates) are using the EU General Data Protection Regulation (GDPR), which is intended to provide reasonable protection to the privacy of individuals, as a shield to refuse to support transparency and accountability of registrants online, and/or extract value from users of WHOIS data.

[97] 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.
[98] L'Oreal /EBay C 324/09.

Public access to WHOIS data is essential to the investigation and prompt resolution of instances of copyright piracy and trademark counterfeiting online. The investigation of virtually every such case involves the use of WHOIS data. WHOIS data is equally important to investigations of distribution of malware, cyberattacks, phishing and online frauds and illegal behavior of all kinds.

WHOIS data is essential to law enforcement, of course, but also to private parties such as copyright and trademark owners, whose independent enforcement of their rights allows law enforcement to conserve scarce resources. Indeed, virtually every internet user benefits from publicly accessible WHOIS data. WHOIS provides greater transparency, so that end users know more about the parties with whom they – or their children – are interacting online. This is a fundamental prerequisite to building public confidence and accountability in the online ecosystem and economy.

Specifically, our concerns are with efforts in the Internet Corporation for Assigned Names and Numbers (ICANN) to respond to the GDPR. With the May 25, 2018 effective date of the GDPR looming, ICANN proposed a Temporary Specification for WHOIS, which the ICANN Board adopted on May 17, 2018.[99] While ICANN continually stated that its goal was to ensure compliance with the GDPR "while maintaining the existing WHOIS system to the greatest extent possible,"[100] the terms of the Temporary Specification are contrary to that statement.

The Temporary Specification eradicates the essential value of WHOIS in aspects not mandated by the GDPR as follows:

- It applies to registrations of legal persons as well as natural persons, even though the privacy protections of the GDPR only apply to natural persons.

- It invites registrars and registries to apply its restrictions globally and to all registrations, even those that lack any point of attachment to the European Economic Area and thus fall outside the jurisdictional reach of the GDPR.

- It requires the redacting of the most important elements of WHOIS data without appropriately balancing public and legitimate interests against privacy interests as provided under the GDPR.

[99] Available at: https://www.icann.org/resources/pages/gtld-registration-data-specs-en.
[100] Available at: https://www.icann.org/news/blog/data-protection-privacy-update-seeking-input-on-proposed-interim-model-for-gdpr-compliance.

- In particular, the Temporary Specification fails to provide public access to the registrant's actual email address as supplied by the registrant to the registrar and then verified by the registrar. The redaction of the registrant's e-mail address pursuant to the Temporary Specification was made despite precise and forceful recommendations to the contrary from several contingents of the multi-stakeholder community, as well as the ICANN Government Advisory Committee (GAC) and the European Commission itself.

- For law enforcement, cybersecurity, consumer protection and IP rights protection, the registrant's e-mail address is the most important WHOIS data element because it is usually the most accurate data point and it also allows investigators to link domains and actors together that are involved in illegal and abusive activity.

- Although the Temporary Specification, consistent with GDPR principles, requires registrars and registries to provide reasonable access to non-public WHOIS data to third parties with legitimate interests except where such interests are overridden by the interests or fundamental rights and freedoms of the registrant, it gives no guidance or specifics whatsoever as to how that standard should be implemented or as to how access should be granted.

In adopting the Temporary Specification, the ICANN Board acted inconsistently with the consensus advice of the GAC and the guidance from key stakeholder groups including the Security and Stability Advisory Committee, the Intellectual Property Constituency and the Business Constituency. Instead, ICANN org and the Board seem to have to paid attention only to the views of the registrars and registries. Since the adoption of the Temporary Specification, fragmentation within the WHOIS system abounds. No uniform framework exists for access to non-public WHOIS data and registrars have been left to their own devices to develop policies and procedures—or not—for such access. The result has been confusion and, far beyond anything GDPR requires, a nearly complete shut-down of any legitimate access to all WHOIS data that the Temporary Specification has identified and required to be made non-public.

