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To whom it may concern:

Attached for your review and consideration, please find my comments regarding Prioritizing Resources and Organization for Intellectual Property Act of 2008, Public Law 110-403 (Oct. 13, 2008) ("the PRO IP Act").

Sincerely,

Eric D. Bull



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**Response to Request for Public comment regarding Prioritizing Resources and Organization for Intellectual Property Act of 2008, Public Law 110–403 (Oct. 13, 2008) (“the PRO IP Act”)**

I am a practicing music and entertainment attorney based in Minneapolis, Minnesota. I have practiced IP and entertainment law for 12 years. I also currently teach classes at the college level on IP issues, media industry contracts, music publishing and licensing; and finally, I am a published, performing singer/songwriter currently working on the completion of my fourth commercially released musical work (1 EP and 3 albums).

I am keenly aware of the impact of intellectual property piracy on individuals, businesses and the greater economy and am also specifically knowledgeable about the disconnect between creators of intellectual property, legislation and enforcement of those rights and the archaic systems and businesses currently collecting and attempting to enforce those rights in commerce and society at large. I will focus my comments toward the music industry and copyright as that is the area which I am most familiar.

**I. The growing inequity**

From a contextual standpoint, the massive shift in the means of creation (i.e. digital recording) and distribution (the internet) have created a class system amongst the intellectual property rights holders akin to traditional wealthy families that are able to protect and often increase their wealth over generations and immigrants starting with nothing. Like any class system, over time, a middle class is created. Talent and hard work will allow you to climb the class hierarchy to the middle class, and possibly assign your IP rights to the upper class, which may or may not be beneficial to you in the 21<sup>st</sup> century.

Historically speaking, copyright was deemed important by the framers of the constitution of the United States as a means to promote the arts and sciences. The length of copyright protection has expanded from 28 years to what for all practical purposes is now 150 years. What was meant to be a moral and cultural protection to allow the creators of original works to benefit from their creation has been subverted to an economic tool for exploitation of that work. Therein lies the dilemma. Are we, as a society going to view IP protection from a cultural, moralistic or economic stance?

Major record labels, publishing companies and radio conglomerates own enough of the IP and means of distribution to reach the largest segment of the population through traditional means – namely radio and retail. While they do own a tremendous amount of property, for nearly a century, these business interests controlled the supply of music and enjoyed a steady or even increasing demand over that time. Unfortunately for them, but fortunately for the rest of us, we have been exposed to new discovery (Pandora, i-like, my-space, you-tube, etc) and distribution outlets (Amazon, i-tunes, file-sharing and torrents).

With the advent of digital recording and distribution the supply has increased exponentially and the demand has remained relatively static. Consumers however, have become accustomed to convenience and an a la carte approach to acquiring and consuming. They are no longer beholden to a few outlets for discovery and acquisition of content. Obviously this will cause a huge shift in the macroeconomic effect and

distribution of wealth. Over time the market will correct itself as the sellers, consumers, laws and technology stabilize.

There are no longer barriers to entry in the creation of commercially viable copyrights. Anyone with a computer and an internet connection can create and distribute their work. There are, however, massive barriers to entry in enforcement of the rights to those works. Performance royalty collection is centralized, possibly monopolized, by a few well-intentioned entities with an archaic business model (ASCAP, BMI, SoundExchange<sup>1</sup>). The sampling-extrapolation<sup>2</sup> model of royalty accounting creates inequitable distribution. It may have worked when there were few new works placed in the marketplace each year and fewer distribution points to monitor. For decades, it made no difference that this method of royalty collection favored the largest publishing companies and their catalogs.

The inequity of this method of monitoring and collection is laid bare by the difficulties of SoundExchange<sup>3</sup> in distributing royalties to its members. In 2008 SoundExchange collected \$173 million in income and was unable to distribute over \$60 million dollars presumably because it had not yet identified or registered copyright holders entitled to collection of those funds.<sup>4</sup> This is nearly 35%. What this shows is that technology exists to more accurately audit and collect the royalty data necessary (what has been called “census” monitoring), but the lack of participation by all but the most astute (and usually largest) rights holders keeps the distribution inequitable. Because these performance rights societies structure themselves as non-profits, and because they have monopolies or near monopolies on royalty collection, a huge portion of rights holders, namely the middle and lower class are underserved or not served at all, even when they become members of these societies. Most civilized nations and signatories to the Berne Convention have government run societies for the collection and distribution of performance royalties. With existing technologies, accurate monitoring, collection and distribution of royalties by the government is not only possible but removes the spectre of payola and favoritism that currently exists toward larger rights holders and the strongest lobbies.

