

July 17, 2018

**Recording Industry Association of America Response to  
National Telecommunications and Information Administration  
Notice of Inquiry re: International Internet Policy Priorities**

Docket No. 180124068-8068-01

Submitted via email to [iipp2018@ntia.doc.gov](mailto:iipp2018@ntia.doc.gov)

The Recording Industry Association of America (RIAA) welcomes the opportunity to respond to the National Telecommunications and Information Administration (NTIA) Notice of Inquiry concerning NTIA's International Internet Policy Priorities.

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.

In our comments, we provide an overview of our experience and stake in this discussion, followed by our views on several of the questions posed, with recommendations for NTIA's consideration.

## **I. Introduction**

Music is not only a vital part of our nation's culture, it is a driver of our economy and jobs, as well as a driver for Internet growth. Today's U.S. music industry is not only an Internet-enabled business, it also fuels the Internet economy. The industry has also been significantly harmed by the Internet policies of the last two decades and, at the same time, depends upon the Internet for future growth. This gives us a unique and important perspective in considering the international Internet policy priorities the United States should adopt.

Today, approximately 80% of U.S. sound recording industry revenues come from digital sources, with 65% of the revenue coming from streaming alone.<sup>1</sup> Streaming revenue for the industry has grown 143% in the past two years. In fact, 2017 saw approximately one trillion streams of music in the U.S., with roughly 2/3 of those streams coming from subscription or digital radio, and roughly 1/3 from ad-supported audio or ad-supported video streams.<sup>2</sup> In terms of revenue, however, 92% of the streaming revenue came from subscription or Internet radio, and only 8% from ad-supported audio or ad-supported video streams.<sup>3</sup> In addition, while the growth of streaming is encouraging, we should keep in mind that 2017 U.S. sound recording industry revenues are roughly 40% less than what they were in 1999 – and roughly the same as they were in 2008.<sup>4</sup>

---

<sup>1</sup> Source: RIAA 2017 U.S. Music Industry Revenues.

<sup>2</sup> Source: RIAA.

<sup>3</sup> Id.

<sup>4</sup> Id.

Music is also a significant driver for other parts of the Internet economy, job growth and trade surplus. Music drives social media – artists on our members’ labels represent six of the top 10 most-followed people on Twitter, five of the top 10 most-followed people on Instagram, seven of the top 10 most-followed people on Facebook, and artists on eight of the top 10 most-viewed videos on YouTube.<sup>5</sup> Music drives smart speaker adoption – a recent survey found that playing music was the top task asked of smart speakers when with friends and family (at 60%).<sup>6</sup> Music fuels major tech offerings – four of the top five U.S. technology companies have licensed music and have a music offering for their customers. In fact, 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.<sup>7</sup> Moreover, 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, according to a U.S. Department of Commerce report entitled *Digital Trade in North America*.<sup>8</sup>

However, the music industry has suffered significant harm from online copyright infringement, as well as from certain Internet policies that have not fully reflected our industry and its priorities, including to effectively address such infringement and those global measures that facilitate that infringement.<sup>9</sup> Sound recording industry revenues fell 50% from their peak when the Internet was still in dial-up mode in 1998-99 to a low in 2014 before gaining some in the past couple of years due to streaming adoption.<sup>10</sup> During this time, some studies indicated that as many as 1/4 of U.S. Internet users engaged in some form of music piracy and that, in 2013, 50% of the music acquired in the U.S. was acquired illegally.<sup>11</sup>

---

<sup>5</sup> Source: [www.musicfuels.com](http://www.musicfuels.com), last checked July 9, 2018.

<sup>6</sup> 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>.

<sup>7</sup> 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-Siwiek-Economists-Inc-April-2018-1-2.pdf>.

<sup>8</sup> 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.

<sup>9</sup> 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); 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](http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_10/wipo_ace_10_20.pdf); Music Community Written Submission dated October 16, 2015 to the Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments, 80 Fed. Reg. 52800.

<sup>10</sup> Source: RIAA

<sup>11</sup> MusicWatch, “*Hacking the Music Pirate*,” January 22, 2015, available at <http://www.musicwatchinc.com/blog/hacking-the-music-pirate/>.