In May 2018, the Department of Commerce and the Department of Homeland Security issued a *Report to the President on Enhancing the Resilience of the Internet and Communications Ecosystem Against Botnets and Other Automated, Distributed Threats*.[101] This extensive Report cites to the importance of WHOIS data in combatting the threats. In particular, the Report notes "[Registries] and registrars can facilitate attribution of bad actors by maintaining accurate WHOIS databases. In addition, the federal government should work to engage with its European

[101] U.S. Department of Commerce and U.S. Department of Homeland Security; *Report to the President on Enhancing the Resilience of the Internet and Communications Ecosystem Against Botnets and Other Automated, Distributed Threats*; May 22, 2018; available at: https://www.commerce.gov/sites/commerce.gov/files/media/files/2018/eo_13800_botnet_report_-_finalv2.pdf.

counterparts to ensure that timely access to WHOIS information is preserved as the European data privacy protections are enforced to preserve a critical tool for domestic and global efforts to investigate botnets."[102]

To date, the implementation of the Temporary Specification has seriously eroded timely access to WHOIS information to the detriment of not only efforts to investigate botnets and other cybersecurity threats, but also all other online enforcement efforts, including intellectual property rights infringements.

Russia

In 2017, Russia was the 24th largest music market in the world, and grew by 14.9 percent over 2016. It was ranked 20th globally for digital music sales, with such sales accounting for 63 percent of that market, placing Russia as the 19th among 31 countries with more than 50 percent digital share of total music revenues. Russia was also ranked 26th of the 35 countries where streaming was more than 50 percent (i.e., 63.9 percent) of total sales in 2017. Russia was ranked 32nd in the world for global physical music sales, with physical sales responsible for 11 percent of music sales there. Finally, the Russian market has among the lowest revenue per capita for recorded music at $0.59.[103]

*In 2017, **Russia** was the **24th largest music market** in the world, and grew by 14.9 percent over 2016.*

Despite having Europe's largest internet population (108.8 million Internet users), Russia still lags in terms of value of the legitimate music market. While Russian's digital market and businesses are advanced, Russian services are, not infrequently, exporting criminal copyright infringement beyond Russia's borders. 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.

[102] U.S. Department of Commerce and U.S. Department of Homeland Security; *Report to the President on Enhancing the Resilience of the Internet and Communications Ecosystem Against Botnets and Other Automated, Distributed Threats*; May 22, 2018; p. 40; available at: https://www.commerce.gov/sites/commerce.gov/files/media/files/2018/eo_13800_botnet_report_-_finalv2.pdf.
[103] *Global Music Report 2018*; pp. 49-50, 54, and 116.

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.

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 OSP 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 OSPs 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.

Americas

In 2017, recorded music revenues grew by 17.7 percent, with digital revenues increasing by 37.2 percent across Latin America, with digital contributing 59 percent of all industry revenue in Latin America. For North America (i.e., the United States and Canada) the music market grew by 12.8 percent in 2017. Notably, streaming was the primary source of revenues for both the United States and Canada, with streaming revenues having increased by 49.9 percent in 2017. In North America, streaming rose to nearly a half (i.e., 46.7 percent) to total music industry revenues across North America in 2017 from slightly over a third (i.e., 35.2 percent) in 2016 and from a fifth in 2015. Subscription audio streams contributed more than three-quarters of all streaming revenue in North America in 2017.[104]

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.[105]

[104] *Global Music Report 2018*, p. 69.
[105] Grimm, Alexis; p. 8, 10, and 12.

Brazil

In 2017, Brazil was the ninth largest music market in world, and grew by 17.9 percent over 2016. It was ranked tenth globally for digital music sales, with such sales accounting for 60 percent of that market, placing Brazil as the 22nd among 31 countries with more than 50 percent digital share of total music revenues. It was also ranked fifth among countries where streaming made the highest contributions to the total recorded music market, (i.e., 55.1 percent), and was ranked ninth of the 35 countries where streaming was more than 50 percent (i.e., 83.8 percent) of total sales in 2017. It accounts for two percent of the total global streaming revenues for recording music, ranking tenth behind the United States, the United Kingdom, Germany, South Korea, France, Japan, China, Australia, and Canada. Brazil was ranked 20th in the world for global physical music sales, with physical sales responsible for five percent of music sales there. Finally, the Brazilian market has revenue per capita for recorded music of $1.43.[106]

*In 2017, **Brazil** was the **ninth largest music market** in the world, and grew by 17.9 over 2016.*

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 from 2006 to 2014. United States had a $2.8 billion surplus in IPR licensing services exports with Brazil in 2014.[107]

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. Moreover, Brazil has not yet acceded to the WIPO Internet Treaties which results in some internationally-inconsistent interpretations of certain copyright concepts under local law.

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

[106] *Global Music Report 2018*; pp. 49-50, 54, 56, 63, and 83.
[107] Grimm, Alexis; p. 11 and 17.

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 OSPs 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.

