

**Recording Industry Association of America and National Music Publishers' Association
Comments in Response to
Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments: Development
of the Joint Strategic Plan on Intellectual Property Enforcement**

Submitted electronically via <http://www.regulations.gov>

The Recording Industry Association of America (RIAA) and the National Music Publishers' Association (NMPA) welcome the opportunity to respond to the U.S. Intellectual Property Enforcement Coordinator's request for public comment on the development of the Joint Strategic Plan on Intellectual Property Enforcement.

The RIAA is the trade association that supports and promotes the financial vitality of the major record companies. Its members comprise the most vibrant record industry in the world, investing in great artists to help them reach their potential and connect to their fans. Nearly 85% of all legitimate recorded music produced and sold in the United States is created, manufactured or distributed by RIAA members. In support of its mission, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conducts consumer, industry and technical research; and monitors and reviews state and federal laws, regulations and policies.

Founded in 1917, NMPA is the principal trade association representing the U.S. music publishing and songwriting industry. NMPA protects and advances the interests of music publishers and songwriters in matters relating to both the domestic and global protection of music copyrights. NMPA represents publishers and songwriters of all catalog and revenue sizes, from large international corporations to small businesses and individuals. Taken together, compositions owned or controlled by NMPA members account for the vast majority of the market for musical composition licensing in the U.S. NMPA aims to protect its members interests through legislative, litigation and regulatory efforts, by representing its members in industry negotiations and in maintaining an antipiracy program to combat unauthorized uses of its members works on unlicensed websites, applications and various online platforms.

In our comments, we provide an overview of our extensive experience in intellectual property enforcement and how it has informed our position on strategic priorities. We then make recommendations regarding the scope and focus of the Joint Strategic Plan.

1. State of the Music Industry

Music is a vital part of our nation's culture – a transcendent form of expression that narrates our history and brings people together. It also is a driver of our economy, our digital trade, and Internet growth. The music industry has for decades provided to consumers the music they want—from every genre and style—in the format they want—from vinyl records to CDs and digital downloads and digital streams. It is this commitment to the fans and receptivity to technological reinvention that has helped the industry to adapt and endure over the years. External forces have at times threatened its vitality, however, and there is only so much the industry can do from within to promote a fair and healthy market for music.

In the past decade, the music industry has shifted from physical product to digital distribution over the Internet. Many Internet platforms, in turn, have grown dependent on music to drive a profit and thrive. Given the promise of this symbiotic relationship, the music industry aims to foster a fair and vibrant Internet

ecosystem in which its product—the music we all love—is valued and enjoyed. Such a market cannot exist, however, if rampant online copyright infringement and policies that facilitate it persist.¹

Music Matters. The average consumer spends nearly 18 hours a week enjoying music.² In the United States, 81% of Internet users engage with music in the digital medium,³ and the music industry has licensed more than 45 million sound recordings to over 360 digital music services worldwide.⁴

Today's options for experiencing music include, among others:

- Free (to the consumer) and subscription digital radio services;
- Traditional digital downloads;
- High fidelity resolution downloads;
- Free (to the consumer) and subscription services providing interactive, on-demand music streaming;
- Interactive, on-demand audio-visual streaming of music videos;
- High resolution on-demand audio streaming;
- Licensed mobile apps that let users synch visuals to music;
- Licensed mobile apps that offer specialized music for your workouts;
- Licensed mobile apps that incorporate music into their games; and
- Licensed apps that offer virtual reality concert experiences; in addition to
- CDs, vinyl records, and ringtones.

The licensing of these digital services allows consumers to access music in their car via satellite or cellular data, in their home or office through their computers or smart speakers, at the gym with their smartphone or tablet, in their living room through their smart TV, through virtual reality headsets and via your gaming console. The music industry's adaptation to technological developments and consumer preferences has given fans greater and more varied engagement with a larger catalogue of music than they have ever had before.

Music Has a Significant, Positive Impact on the Economy, Digital Trade and Internet Businesses. A recent report found that the music industry creates \$143 billion annually in value when both direct and indirect effects are included, and supports 1.9 million American jobs across a wide range of professions.⁵ A 2016 study likewise found that copyright-intensive industries, including the music industry, contributed \$1.2 trillion to the U.S. economy each year, and grew at an aggregate annual rate of 4.81 percent from 2012 to 2015, compared

¹ We note the Administration has recognized that the digital environment offers both tremendous potential and serious challenges for the music industry and for copyright-intensive industries generally. As noted in the 2018 Special 301 Report, "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." 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>.