MusicWatch estimated that, in 2016, 57 million Americans engaged in some form of music piracy.<sup>12</sup> And IFPI reported that, in 2017, 40% of Internet users accessed music in some way infringing copyright.<sup>13</sup>

The prevalence of music piracy, along with Internet policies that permit Internet platforms to reap benefits from such infringement without liability, has distorted music industry revenues significantly. This issue is known the “value gap.” For example, while 1/3 of the industry’s total streams in 2017 were advertisement-supported (the overwhelming majority from YouTube), ad-supported streaming revenue only accounted for 8% of the industry’s streaming revenue. This imbalance is largely caused by flawed interpretations of copyright safe harbors that facilitate their abuse.<sup>14</sup>

We hope that policymakers will continue to learn from our experience, and develop more mature, nuanced policies to deter such negative consequences while promoting NTIA’s mission to strengthen the global marketplace for American digital products and services, including music. It is critical that U.S. digital policy reflect and advance (and not harm) the priorities of the music and other copyright-intensive sectors, which continue to provide so many important benefits to the U.S. – driving the Internet’s growth, and contributing to the emergence of new business models and technological innovation. As discussed further below, this necessitates public policy requiring all in the Internet ecosystem to take more responsibility for their actions or inactions to further the goal of a lawful, safe and vibrant Internet.

We note that the December 2017 *National Security Strategy of the United States* identifies IPR theft as a significant threat to American prosperity, noting that any international agreements must “adhere to high standards in intellectual property, and digital trade” among other disciplines.<sup>15</sup> 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.<sup>16</sup> The NTIA should consider this as a guiding principle as it seeks to prioritize its international Internet governance priorities.

## **II. Free Flow of Information and Freedom of Expression**

Since our inception, protecting First Amendment rights has been a core mission of the RIAA. Free expression is incredibly important for music makers, where music lyrics are often highly subject to different interpretations. Music is made and used to express joy and anger, to protest and to empower. Throughout history, there have been many efforts to censor selected songs based on some people’s

---

<sup>12</sup> MusicWatch, “*Bad Company You Can’t Deny*,” February 22, 2016, available at <http://www.musicwatchinc.com/blog/bad-company-you-cant-deny/>.

<sup>13</sup> IFPI, *Connecting with Music, Music Consumer Insight Report*, September 2017, available at <http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2017.pdf>.

<sup>14</sup> 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>.

<sup>15</sup> *Nation Security Strategy of the United States*; December 2017; p. 20; available at <http://nssarchive.us/wp-content/uploads/2017/12/2017.pdf>.

<sup>16</sup> *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>.

interpretation of another person's music.<sup>17</sup> In the U.S., the protection against such censorship is the First Amendment.

First Amendment jurisprudence shows that the right to free expression is incredibly important, but not unlimited. It does not cover wholesale, unvarnished, unlimited copying and distribution of another's expression for one's pecuniary interests. It does not protect against ordinary defamation or libel. It does not immunize a person against certain other illegal activity simply because that activity occurs online.

We raise this because, in considering questions about restrictions on the free flow of information, care must be taken to distinguish between true censorship of legitimate free expression, and legitimate actions taken to deter illegal conduct online. For example, hosting companies often remove or disable access to an infringing piece of content from their systems globally, whether due to a DMCA complaint or a U.S. court order. This is not a violation of freedom of expression or an improper restriction on the free flow of information, but rather an action taken to deter the harm from illegal, infringing conduct.

If one truly believes that any government action to remove any content globally would be a violation of freedom of expression or an undue restriction on the free flow of information, that would mean a government would be prohibited from acting to prevent the spread of child pornography, botnets, malware and other illegal conduct. That is simply not good policy. Rather, a careful and nuanced approach must be taken to ensure the free flow of lawfully distributed information in a manner that doesn't unduly undermine other important rights and interests.

All stakeholders in the Internet ecosystem have a role to play in ensuring this policy goal is met. As noted above, one of the first steps is a recognition that not all activity online qualifies as "expression," much less as expression that should be lawfully protected. Our conversation must shift to ensure we are protecting the rights the First Amendment was intended to protect, and that we are not using "free expression" as a shield to protect and immunize illicit and unlawful activity.

Second, Internet platforms – often the gateways used for expression of ideas and discourse – must take more responsibility and do a better job in not only responsibly educating consumers about the lawful contours of free expression, but also 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.