## **II. Piracy**

Piracy is a natural extension of the growing inequity described above. I would equate piracy to speeding on the highway. Most people know it is illegal, but even those in law enforcement probably engage in it on occasion. It is a matter of convenience and moral acceptance. This is a situation where you cannot “unring the bell” as they say. In order to combat speeding, speed limits have increased over time as automobile and highway safety technology has increased.

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<sup>1</sup> SESAC, as a for-profit enterprise is not considered for these purposes

<sup>2</sup> These performance rights organizations take a small sampling of radio stations, venues and other performance outlets and then extrapolate the data to determine the amount of royalties distributed to their members.

<sup>3</sup> SoundExchange has been authorized as the sole collection society for digital performances of music over the internet and satellite radio.

<sup>4</sup> SoundExchange Annual Report for 2008 (<http://soundexchange.com/about/the-numbers/>).

Piracy of intellectual property is morally wrong and statutorily wrong. Adding more “piracy police” is not going to solve the problem. Attempting to enforce a “piracy speed limit” that the government has no practical ability to enforce is doomed to fail. Instead, we should be focusing enforcement on technology developers and educate rights holders how to register and validate their rights. As internet companies which facilitate piracy (i.e. file-sharing and torrents) gain consumers, it is impossible for them to remain below the radar of census reporting technology that currently exists. While we remain cognizant of the Supreme Court’s decision in Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) and its progeny related to file sharing issues, an analysis of the use of the technology must be undertaken for non-piracy commercial uses. However, as is occurring now with negotiated royalty settlements for varying sized companies, entities of a certain size or notoriety need have threshold requirements for reporting and paying royalties, not to a private authority but to an entity with the legitimacy of the IRS.

Quite simply the government needs to audit legitimate uses and piracy, not to punish the wrongdoer, but to reward the rights holders equitably.

### **III. Barriers to Enforcement**

The cost to stop infringement at the individual level is not an option for rights holders, large or small. The cost in time and dollars is too great. Even if the rights holders have standing to bring an infringement suit under the Copyright Act, the cost of bringing such a suit usually is thousands or tens of thousands more than the damages and too great a risk except in the most extreme circumstances. Further, the ability to find all of the potential defendants is too time consuming and expensive as well.

Additional barriers to entry for self-help enforcement by rights holders are:

1. the lack of education of creators and infringers on these issues;
2. the cost of competent legal advice and services
3. the complexity of publishing and royalty accounting.

All of these barriers deter the creators from actively enforcing their IP rights and, instead they put their trust in the hands of the entrenched businesses who have historically performed that role. As was described above, this system simply does not and will not work in the internet age.

### **IV. Solutions**

In my opinion the problem is not with piracy, but with a lack of foresight. Why are we choosing to react to this paradigm shift when we can be proactive? My belief is that copyright is no longer a one size fits all proposition. There are “stages” of copyright and there should be levels of copyright enforcement.

Stage 1. Basic Copyright. A copyright is created upon “fixation in a tangible medium of expression”. The creator has all of the existing rights currently;

Stage 2. Published Copyright. A work that is commercially available over the internet or at retail (other than on their own social network or webpage) regardless of the number of downloads or streams;

Stage 3. Commercial Copyright. A work that has been commercially published in exchange for a sum of money (tbd), or has achieved a certain number of downloads or streams.

One possible way to enforce multiple stages of copyright, while I shudder to even say this as a lawyer, is to create a tiered civil IP court, similar to a separate bankruptcy court, family court or conciliation court/civil court system. This will allow people to obtain self-help in enforcement of smaller claims rather than have to file a claim in Federal District Court. Unfortunately, I do recognize the issues of international law and the globalization of internet use and I do not have a tenable solution for this problem.

Criminal enforcement should be based on an education model where children (and adults) are taught early on what copyright is and what infringement is. Like speeding, morally most people will try to remain law-abiding. Making an example out of large infringers may deter those with a penchant for criminal enterprise. But like any societal problem, there is no way to lump all infringers together and treat them equally.

## **V. Combined with leveling the playing field.**

As an artist, it is gratifying to know how many streams, downloads, and sales of my work have occurred. It is my decision as a rights holder whether to give away, sell or license my work, which thereby affects the value of my copyright. If I were even moderately convinced that there was a fair and unbiased auditing, royalty collection and payment system in place that accurately represented my level of commercial success, I would be less likely to begrudge those who are receiving a larger, but fairer portion of the pie.

Respectfully submitted,

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