² Source: IFPI Music Consumer Insights Report 2018, available at <https://ifpi.org/downloads/Music-Consumer-Insight-Report-2018.pdf> (reporting global statistics).

³ Source: MusicWatch, Inc.

⁴ Source: IFPI.

⁵ Siwek, Steven, "The U.S. Music Industry: Jobs and Benefits, April 2018," prepared for the Recording Industry Association of America, available at <http://www.riaa.com/wp-content/uploads/2018/04/US-Music-Industries-Jobs-Benefits-Siwek-Economists-Inc-April-2018-1-2.pdf>.

with the average annual growth rate of 2.11 percent for the U.S. economy generally.⁶ In addition, a 2016 U.S. Department of Commerce report entitled *Digital Trade in North America* reported that intellectual property rights (IPR) licensing – of which music is a core part – globally generated an \$80 billion digital trade surplus for the United States in 2016.⁷ These statistics independently and collectively demonstrate the importance of the music business to the American economy.

Music also helps support the Internet economy, driving growth generally and for a number of highly influential Internet businesses. Music videos are the biggest content genre on YouTube, for example, with 1.1 trillion streams in 2017 globally.⁸ Music also drives social media, with artists on our members' labels representing 6 of the top 10 most-followed people on Twitter, 5 of the top 10 most-followed people on Instagram, and 7 of the top 10 most-followed people on Facebook, also performing on 9 of the top 10 most-viewed videos on YouTube.⁹ Nine out of 10 regular social media users engage in a music-related activity on their social media apps,¹⁰ and a recent survey found that playing music was the top task asked of smart speakers when with friends and family (at 60%).¹¹ Moreover, several of the largest U.S. technology companies, including Amazon, Apple, Facebook, and Google, have licensed our music for use on their platforms by fans. These statistics, among others, show that social media and other Internet businesses derive substantial benefit from the music industry.¹²

The Music Industry is Recovering and Overwhelmingly Digital. The innovations mentioned above have helped the music industry find a footing for moving forward in the digital age. In the first half of 2018, U.S. sound recording industry revenues grew 10%,¹³ and 87% of revenues came from digital sources, with 75% from

⁶ Siwek, Stephen; *Copyright Industries in the U.S. Economy: The 2016 Report*; Economists Incorporated; Prepared for the International Intellectual Property Alliance; 2016; p. 2; available at: http://www.iipawebsite.com/copyright_us_economy.html. The 2018 update to this report is currently under development but was not available at the time of this filing.

⁷ Nicholson, Jessica; U.S. Department of Commerce, Economics and Statistics Administration, Office of the Chief Economist; *Digital Trade in North America*; pp. 3-5; January 5, 2018, available at <https://www.commerce.gov/sites/commerce.gov/files/media/files/2018/digital-trade-in-north-america.pdf>. See also Statement of the Recording Industry Association of America (RIAA) before the United States International Trade Commission Global Trade 1: *Market Opportunities and Key Foreign Trade Restrictions*, April 21, 2017, which describes the relationship between music and smartphone growth, and Internet growth generally.

⁸ Source: Midia Research - See <https://www.midiaresearch.com/blog/state-of-the-youtube-music-economy-2-0-a-turning-point-for-all-parties/>.

⁹ Source: www.musicfuels.com, last checked November 1, 2018.

¹⁰ Source: MusicWatch, *Music Scores a Gold Record on the Social Media Charts*, August 6, 2018, available at <http://www.musicwatchinc.com/blog/music-scores-a-gold-record-on-the-social-media-charts/>.

¹¹ Source: *Smart Audio Report Fall/Winter 2017* by NPR and Edison, available at <https://www.nationalpublicmedia.com/wp-content/uploads/2018/01/The-Smart-Audio-Report-from-NPR-and-Edison-Research-Fall-Winter-2017.pdf>.

¹² As MusicWatch has further explained, "The music itself is a vital ingredient to the social conversation. The content stays fresh with constant new releases and tour announcements. Artists make a cultural contribution and are valued influencers. The sustained desire for news about favorite artists engenders engagement on the platforms. Musicians bring a credibility that is sometimes lacking in today's social spheres." See MusicWatch, *Music Scores a Gold Record on the Social Media Charts*, August 6, 2018, available at <http://www.musicwatchinc.com/blog/music-scores-a-gold-record-on-the-social-media-charts/>.