Third, governments should not blindly promote existing U.S. safe harbors and immunities as the *sine qua non* for Internet growth. Rather, as parts of the U.S. government have stated, the government 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, the safe harbors should only apply to innocent intermediaries who are truly passive and neutral in

---

<sup>17</sup> See e.g. Cary Sherman, "Music: The Ultimate Expression of Free Speech," October 21, 2013, available at <https://www.riaa.com/music-the-ultimate-expression-of-free-speech/> for examples of such censorship.

the operation of the service.<sup>18</sup> Once the service changes to having a more active role or engagement with third-party content, the risk allocation must shift as well.<sup>19</sup>

Fourth, the U.S. government should protect against any data localization requirements imposed by our trading partners on cloud- and Internet-based digital products and services, while at the same time ensuring there are strong intellectual property rights protections and enforcement regimes in place.

Finally, we hope that companies, technical experts and others will come together to develop and implement practical, operative solutions to identify and combat against illegal activity online while preserving lawful free expression and legitimate data flows. Doing so will create greater trust and accountability online, discourage veiled attempts to use “free expression” to hide or exonerate illegal activity, and ultimately act to protect and promote true freedom of expression.

### **III. Multi-stakeholder Approach to Internet Governance**

Our experience suggests that the multi-stakeholder model of Internet Governance, at least with respect to the DNS system, may be of limited value. We always prefer a marketplace, consensus-based approach to solving problems. However, when consensus cannot be achieved, or the problems persist despite consensus, government must get involved and possibly legislate to protect the public interest.

Currently at ICANN, we see three potential areas of breakdown concerning the multi-stakeholder model. First, despite consensus to certain policies concerning the DNS system, there have been unacceptable delays in actual implementation of those policies. Two examples include the consensus policy that was approved in February 2014 to have thin registries become thick registries, and the privacy proxy service accreditation policy that was approved in August 2016. Neither of these policies has been implemented to date.

Second, the stakeholders within ICANN have become so polarized and unable to see each other’s views that no consensus is being reached. Consider that ICANN kicked off a policy development process in January 2016 to address registration directory services, otherwise known as next generation WHOIS service. That policy development effort was abandoned 2 ½ years later for failure to make any meaningful progress, even though it had the advantage of an expert working group report on the subject going into the policy development process.

Third, stakeholders are using changes in applicable law to advocate or implement policies that we believe are inconsistent with the goals of the applicable law or ICANN’s mission. Specifically, we are concerned that some registrars and registries (as well as some registrant advocates) are using the E.U. 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. This is contrary to ICANN’s mission to support accuracy and accessibility of WHOIS information, subject to applicable laws.

---

<sup>18</sup> 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>.

<sup>19</sup> Id.

In terms of DNS policy generally, NTIA should continue to pursue a policy of ensuring WHOIS accuracy and easy accessibility for all legitimate uses of such data. The Internet, as a network of networks upon which significant commerce is based, relies heavily on trust and accountability. Accurate and accessible WHOIS data is a key component to ensuring such trust and accountability, and the continued interoperability of these networks. The current fragmentation and unavailability of large swaths of WHOIS data undermines that trust and accountability. This must be rectified as soon as possible.

NTIA should also encourage ICANN to expeditiously finalize the implementation of the thick WHOIS consensus policy and the privacy/proxy services accreditation policy. Showing that multi-stakeholder policies in a post-IANA transition world are implemented and enforced will help lend credibility to the multi-stakeholder model.

#### **IV. Conclusion**

The Internet offers vast potential as well as considerable negative impacts on the music industry. Good digital policy should not only help the creative industries realize the tremendous potential of the Internet, such policy should also facilitate and further expand the contributions of the industry to U.S. economic growth, job creation and digital trade. Too often, however, such policy has not been fully developed and implemented, leaving our industry and the creative sectors generally unable to compete on a level playing field against those that seek to unjustly enrich themselves at the expense of American creators. Protecting and promoting American creative industries, ensuring that those industries are included with other stakeholders in creating and operationalizing policy, and advancing Internet responsibility should all be critical priorities for U.S. Internet policy.

\* \* \*

Thank you for the opportunity to submit our comments on this important topic. We look forward to working with NTIA on further developing its international Internet policy priorities.