Canada

In 2017, Canada was the seventh largest music market in world, and grew by 14.4 percent over 2016. It was ranked seventh globally for digital music sales, with such sales accounting for 65 percent of that market, placing Canada as the 18th among 31 countries with more than 50 percent digital share of total music revenues. It was also ranked ninth among countries where streaming made the highest contributions to the total recorded music market, (i.e., 55.1 percent), and was ranked 34th of the 35 countries where streaming was more than 50 percent (i.e., 53.6 percent) of total sales in 2017. It accounts for three percent of the total global streaming revenues for recording music, ranking ninth behind the United States, the United Kingdom, Germany, South Korea, France, Japan, China, and Australia. Canada was ranked eighth in the world for global physical music sales – ranking sixth in the top ten for global vinyl sales (with such sales accounting for 30.4 percent of physical sales in that market) – accounting for two percent of total global physical sales, with physical sales responsible for 21 percent of music sales there. Finally,

the Canadian market has revenue per capita for recorded music of $12.32.[108]

*In 2017, **Canada** was the **seventh largest music market** in the world, and grew by 14.4 percent over 2016.*

Regarding digital services trade generally, the U.S. digital services trade surplus with Canada was $13.9 billion in 2016. In the same year U.S. IPR licensing exports equaled $7.9 billion, and the U.S. IPR licensing services trade surplus amounting to $6.5 billion, exceeding all services categories in the report – i.e., financial, insurance, telecommunications, computer and information services, and government goods and services – with the exception of travel services.[109]

For the sound recording 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. In addition to the systemic priorities enumerated above, the sound recording industry urges the United States to pursue the following priorities with Canada through the NAFTA modernization negotiations.

- National Treatment: Canada should provide full national treatment to U.S. copyright holders. In some important respects, Canada fails to provide U.S. artists and record labels national treatment under the Canadian *Copyright Act*, which raises serious questions regarding Canada compliance with its NAFTA commitments. As a result, U.S. artists and labels face unfair discrimination, and are denied protections afforded to their Canadian counterparts, including for over the air broadcasts, background music and certain other uses of their recordings. This stands in stark contrast to the situation in the United States in which Canadian labels and performers enjoy full national treatment, even with respect to rights that go beyond U.S. international obligations and the protections to be found in Canadian law.

  Canada has historically argued that it is able to discriminate against U.S. parties based on the exemption for the cultural industries in Annex 2106 of NAFTA.[110] Although the exemption

[108] *Global Music Report 2018*; pp. 49-50, 54, 56, 59, 63, and 85.
[109] Nicholson, Jessica; U.S. Department of Commerce, Economics and Statistics Administration, Office of the Chief Economist; *Digital Trade in North America*; p. 5; January 5, 2018; available at: https://www.commerce.gov/sites/commerce.gov/files/media/files/2018/digital-trade-in-north-america.pdf
[110] Annex 2106: Cultural Industries exemption states "Notwithstanding any other provision of this Agreement, as between Canada and the United States, any measure adopted or maintained with respect to cultural industries, except as specifically provided in Article 302 (Market Access - Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the

is worded quite broadly, the exemption must not be construed to permit Canada to abrogate specific intellectual property rights protections it had agreed to in NAFTA.[111] NAFTA includes an unfair provision that allows Canada to derogate from the national treatment principle in respect of U.S. performers under Article 1703 of NAFTA, which requires that U.S. performers only be entitled to equitable remuneration on a reciprocal basis.[112] But no such exemption exists for U.S. sound recording producers. This is a clear indication that NAFTA did not intend to permit any exemptions for U.S. sound recording producers based on the principle of reciprocity. Nor can Canada's discriminatory policies be justified under Article 1703 given that excluding U.S. sound recordings from protection creates incentives for radio stations to play U.S. rather Canadian sound recordings, thus hurting Canada's

provisions of the Canada - United States Free Trade Agreement. The rights and obligations between Canada and any other Party with respect to such measures shall be identical to those applying between Canada and the United States. "The Canada - United States Free Trade Agreement Art. 2005: Cultural Industries states: "1. Cultural industries are exempt from the provisions of this Agreement, except as specifically provided in Article 401 (Tariff Elimination), paragraph 4 of Article 1607 (divestiture of an indirect acquisition) and Articles 2006 and 2007 of this Chapter [Retransmission rights and Print-in-Canada Requirement]. The definition of "cultural industries" is very broadly defined in Article 2107 of NAFTA as meaning " persons engaged in any of the following activities: (a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing; (b) the production, distribution, sale or exhibition of film or video recordings; (c) the production, distribution, sale or exhibition of audio or video music recordings; (d) the publication, distribution or sale of music in print or machine readable form; or (e) radio communications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services.