¹³ Source: RIAA - See <https://www.riaa.com/wp-content/uploads/2018/09/RIAA-Mid-Year-2018-Revenue-Report-News-Notes.pdf>.

various forms of digital streaming.¹⁴ Streaming revenues grew 28% year-over-year in the first half of 2018, and paid subscription streaming services accounted for 75% of streaming revenue.¹⁵

While the growth of streaming is encouraging, we should keep in mind that 2017 U.S. sound recording industry revenues were roughly 40% less than what they were in 1999 – and roughly the same as they were in 2008.¹⁶ The music industry has rapidly shifted to digital distribution over the last decade, but revenues have yet to catch up to the levels seen prior to the birth of online copyright infringement. Moreover, notwithstanding the recent growth associated with digital streaming, ad-supported, on-demand services that streamed hundreds of billions of songs to fans in the U.S. in the first half of 2018 accounted for only 11% of total streaming revenues.¹⁷ For the fragile recovery in the music industry to continue and be sustainable, the digital marketplace must be fair. It is critical to address not only copyright infringement and piracy, but also the massive disparity between the value created by some digital platforms from their use of music and what they pay (or don't pay) those creating and investing in it.

The Value Gap Persists, and Harm from Online Copyright Infringement Continues to Stifle the Ability of the U.S. Music Industry to Thrive. Unfortunately, the value gap, which we discussed in our 2015 submission for the Joint Strategic Plan, persists and continues to be a drag on the music industry's recovery. Online copyright infringement also continues to plague the industry.

As to the value gap, technology companies continue to reap substantial benefits from the exploitation of music that far exceeds the amount that they actually pay to creators and copyright owners. The misapplication of Digital Millennium Copyright Act (DMCA) safe harbors created and fuels this disparity. Internet platforms like YouTube can (and do) present copyright owners with a choice—they can use the DMCA's broken and ineffective notice-and-takedown system in a futile attempt to keep infringing works off of the site or offer a license at a fraction of market value, ensuring at least some payment for the inevitable streaming of their content. The depressed price ultimately paid by some platforms drives down legitimate rates negotiated with others, perpetuating a perverse market in which dominant Internet platforms are incentivized to profit from – rather than correct – this inequity.

The discrepancy between streaming usage versus streaming revenue for music illustrates this value gap. As noted above, ad-supported streams (including video services like YouTube and Vevo) accounted for hundreds of billions of plays for music fans, yet only contributed 8% of industry revenues. Contrast this against revenues from paid subscriptions, which contributed 55% of music business revenues. In fact, video streams contribute so little on a per-stream basis that they only pay 1/7th of what competing services (like Spotify, which also has both a free and paid tier) pay, so that it takes approximately 58 hours of continuous streaming on a video platform like YouTube to generate just \$1 for the music creators.

Online piracy also continues to be a problem for the music industry, as rogue actors persist in appropriating online tools to facilitate infringement globally. IFPI estimates that up to 38% of Internet users have obtained

¹⁴ Source: RIAA - See <https://www.riaa.com/wp-content/uploads/2018/09/RIAA-Mid-Year-2018-Revenue-Report-News-Notes.pdf>.

¹⁵ Source: RIAA - See <https://www.riaa.com/wp-content/uploads/2018/09/RIAA-Mid-Year-2018-Revenue-Report-News-Notes.pdf>.

¹⁶ Source: RIAA – See <https://www.riaa.com/u-s-sales-database/>.

¹⁷ Source: RIAA - See <https://www.riaa.com/wp-content/uploads/2018/09/RIAA-Mid-Year-2018-Revenue-Report-News-Notes.pdf>.

music through infringing methods,¹⁸ and several studies confirm the obvious—that this stealing has a detrimental effect on music revenues.¹⁹ Today, music piracy often takes the following forms:

- *Stream Ripping.* The most pressing music copyright infringement problems today come from hugely popular stream-ripping sites, add-ons, and apps that engage in the unauthorized reproduction and distribution of the copyrighted music that appears on YouTube, Facebook, and other services licensed to stream music. These illegal sites violate licensed services' terms of use and circumvent technological protections to provide unlicensed free downloads, depriving creators of their share of revenue and harming paid services that offer tethered downloads for offline listening. IFPI estimates that, globally, 32% of consumers have engaged in stream-ripping.²⁰
- *Mp3 Search-and-Download Sites; Unauthorized Streaming Sites; Pre-Release Sites, and Related Apps.* This class of sites directly or indirectly offers unauthorized on-demand streaming and/or downloading of our members' music, including their most popular and valuable content. Some of the most harmful of these sites specialize in providing pre-release music, i.e., tracks and albums that have not yet been commercially released to the public.
- *Cyberlockers.* A "cyberlocker" is a type of website/service which enables users to upload, store and distribute digital files on a dedicated storage infrastructure on the Internet that is controlled, managed and maintained by the website's operator. Unlike legitimate storage services, cyberlockers seek to maximize and monetize traffic to their service, and nothing draws traffic like popular copyrighted content that can be downloaded for free. Files can often be uploaded without even opening an account, such that services are unable to police uploaders or effectively remove repeat infringers from their system. For many of these services, there would be no economic viability in the absence of traffic generated through piracy.
- *BitTorrent Indexing Sites.* BitTorrent indexing sites provide a searchable index of links to content which can be downloaded by users running the appropriate client software, and many of these sites organize, display and describe the files they index to facilitate infringement. Increasingly, BitTorrent sites (and other infringing services) are registering multiple domains to stay operational if one site is seized or blocked, and to work around search engine demotion algorithms. A simple change in the county code or other top-level domain allows the site to reappear in top search results.
- *Rogue Mobile Apps.* We continue to see a variety of rogue mobile apps that use music to promote or enhance their service without authorization and without any compensation to the creator or owner of the music. In the last year alone, RIAA noticed over 500 infringing apps it identified on the major mobile app stores in the U.S.

¹⁸ Source: IFPI Music Consumer Insights Report 2018, available at <https://ifpi.org/downloads/Music-Consumer-Insight-Report-2018.pdf>.

¹⁹ See, e.g., Smith et al, "The Truth about Piracy," IDEA, Carnegie Mellon University, Feb. 2, 2016, available at <https://idea.heinz.cmu.edu/2016/02/02/the-truth-about-piracy/> (noting that the weight of economic studies considering the issue have found that copyright infringement harms revenue for legitimate copyright dependent products); and Smith et al, "Copyright Enforcement in the Digital Age: Empirical Economic Evidence in the Digital Age," presented at the World Intellectual Property Organization, Tenth Session, Nov. 23 to 25, 2015, available at http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_10/wipo_ace_10_20.pdf.

²⁰ Source: IFPI Music Consumer Insights Report 2018, available at <https://ifpi.org/downloads/Music-Consumer-Insight-Report-2018.pdf>.

- *Unauthorized Access to Subscription Streaming Services.* As licensed subscription streaming services have grown, so has the practice of unauthorized sharing of accounts for such subscription services. There has also been an increase in the number of apps that alter the services to provide the premium functionality of the licensed service for free to the app user.
- *Unauthorized Lyric and Sheet Music Sites.* Sites that provide access to song lyrics and/or sheet music without authorization also present a persistent problem for music publishers and songwriters. While NMPA has in the past initiated litigation against unlicensed websites the sheer volume and multiplicity of infringing sites makes litigation against every target impracticable. Moreover, gamesmanship by these sites of the DMCA safe harbors distorts the marketplace for licensing negotiations. Enforcement through automated software programs, moreover, imposes a steep cost on these industries which have been particularly hard hit by the problem of pervasive piracy.

Online piracy of the kinds described above often leads to other social harms as well. Many rogue infringing sites that profit from music piracy also distribute malware and engage in identity theft scams for alternate sources of revenue. In fact, rogue infringing sites are 28 times more likely to inject users with malware than other mainstream sites,²¹ creating additional cybersecurity risks and increasing harm to the public.

Limitations on our Ability to Enforce Our Intellectual Property Rights. We engage in various forms of self-help to address and try to mitigate online copyright infringement, from a robust infringement notice program²² to civil litigation,²³ criminal referrals for criminal copyright infringement,²⁴ and active use of voluntary practices to deter the flow of dollars and eye balls to infringing services. However, we face several challenges to our ability to enforce our rights online. The limitations largely relate to our inability to identify and bring to justice those responsible for these rogue sites.

