

**BEFORE THE
U.S. PATENT AND TRADEMARK OFFICE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION**

**Request for Comments on Department of
Commerce Green Paper, Copyright Policy,
Creativity, and Innovation in the Digital
Economy**

Docket No. 130927852-3852-01

POST-MEETING COMMENTS OF THE HARRY FOX AGENCY, INC.

The Harry Fox Agency, Inc. (“HFA”)¹ respectfully submits these post-meeting comments in response to the Request for Public Comments and Notice of Public Meeting, 78 Fed. Reg. 61337 (Oct. 3, 2013) (the “Request for Comments”) and the Notice of Extension of Public Comment Period, 78 Fed. Reg. 78341 (Dec. 26, 2013) concerning the Department of Commerce’s Internet Policy Task Force (“Task Force”) Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy (“Green Paper”).

HFA’s Interest in this Proceeding

HFA is one of the nation’s leading providers of licensing, royalty calculation and royalty distribution services for the music industry. HFA has longstanding relationships with publishers, record labels and digital music services, all of which use HFA as their comprehensive source for, among other services, mechanical licensing, copyright research, and rights administration services. In addition, HFA’s licensing and administration services have expanded beyond audio

¹ HFA is a subsidiary of the National Music Publishers’ Association. HFA participated in the NMPA’s initial comments concerning the Green Paper and supports the joint reply comments submitted by the The American Society of Composers, Authors & Publishers, Broadcast Music, Inc., the Church Music Publishers Association, the Nashville Songwriters Association International, the National Music Publishers’ Association, and the Recording Industry Association of America, Inc. and SESAC, Inc.

only, digital and physical mechanical uses to include the licensing and administration of the digital exploitation of lyrics, tablature, audiovisual uses, ringtones, digital background music services and more.

HFA is well known as an agent for tens of thousands of music publishing clients and self-published songwriters. In this role, HFA issues licenses and collects and distributes royalties for the use of copyrighted musical compositions. While HFA continues to manage its 94-year-old business, HFA has developed an additional service business under its Slingshot brand.

Slingshot is a suite of copyright, licensing, royalty distribution, technology and consulting services offered to users of copyrighted musical compositions and is designed to facilitate the administration of intellectual property rights. Depending upon each customer's needs, HFA's Slingshot services handle a portion or all of the end-to-end licensing process, from preparation of a licensing agreement, data matching and copyright research services through to licensing, royalty reporting and royalty distribution. HFA's Slingshot services also administer direct licensing agreements among publishers and digital music service providers whether or not the publishers are represented by HFA and whether or not the license agreements between the parties are blanket catalog licenses or require issuing track-by-track licenses.

In support of these Slingshot administration services and our publisher clients, HFA continuously enhances its database. HFA, therefore, is a primary source for real-time sound recording and publishing data. This data, complemented by dynamic business and payment rules, establish the foundation upon which HFA's copyright management services are built.

HFA provides its publisher clients and Slingshot customers with technology solutions that increase revenue and enhance productivity, including flexible backend financial systems and databases, web-based licensing applications, online payment options, and royalty distribution systems. HFA is a founding member of the Digital Data Exchange ("DDEX"), an international

organization whose fundamental mission is to develop communication standards to support the distribution of digital content. Additionally, for the past four years, HFA has been recognized by InformationWeek on its Top 500 Relentless Innovators list.

HFA's rights administration solutions have placed it at the fulcrum of the ever-changing music distribution landscape and enabled it to develop productive relationships with innovative music users. As a result, HFA is both very interested in participating in the Task Force's discussion regarding ways to encourage the success of music businesses that operate online and believes it is well situated to contribute to such a discussion. This comment, therefore, is intended to provide a more complete picture to the Task Force of the role licensing plays in the music distribution ecosystem than has been set forth to date.

Issues of Concern to HFA and its Clients

Any Fix to Music Licensing Must Ensure Proper Payment to Rightsholders

A. Licensing is Part of a Process to Track Usage and Ensure Payment, Not an End in and of Itself

The Green Paper and commentators thereto, focus on the issue of "fixing licensing"² as the solution that will pave the way for a robust and successful digital music marketplace. The