[111] We note that Canada agreed to a much narrower approach to the cultural exemption in the CETA and TPP which do not have entire exemptions for intellectual property commitments for cultural industries. See Peter Grant, Does the TPP Protect Canadian Cultural Policy?, February 7, 2016 available at: http://www.barrysookman.com/2016/02/07/does-the-tpp-protect-canadian-cultural-policy/. Canada currently also relies on the Ministerial Statement adopted when Canada ratified with WPPT to exclude U.S. makers and performers of sound recordings from receiving equitable remuneration for the uses specified above, allegedly based on the United States not providing Canadians with protection under the U.S. Act. Canada is not, however, entitled to deny equitable remuneration to U.S. makers of sound recordings for the communication to the public of pre-1972 sound recordings under the WPPT for the following reasons:

- Canada is required under the WPPT to act reciprocally by providing U.S. makers the same level of protection given to Canadians. Under the Art 4(2) of the WPPT Canada, can only make a reservation limiting the right to collect equitable remuneration for US pre-1972 recordings if the United States does not provide such protections to Canadian pre-1972 recordings.
- While the United States does not provide Federal copyright protection for pre-1972 recordings for its nationals, it expressly provides such protection for Canadian recordings first published in Canada (and not published simultaneously (within 30 days) in the United States), under Section 17 USC §104A. More than 99 percent of Canadian recordings are protected by U.S. Federal copyright protection.
- The performance right for pre-1972 recordings is also protected, at least in some States, under common law.

[112] Art. 1703 1 states "Each Party shall accord to nationals of another Party treatment no less favorable than that it accords to its own nationals with regard to the protection and enforcement of all intellectual property rights. In respect of sound recordings, each Party shall provide such treatment to producers and performers of another Party, except that a Party may limit rights of performers of another Party in respect of secondary uses of sound recordings to those rights its nationals are accorded in the territory of such other Party."

cultural industry by reducing their exposure to the Canadian marketplace and reducing equitable remuneration to Canadian makers of sound recordings.

Such discrimination against U.S. interests should not be permitted under an exemption designed to protect Canadian cultural industries, a point underscored by the fact that Canada's cultural industries themselves do not endorse the discriminatory treatment supposedly enacted for their benefit. In a modernized NAFTA, it is critical that the United States secure a clear understanding from Canada that national treatment obligations for intellectual property rights falls outside the scope of any cultural exemption, and eliminate NAFTA Article 1703(1).

- Right of Making Available. Under the WPPT, performers and producers of sound recordings are required to be provided the exclusive right to make their recordings available to the public. This right is the foundation for licensing in the digital marketplace, and central to the ability of labels and performers to enforce their rights against copyright infringers including pirate sites and services. However, Canada's implementation of this right raises serious questions regarding its compliance with its WPPT obligations, as Canada has made it essentially a right to collect equitable remuneration as right holders must file tariffs with the Copyright Board in order to license the right and because right holders cannot sue for infringement of their rights without the consent of the Minister. Securing Canada's WPPT compliance by removing the impediments to the exercise of exclusive rights should be a U.S. negotiating priority.

- Collective Management. Canada should reform its Copyright Board's extremely slow and unpredictable tariff-setting process. Tariff rates are routinely set years after they have been proposed, and often after the tariff period has expired. U.S. makers of sound recordings receive 1/10 of the royalties they receive in the United States for webcasting and other non-interactive music services. In the United States, the rates for these services must be based on the "willing buyer/willing seller standard". However, in Canada the Copyright Board in the *Tariff 8 Decision* rejected using U.S. and Canadian market-based agreements between record labels and services, as the rate setting standard. This had the effect of depriving U.S. makers and performers of sound recordings of fair/market-based royalties for critical online music services markets.

- Notice and Notice. Canada does not require hosting or search providers to remove or disable access to infringing content even when they have such knowledge as long as Canada maintains its "notice and notice" system. Canada is a unique outlier among its trading partners in this respect. This system will inevitably result in cases where rights holders are

significantly prejudiced by being unable to have infringing content taken down from Canadian hosted sites and where a Canadian based entity provides hosting serviced for infringing content that is made available to U.S. residents.