As noted in RIAA's notorious markets submission,²⁵ some of these limitations include:

- degradation of access to WHOIS domain name registration data, which frustrates our ability to find the purported identity and location of the operator of the infringing domain,
- prevalent use of privacy/proxy services or false domain registration data to further obscure the identity of the operator of the infringing service,

²¹ DIGITAL CITIZENS ALLIANCE, DIGITAL BAIT 2 (Dec. 2015),

<https://www.digitalcitizensalliance.org/clientuploads/directory/Reports/digitalbait.pdf>. See also EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE, IDENTIFICATION AND ANALYSIS OF MALWARE ON SELECTED SUSPECTED COPYRIGHT-INFRINGING WEBSITES 3 (2018) (stating that copyright infringing websites "commonly distribute various kinds of malware and potentially unwanted programs (PUPs), luring users into downloading and launching these files"), https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2018_Malware_Study/2018_Malware.

²² In 2017, RIAA alone sent notices for 5,935,216 infringing URLs to search engines, 4,539,331 URLs to infringing sites, and 5,429,602 infringing URLs to the technical hosting provider (including reserve proxy services, like Cloudflare, where applicable), and hundreds of notices to mobile app stores. This doesn't include notices sent by others in the music industry.

²³ For example, since 2015, RIAA has brought copyright lawsuits against an ISP that contributes to the infringing activity of its users, a "mixed tape" site that profits from streaming our members' music without authorization and stream-rippers that circumvent the technical protection measures of authorized streaming services and distribute our members' music without authorization.

²⁴ We note that federal prosecutors recently secured a 5 year prison sentence for an operator of a cyberlocker that engaged in criminal copyright infringement via that service.

²⁵ See RIAA's submission in response to your request for comments identifying Internet and physical markets based outside the United States that should be included in the forthcoming Notorious Markets List, Docket No. Docket No. USTR-2018-0027, dated Oct. 1, 2018.

- use of reverse-proxy services like Cloudflare that further complicate our ability to identify the location of the IP address of the servers used by the infringing service,
- increased use of so-called “bullet-proof ISPs” that are located outside the US that host infringing sites and ignore notices or warnings of infringement on sites they host, and
- the practice of subleasing IP address space which further complicates our ability to find the responsible hosting provider of the infringing service.

We refer you to RIAA’s notorious markets submission for a more detailed description of these limitations. We also note these efforts are further frustrated by ICANN’s recent unilateral decision to suspend work on implementing a privacy/proxy service policy that would require these services to disclose domain name registration data under appropriate circumstances.

Lack of Reasonable Platform Accountability. As also noted in other filings by us and others in the copyright community recently,²⁶ the problems described above are compounded by the lack of reasonable, sensible accountability on the part of various platforms that have knowledge (or should reasonably know) of infringing activity that is promoted or facilitated through their service. The incentives of these platforms to deter such activity differ significantly, depending upon whether they rely on user uploaded content or instead rely on curated, professional content licensed directly from its owners. This is particularly true today, where some largely unregulated online platforms have a disproportionate influence over how Internet users communicate and engage in commerce online.

When the Internet was nascent, and it was not clear the scale to which the Internet would grow and how strong our nation’s dependence upon it would become, the government gave certain classes of online platforms broad immunities to help them grow on the presumption that they would be good actors and take voluntary steps to avoid abuses. Some in the Clinton administration cautioned that such immunities could cause significant collateral damage. As noted in the White Paper, “[i]t would be unfair – and set a dangerous precedent – to allow one class of distributors to self-determine their liability by refusing to take responsibility. This would encourage intentional and willful ignorance.”²⁷

While the platforms have certainly grown on a massive global scale, they have not done enough to curb abuses. Platforms have been given ample opportunity to prove themselves responsible stewards of the Internet but, unfortunately, have time and again proven that profits are more important to them than doing the right thing. To make matters worse, these services often claim they are acting in a manner to promote free speech when instead what they are actually doing is turning a blind eye to infringing and other abusive conduct over their systems.

Some examples of the lack of platform accountability that affect the music industry include the refusal by several sites that host, organize, stream, promote and profit from user uploaded content to use, or comprehensively use, content-matching technologies to prevent the unauthorized dissemination of music even though such technologies are commercially available and it is clear that infringing music is prevalent on

²⁶ See Written Submission of the Recording Industry Association of America before the United States International Trade Commission, Global Digital Trade 3: The Business-to-Consumer Market, Key Foreign Trade Restrictions, and U.S. Competitiveness, (August 15, 2018); Comments of the Motion Picture Industry of America, Inc. in the Matter of Competition and Consumer Protection in the 21st Century, Doc. Id: FTC-2018-0090 (Oct. 22, 2018), available at <https://www.mpaa.org/wp-content/uploads/2018/10/181022-MPAA-submission-for-FTC-Hearing-4-on-Innovation-and-Intellectual-Property-Policy.pdf>.

