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The Impact of Copyright Policy on Innovation in the Digital Era

Thank you for the opportunity to speak to you today. My name is Jay Rosenthal – and I am Senior Vice President and General Counsel to the National Music Publishers Association. Prior to taking the position at NMPA, I represented artists, songwriters, producers, managers and indie labels for almost 25 years as a transactional attorney. I also engaged in public policy matters as General Counsel to the Recording Artists' Coalition, and I presently teach entertainment law at the GW School of Law and the Washington College of Law at the American University.

Founded in 1917, the National Music Publishers' Association is the largest U.S. music publishing trade association with over 2600 publisher members. The NMPA's mandate is to protect and advance the interests of music publishers and songwriters in matters relating to the domestic and global protection of music copyrights.

We hope by better understanding the perspective of songwriters and music publishers you will develop meaningful guidelines that will help you develop a research agenda that will promote innovation in both the consumer/technology and the creative communities.

As a general matter, we support a copyright "ecosystem" that nurtures and encourages artists to create new works, and at the same time supports opportunities for technological innovation and competition.

However, we do not believe – as some promote - that copyright law is a system demanding equal balance between creators' rights, on the one hand, and technology and consumer interests, on the other.

The interests of the consumer/technology communities must, of course, be taken into consideration and should be given proper due. But in our view, of paramount focus, copyright law should prioritize creators' property interests and economic rights.

Notwithstanding our view of copyright, and contrary to the assertions of copyright critics, the equilibrium between consumer/technology interests and creators in the copyright system has shifted dramatically AGAINST copyright creators.

More music is being created and heard today than ever before – lawfully and unlawfully. Yet, because of digital technology, today's rightsholders have far less control over their works and as a result they have been subjected to the greatest proliferation of copyright infringement the world has ever seen.

At times, it actually seems like works fall into the public domain not when the copyright term is over – but rather when the work is published.

The over one million members of the songwriting community have been and will continue to be severely impacted by these developments. While a staggering volume of copyrighted music is being distributed, copied, and streamed through the Internet, the creators of that music - America's songwriters - receive very little compensation.

Unlike performing artists, many songwriters do not have other sources of income. Songwriters do not tour, they do not sell merchandise, they do not do endorsement deals – generally no movies, no television, etc. They rely almost solely on their songwriting income.

Furthermore, there are half as many albums released on major labels as there were 10 years ago. That means there are half as many opportunities for placement of songs, and the payment for those songs has dropped dramatically.

It is also evident that public performance income on the Internet cannot be counted on as a reliable source of songwriting income the way it has in the past.

Since the beginning of this age of rampant online theft, we have witnessed the creeping involuntary amatuerization of the creators of musical works – and this especially applies to songwriters.

This is the greatest danger to our culture, and it is certainly not what the founding fathers intended when they spoke of "progress" as the ultimate goal of copyright.

The copyright law was not created to promote songwriting as a hobby. By involuntarily pushing professional songwriters into an amateur status – simply because they are not making enough money as full-time songwriters – fewer songs will be professionally written and recorded – and for those written and recorded, the quality will undoubtedly suffer. I believe this should be a focus of your research as well.

The lesson learned from all of this is that it is impossible to compete with free – and those creating guidelines to promote technological innovation must reject any business model based on "free."

We hope there is a recognition that the culture of the consumer/technology community must change, as should the business models adopted by the copyright

community. We also hope the recommendations of your Committee will provide the consumer/technology community with a new copyright framework – one that will incentivize technologists to develop new technologies and systems incorporating the means to pay the creators of musical works from its inception, rather than placing a premium on systems and services ignoring the responsibility to pay the creators of copyrighted works. Too often, new media companies build their business on the backs of creators by using their music as a draw to their new service, and then put licensing and compensation of creators at the bottom of their priority list.

With all that said, we believe it is in the best interest of both the creative and consumer/technology communities to find common ground, and to develop ideas that will promote innovation in both communities. As such, I would like to address a few specific issues that stand out as particularly problematic.

First of all, our copyright system should not prohibit or inhibit the right and/or the ability of copyright owners or ISPs to engage in reasonable copyright enforcement measures – whether as a legislative or litigation matter. As an example, ISPs should and must become more involved in the solution to piracy, and nothing in our laws should prohibit an ISP from implementing a pro-active approach to copyright enforcement.

As a general proposition, fair use should not be expanded beyond its present parameters. Specifically, unauthorized P2P activity should not be a form of fair use. If that were the case, the damage to songwriters would be unprecedented and debilitating, since songwriters do not have other significant income streams. Without strong copyright laws supporting claims for direct and secondary liability, the amateurization of the songwriter will accelerate.

We must also strive to promote a copyright system whereby technologists have incentive to create new technologies that incorporate a means to pay the copyright holder from the inception of the technology. Songwriters and publishers do not want to sue creators of technology – they want to license and engage in commerce. And they want the companies to do what is right and lawful while they are creating their technology.

Recent court cases have not been as sympathetic to the copyright owner as the technology innovator or consumer. For example, courts have made it exceedingly hard to notify services of infringing activity under the DMCA takedown notice provision. These cases have effectively made it almost impossible for songwriters or any independent label or musician, to seek takedown of their works. A service may have the best takedown notice program ever, but the incredible burden placed on smaller and independent copyright owners, like songwriters, to police the Internet have made the entire process illusory. As a result, services now have an incentive to use copyrighted works without authority because they are not afraid of enforcement measures – what the copyright owner doesn't know, won't hurt them.

Statutory damage awards have also been problematic for creators. Recently the 2nd Circuit ruled that only one statutory damage award is proper for infringement of an album. While it is unclear how that impacts songwriters and publishers, certainly it is clear that some albums may have many songwriters and publishers, and any extension of that ruling to the songwriter interest would constitute a windfall to infringers, and would actually incentivize infringers of albums since they would also know that only one statutory award for the album would also apply to the underlying musical compositions.

While technological mandates should be limited – as a matter of copyright policy and business realities - they should not be prohibited – especially if the goal is to aid in copyright enforcement or help develop and maintain a sensible copyright system that will ensure economic gain to songwriters and publishers – thus providing incentive to the songwriter to continue to create music. For example, watermarking and fingerprinting technologies designed to help determine the proper party to pay should certainly not be prohibited or discouraged.

One final point about secondary creators of music - There has been an inordinate amount of concern about the impact our copyright regime has on the creation of new works incorporating pre-existing works– for example, mash-ups and the use of digital samples. Some believe the copyright law somehow inhibits the creative process for creating these and other types of works. It has been my experience that licensing requirements have not inhibited the innovative process to any significant degree. If a creator wants to use pre-existing works, there are licensing services available to legally and easily arrange for the use. So I do not believe a change in the copyright law, or even engaging in research on this topic is necessary for these and similar types of works.

I hope these few points I touched upon will help you better understand the concerns of the songwriter/publishing community as new technologies are developed. I look forward to answering any question you may have.