- Royalties. Canada should require that royalties be paid fully to sound recording and musical works rights holders for reproductions made by radio stations. Prior to 2012, there was an exemption for making these broadcasting mechanical copies, but this exemption was conditioned on broadcasters paying any applicable tariff. The elimination of this exemption and the application of new exceptions for back-up copies and technical processes means that broadcasters have a right to avoid paying between 23 and 50 percent of royalties, with a potential loss of up to $12.5 million annually for all rights holders. Canada should remove the exemption and clarify that the new exceptions do not apply to copies made in the course of broadcasting.

Mexico

In 2017, Mexico was the 18th largest music market in world, and grew by 7.9 percent over 2016. It was ranked 13th globally for digital music sales, with such sales accounting for 79 percent of that market, placing Mexico as the eighth among 31 countries with more than 50 percent digital share of total music revenues. It was ranked 22nd of the 35 countries where streaming was more than 50 percent (i.e., 72.5 percent) of total sales in 2017. It accounts for one percent of the total global streaming revenues for recording music, ranking 14th among countries contributing to global streaming revenues. Mexico was ranked 16th in the world for global physical music sales, accounting for two percent of total global physical sales, with physical sales responsible for 15 percent of music sales there. Finally, the Mexican market has revenue per capita for recorded music of $1.10.[113]

*In 2017, **Mexico** was the **18th largest music market** in the world, and grew by 7.9 percent over 2016.*

Regarding digital services trade generally, the U.S. digital services trade surplus with Mexico was $3.9 billion in 2016. In the same year U.S. IPR licensing exports equaled $3.7 billion, and the U.S. IPR licensing services trade surplus amounting to $3.0 billion, significantly exceeding all services categories – i.e., financial, insurance, telecommunications, computer and information

[113] *Global Music Report 2018*; pp. 49-50, 54, 59, 63, and 108.

services, government goods and services as well as travel services (where the services trade surplus with Mexico was $1.3 billion).[114]

The sound recording industry faces numerous challenges in Mexico. Mexico also has the highest reach of YouTube (which claims immunity from piracy under TPP-style safe harbors in the U.S.) for music (99% of users surveyed), and the largest increase in stream ripping piracy (predominantly from YouTube) of any country, (66% growth from 2015 of users surveyed). While Mexico has the highest percentage of pirate site users of any country, (71% of users surveyed), users in Mexico are among the most likely to turn to YouTube when pirate sites are unavailable. Users in Mexico are also the most likely to turn to stream ripping from YouTube when pirate sites unavailable.[115] To address these and other concerns, the United States should pursue the following country-specific priorities, in addition to the systemic priorities above, through the NAFTA modernization negotiations.

- Right of Making Available. Mexico needs to confirm that its law currently provides a right of making available to the public through its distribution right, which is part of Mexico's obligations under the WPPT.

- Online Copyright Enforcement. Online piracy remains a critical concern for the sound recording industry in Mexico, which is perpetuated by a significant extent by the lack of IPR enforcement with respect to piracy over the Internet and inadequate civil and criminal court procedures for dealing with online piracy cases. NAFTA modernization should provide for stronger online IPR enforcement tools in Mexico.

- Service Provider Responsibility. Mexico has inadequate rules governing obligations on service providers with respect to copyright infringement, which leaves the sound recording industry with little ability to address piracy and to engage in the digital economy where fair competition prevails. NAFTA modernization should ensure service provider responsibility and fair competition with respect to copyright infringement. This rule should be implemented in the first place and before any exceptions to such rules are contemplated.

[114] Nicholson, Jessica; U.S. Department of Commerce, Economics and Statistics Administration, Office of the Chief Economist; *Digital Trade in North America*; p. 5; January 5, 2018; available at: https://www.commerce.gov/sites/commerce.gov/files/media/files/2018/digital-trade-in-north-america.pdf
[115] IPSOS Connect and IFPI, Music Consumer Insight Report 2017, available at http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2016.pdf

- TPMs. Mexico's law with respect to TPMs is overly narrow, covering only computer software. NAFTA modernization should provide for broader TPM protections in Mexico, including to expand TPM protection to IP-protected industries beyond software companies.

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. Such policy should neither entrench technologically-outdated pre-Millennium laws nor export incomplete versions of U.S. law that fail to reflect key affirmative protections for the American creative sector. Such policy should not entrench those business models effectively subsidized by distorted interpretations of U.S. law 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 written submission, 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 platforms 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.