²⁷ “Intellectual Property and the National Infrastructure,” known as the *White Paper*, September 1995, available at <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf>.

their service.²⁸ Some e-commerce platforms take only limited action to deter the use of their platforms to distribute counterfeit goods, and don't take reasonable proactive steps to ensure their sites are used only to distribute authentic products. And with limited exceptions, privacy/proxy providers, registrars, and registries refuse to take action to deter illegality occurring over domains they manage even after receiving credible evidence of such illegality.

This combination of outdated laws and the lack of reasonable platform accountability has created an environment where we and the services we have licensed directly (that don't rely on the DMCA) must compete with free, illegal services and services that exploit legal loopholes to stifle market rates for music. This ultimately harms consumers, competition, creativity and innovation in the music space and severely disadvantages those who license music to enhance other innovative offerings.

2. Recommendations

Engagement with our Trading Partners. The December 2017 *National Security Strategy of the United States* identifies IPR theft as a significant threat to American prosperity, and it further states any international agreements must “adhere to high standards in intellectual property, and digital trade” among other disciplines.²⁹ Consistent with this strategy, the President’s 2018 Trade Policy Agenda confirmed that the U.S. should look to ensure strong provisions on digital trade and intellectual property.³⁰ U.S. international engagement globally, both in trade agreement negotiations and elsewhere, therefor should make strong copyright protection and enforcement a top priority, and reject flawed copyright loopholes such as overbroad safe harbors and exceptions.

As part of this principle, we believe that our efforts with our trading partners should be designed with the goal of encouraging more accountability from online platforms, not less. This includes ensuring that Internet platforms take steps to prevent the use of their platforms for infringing or other illegal activity and rejecting the outdated premise that safe harbors and platform immunities are the sine qua non for Internet growth. Safe harbors should be “right-sized” to more appropriately balance and reconcile when truly passive, neutral intermediaries might be eligible for a safe harbor versus obligating others that encourage, facilitate, know or should reasonably know about, or otherwise profit from infringing activity to be held more accountable for their actions. It also calls on the U.S. to look to strengthen copyright laws abroad, including having more fundamentally sound secondary liability regimes and ensuring appropriate technical protection measures are protected.³¹

The U.S. should also work with its trading partners to ensure that there is an appropriate level of transparency and accountability from registrants, registrars, registries, privacy/proxy providers and others in the Internet ecosystem to ensure those involved in infringing activity can be found and held accountable for their illegal activity, wherever they may be located.

²⁸ Some of these services already know what is on their site because they use the information to target advertising.

²⁹ *National Security Strategy of the United States*; December 2017; p. 20; available at <http://nssarchive.us/wp-content/uploads/2017/12/2017.pdf>.

³⁰ *The 2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on Trade Agreement Programs*; February 28, 2018, available at <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF>.

³¹ Please see Written Submission of RIAA to the USITC, *supra*, for a more detailed discussion of copyright and related provisions that we believe should be included in our trade agenda to provide better tools for intellectual property protection globally.

With respect to the DNS space, this means the U.S. should engage with its trading partners in the E.U. and with ICANN to correct the unintended consequences of the GDPR on access to WHOIS data.³² This should include ensuring that as much WHOIS data as possible is included in the public domain for transparency and accountability purposes, and that information that is not publicly available is consistently and uniformly accessible to address copyright infringement investigation and other investigations into illegality online.

The U.S. should also work with its trading partners to require greater diligence and accuracy of domain name registrant data and correct the problems with the use of privacy/proxy services to hide the identity of those engaging in illegal behavior online. We note that there was a recent test of the impact of using diligence to ensure accurate, accessible domain name registrant data on abuses online. That test, conducted on the country code top level domain .dk, showed that after implementing the enhanced check on domain name registrant identity, the .dk operator was able to reduce the number of domains on .dk associated with websites suspected of intellectual property infringement in relation to the total number of online stores on .dk from 0.28% to virtually 0%, and the number related to websites suspected of intellectual property infringement in relation to the total number of active websites on .dk from 6.73% to 0.12%.³³

We also need to ensure that our digital attachés and IP attachés work together to advance the policy of strong IP protection, free speech and strong digital trade. These concepts are not in tension, but rather should be considered in tandem as complementary to each other to ensure and protect expression online. Doing so promotes the policies set forth in the Copyright Clause of the Constitution, which recognizes that respecting the work of creators in their expression for limited times increases both protection and distribution of expression generally to the benefit of the public.³⁴ Ensuring strong copyright protection online also helps digital trade and free speech by creating a safer, more vibrant environment online for the public that encourages lawful free speech and promotes lawful commerce.