² See, e.g., See U.S. Department of Commerce, Internet Policy Task Force, *Copyright Policy, Creativity, and Innovation in the Digital Economy* (Green paper, July 2013), 77-99, available at <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf> (hereinafter "Green Paper"); Alan Barnes & Lee Knife, *Comments of Digital Media Association in response to USPTO & NTIA, Request for Comment on Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy*, 4-6, submitted Nov. 13, 2013, available at http://www.uspto.gov/ip/global/copyrights/comments/Digital_Media_Association_Comments.pdf (hereinafter "Comments of Digital Media Association") (discussing streamlining the Section 115 license for the benefits of innovation in the industry); Casey Rae, *Comments of Future of Music Coalition in response to USPTO & NTIA, Request for Comment on Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy*, submitted Nov. 13, 2013, http://www.uspto.gov/ip/global/copyrights/comments/Future_of_Music_Coalition_Comments.pdf (addressing current frictions in music licensing and providing possible approaches to dealing with these issues); Mark Cooper, *Comments of the Consumer Federation of America in response to USPTO & NTIA, Request for Comment on Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy*, 94, submitted Nov. 13, 2013, available at http://www.uspto.gov/ip/global/copyrights/comments/Consumer_Federation_of_America_Comments.pdf (stating that policy makers should strive to reform mass market licensing in a way that supports the digital market).

focus on licensing is understandable from the perspective of music users. Digital music services want protection from liability for distributing as broad a catalog of music as possible.³ A license provides such protection. Indeed, significant challenges exist when digital music services seek such protection for large catalogs or recordings that include not only commercial releases by major and independent labels, but also the ever growing supply of releases by self-managed artists and amateurs. Commentators and participants in the Roundtable discussions, however, placed limited emphasis in their statements on the fact that licensing is just the first step in a process intended to result in accurate payment by users to songwriters and music publishers for each and every use of their songs. To the extent the Task Force were to recommend any legislative action intended to address instances where marketplace solutions are constrained by law, it must ensure that the incentives to track the usage of music, find the owners of that music, and accurately pay the owners of that music are not removed or diminished.

The obstacles encountered by digital music services in obtaining liability protection are described generally as resulting from the fact that (i) mechanical licenses (*i.e.* licenses for the use of a musical composition to make and distribute a recording) have traditionally been granted on a work-specific, track-by-track basis and not via a blanket license, (ii) a single musical composition often has multiple owners, (iii) collective licensing organizations do not have the authority to license multiple rights on behalf of their affiliates, and (iv) “the lack of publicly available, accurate, reliable and comprehensive music publisher ownership data.”⁴ In light of these complaints, digital music services seek a one-stop shop (or a handful of large shops) where they can obtain guaranteed, universal, up-to-date information regarding every song currently

³ See, e.g., *Comments of Digital Media Association* at 2-8 (stating DiMA’s main focus for the past decade has been to streamline the music licensing process to make more content legally available online).

⁴ *Id.* at 4–5.

within copyright protection and license efficiently every such song.⁵ This focus on licensing efficiency with the goal of providing consumers legal ways of accessing music online is laudable, but is only part of the story.

Traditionally, mechanical licenses have been issued on a track-by-track basis for a simple reason: to link a specific sound recording to a composition so that each and every distribution of the recording results in a payment for the use of the song. Performing rights organizations, on the other hand, have traditionally relied principally upon survey-based reporting and payment, but are increasingly using census-based approaches to distribute royalties received for online uses of music.⁶ In the digital age, music publishers justifiably expect that each distribution of a recording will be tracked and that they will be paid properly. Fortunately, ever evolving technology and a focus on improving the quality and exchange of music data has enabled the detailed tracking of digital uses of music, the accuracy of which improves on a daily basis.

Licensing digital music services, therefore, is just the first step in a process characterized by massive exchanges and matching of data with the goal of quantifying music usage, identifying ownership and executing payment instructions. Set forth below is a general description of that process.

B. The Licensing and Royalty Payment Process Requires Partners to Exchange and Update Data on a Continuous Basis

The Task Force must have a complete understanding of the process that currently results in the licensing of digital music services and payment to songwriters, music publishers and other royalty participants in order to make informed recommendations. It can be summarized at a very general level in five steps:

⁵ *Id.* at 4–6 (discussing the need for a central hub of licensing information and a streamlined licensing system in order to make a larger number of musical works available to the public.)

⁶ See ASCAP Payment System, Keeping Track of Performances, ASCAP.com, available at <http://www.ascap.com/members/payment/keepingtrack.aspx>.

1. Musical compositions catalog registration and management

The initial step in the process is for an administrator, such as HFA or a music publisher itself, of any existing or new database of songs to ingest and manage, on a daily basis, song catalog additions, including ownership claims and disputes, business rules for usage and rules regarding payment, such as letters of direction, information about estates and heirs, and, of course, government levies and garnishments.

2. Licensing or Matching

Next, the digital music service and the owner or administrator of musical compositions exchange millions of lines of data regarding the sound recordings in the digital music service's repertoire and the compositions in order to generate matches linking the sound recording to the musical composition. Once a match is established, a license is issued.

3. Updating licensing or matching results

Following the original match, the data exchange is repeated regularly so that the daily updates to the database of musical compositions are reflected in the existing licenses or matching results, and so additional licenses or matches can be generated.