Use of All Legal Authorities, Including Trading Tools.

Changes to U.S. Law. There are several changes that should be made legislatively to help legal authorities and third parties better protect intellectual property rights. These include fixing the DMCA, making it a felony to knowingly engage in unauthorized streaming of copyrighted works, and investigating the positive impact that website blocking of foreign sites has in other jurisdictions and whether U.S. law should be revised accordingly.

With respect to the DMCA, the law should be revised to reflect the proper balance between granting appropriate safe harbors to truly passive, neutral intermediaries while ensuring that those that engage and/or profit from the unauthorized use of copyrighted works are held accountable for their activities. It should reinvest practical, sensible meaning into the representative list condition and to red-flag conditions to the DMCA safe harbor, and address the problems of repeat infringements, and not just repeat infringers.

³² For more information on the concerns with changes to the WHOIS database, see The Recording Industry Association of America Response to the National Telecommunications and Information Administration Notice of Inquiry re: International Internet Policy Priorities, Docket No. 180124068-8068-01 (July 17, 2018), and Recording Industry Association of America Response to National Telecommunications and Information Administration Request for Comments re: Developing the Administration's Approach to Consumer Privacy Docket No. 180821780-780-01 (November 9, 2018).

³³ See "Analysis of Domains Suspected of Infringing Intellectual Property", prepared for DIFO in collaboration with EIT DK ApS / Henrik Bjørner, available at <http://cybercrime.eu/published-analyzes/analysis-of-domains-suspected-of-infringing-intellectual-property-on-the-danish-domainname-system-2018-07-02/> and summarized at https://www.dk-hostmaster.dk/sites/default/files/2018-07/Kriminalitetsbekaempelse_onepager_juni2018.pdf.

³⁴ U.S. Const., art. I, § 8, cl. 8. See also *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (stating that by "establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas").

Alternatively, the Administration should consider whether an alternative or additional duty of care standard should apply to all Internet platforms and sites.³⁵

In addition, the law should be revised to acknowledge that for many copyright industries, unauthorized streaming that rises to criminal conduct has become just as large a problem, if not more so, than unauthorized download activity that rises to criminal conduct.

With respect to website blocking, as 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.”³⁶ Given the increasing ease for rogue infringing actors to access U.S. audiences while keeping all of their infrastructure off-shore, such as through the use of non-U.S. cctlds for their domain and bullet proof ISPs to host their services, there is a pressing need for additional tools to deter and stop this type of piracy harming U.S. consumers and businesses. As website blocking has had a positive impact in other countries without significant unintended consequences, the U.S. should reconsider adding this to its anti-piracy tool box.

Other Potential Action. We also encourage the Administration to use its authority to (i) investigate and educate users about the harms that may occur to them by interacting with infringing sites, (ii) ensure that those online platforms that contract with the U.S. government follow a code of conduct that calls for them to engage in reasonable diligence and accountability to deter the use of their platforms for copyright infringement and other illegal conduct, (iii) investigate the pervasiveness of online copyright infringement and the harm it has caused to the U.S. economy, and (iv) investigate how U.S. businesses facilitate, encourage or profit from online copyright infringement, and what more they can do to deter such infringing activity.

Law Enforcement Action and Cooperation. We appreciate the efforts of federal law enforcement agencies to use available legal tools to crack down on copyright infringement, including the actions against KickAssTorrents, MegaUpload, Sharebeast, and others. However, we believe more funding is required to sustain and enhance such efforts, particularly as rogue actors become more adept at obfuscating and moving their location across jurisdictional lines. This should include increased and dedicated funding for copyright enforcement, including dedicated funding for CCIPS for copyright infringement cases and for grants for state and local law enforcement for intellectual property enforcement. It should also include increased funding for training dedicated to driving cooperation between law enforcement on international cases. We would also like to see increased focus on targets engaged in unauthorized distribution of pre-release content, and services supported by rogue ad networks.

Engagement & Partnership with Private Sector and Other Stakeholders. Finally, we continue to believe that voluntary best practices can help deter copyright infringement online. We have seen positive results with such voluntary best practices with the online advertising industry and with payment processors. In addition, we note that some new gTLD operators have committed to take action to curb pervasive infringing activity over domains they manage.

However, more should be done by other Internet platforms to create a vibrant, healthy and lawful Internet ecosystem. To that end, we would encourage the IPEC to encourage voluntary best practices in the following areas:

³⁵ Please see our and other music industry comments to Copyright Office Section 512 study and our prior comments from October, 2015 on the IPEC Joint Strategic Plan for a more detailed discussion of needed changes to the DMCA.

³⁶ 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>.

- *Making the Standard Technical Measures Condition to the DMCA Meaningful* – Reasonably priced, commercially available technologies exist today to identify and protect copyrighted works. While some service providers have implemented such measures, many others feel no compulsion to do so. The IPEC should call together service providers and copyright owners to discuss these technologies and develop “standard technical measures” around them as contemplated in 17 USC § 512(i).
- *Cloud Hosting Services and CDNs* – Companies that provide such services should come to the table to discuss ways to continue delivering quality products while also respecting the property of others. We need greater certainty in their responses in the face of notices of widespread infringement, and additional efforts to ensure that a takedown notice is effective. We also need to develop a common-sense approach to implementing a repeat infringer policy.
- *Reverse Proxy Services* – Too often, we see these services, such as those offered by CloudFlare, used by infringing websites to obfuscate their identity. To deter such abuse, such services should engage in enhanced diligence about their potential customers before providing such services to them and take prompt action to suspend or terminate their services to sites that have been repeatedly noticed for infringing activity.
- *App Stores* – Far more could be done by the providers of digital storefronts where consumers locate and obtain/purchase applications for mobile devices, browser plug-ins or software applications. While we appreciate that notice programs have been developed to address infringing apps that are available on some mobile app storefronts, we need to address how to increase the diligence so that infringing apps are more likely to be rejected before making it into the storefront in the first place, and better tools to avoid repeat infringing apps, whether by the same developer under a different name, or a copycat app that provides substantially the same infringing service under a substantially similar name.
- *Registries, Registrars, and Privacy/Proxy Services* – We were encouraged by the recent NTIA statement that it “looks forward to working with Verisign and other ICANN stakeholders in the coming year on trusted notifier programs to provide transparency and accountability in the .com top level domain.”³⁷ It would be a positive development to see Verisign and other legacy top level domain (TLD) operators join Donuts and Radix in establishing sensible trusted notifier programs that permit trusted notifiers to alert them to pervasive infringing activity and other illegal conduct occurring over domains on their TLDs so that the TLD operators can take appropriate mitigating action to keep those TLDs safe and trustworthy. In addition, it would be useful to see a code of conduct for registrars and privacy/proxy services to take proactive steps to verify the identity of their customers, ensure accurate information about them is available, and to take reasonable action to deter copyright infringement occurring over the domains they manage, including suspension or termination in appropriate circumstances.
- *Search* – Significant progress has been made in the past few years to have sites demoted in search if the search engine has received notices of large numbers of infringing URLs on those sites. However, we believe more can be done generally, and also should be done to address the evolving nature of online copyright infringement. For example, in addition to demotion, it would be useful to have a code of conduct concerning the promotion in search of known, authentic licensed sites over unknown or infringing sites. In addition, some infringing services, such as some stream-rippers, use dynamic URLs to make available and deliver infringing copies of our members’ works. Because of this, we cannot send to search

³⁷ See NTIA Statement on Amendment 35 to the Verisign Cooperative Agreement (Nov. 1, 2018), available at <https://www.ntia.doc.gov/press-release/2018/ntia-statement-amendment-35-cooperative-agreement-verisign>.

engines a notice about a deep link URL associated with the infringing activity because such a URL does not exist or is not persistent. It would be useful to develop further heuristic models to help identify infringing sites and demote those based on those heuristic attributes as well.

3. Conclusion

We hope these comments are helpful in developing the IPEC Joint Strategic Plan and ensuring that we and other copyright-intensive communities have a strong foundation on which to grow and thrive well into the 21st Century.