4. Usage and Royalty Calculation

Once the digital music service or its administrator has received and ingested the license or matching results, those results are linked to its usage tracking system. The digital music service or its administrator then calculates the royalties due for the period and allocates royalties to particular compositions based on the usage and license or matching information.

5. Royalty Reporting and Distribution

After the royalties are calculated and allocated to particular songs, the digital music service or its administrator (a) determines whom to pay with respect to each song, (b) generates the related royalty statements, (c) transmits those statements to the owners or administrators of the relevant songs, and (d) pays the appropriate party, which may not be the owner or administrator depending on instruction, on the terms of the license or match information currently in its or its administrator's system.

As is clear, each step in the process described above requires establishing a relationship, obtaining, formatting and exchanging sound recording, publishing and usage data, generating a match, updating that data on a regular basis and then repeating the process in order to calculate and pay royalties accurately at any given moment in time. Even the song database, which is often portrayed as a large, but relatively simple list, is an ever changing collection of information that requires constant data exchanges with copyright owners and others with claims to royalty payments. What is also clear is that whether the matching process takes place at the beginning of the process as part of track-by-track licensing or later in the process after some sort of blanket liability coverage has been granted, the matching process is necessary to executing accurate royalty payments. Moreover, the matching process will only be successful if all parties involved in providing and exchanging data have incentives to do so in a timely and accurate manner. Otherwise, out of date or incorrect data (whether sound recording, publishing or usage data), information exchange problems, or incorrect calculations will result in songwriters and music publishers not being paid properly.

Lastly, the type and scope of recordings in a digital music service's repertoire can meaningfully affect the success of the data collection, exchanges and matching involved in the licensing and payment process. Before any sound policy decisions could be considered, the

Task Force would have to know the relative usage and royalties generated by commercial releases by major and independent labels as compared to the ever growing supply of releases by self-managed artists and amateurs, which are widely available on digital music services. Rights management expertise present within large record companies and music publishers may simply not exist in the amateur market. For example, if 90% of usage and royalties are associated with one to two-million tracks out of the 30 million or more tracks offered by many digital music services, and those tracks are well managed within the existing data and collection and exchanges protocols associated with the licensing and payment process, then the scope of the problem identified in the Green Paper would be vastly different than the one posited by many commentators. Failure to understand the proper scope of the problem could affect the success of any solutions. DiMA appears to be best situated to supply such information.

C. The Market Solution is the Best Solution

The Green Paper recognizes the great progress made by the creative industries, with their online distribution partners, in fulfilling consumers' expectations that creative works be widely available online.⁷ The growth in online services providing widespread, legal access to music, in HFA's opinion, is the result of market driven solutions taking hold as the online music marketplace matures. Moreover, as the market continues to spur the development of new music distribution models, it will incentivize the development of solutions to the complexity of providing liability coverage to digital music services and accurate payment to songwriters, music publishers and other royalty participants.

Several commentators have noted the development and growing implementation of DDEX standards for the exchange of music related data. DDEX was created as a result of market demand for a standardized data solution. We expect DDEX's work to continue. In

⁷ *Green Paper* at 77-80.

addition, Google, Inc. provides one of the most significant examples of such a solution in its comments to the Green Paper. As Google puts it “Content ID has been a win-win-win solution for YouTube, copyright owners, and YouTube users. The system has created a new source of revenue for copyright owners, as well as for YouTube.”⁸ In other words, YouTube had an incentive to make a substantial investment in Content ID because it saw a new source of revenue and understood its users would have a better experience because they would not have to seek out licenses on their own.⁹ Publishers partnered with and licensed YouTube in order to access the new source of revenue offered by its distribution platform. Although the Content ID system may not be perfect, all involved are working diligently to make sure that revenue flows to the owners and creators of works included in videos uploaded to YouTube.

Conclusion

Barriers that inhibit the successful launch and operation of digital music services should be removed in order to provide consumers with access to the best, most creative music our songwriters and artists can provide. The development of new music distribution models and their concomitant revenue opportunities will incentivize the development of solutions to the problems of providing liability coverage to digital music services and accurate payment to songwriters, music publishers and other royalty participants. These solutions may or may not involve blanket licensing, but they will always require that users and creators of music partner to provide robust data collection, data exchange, matching and, ultimately, accurate royalty payment. As a result, any proposals intended to address instances where marketplace solutions are constrained by law must ensure that the incentives to track the usage of music, find the

⁸ Pablo Chavez, *Comments of Google in response to USPTO & NTIA, Request for Comment on Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy*, submitted Nov. 13, 2013, 3-4, http://www.uspto.gov/ip/global/copyrights/comments/Google_Comments.pdf.

⁹ *Id.*

owners of that music, and accurately pay the owners of that music or other royalty participants is not removed or diminished.

Respectfully Submitted,

The Harry Fox Agency, Inc.
40 Wall St., 6th Floor
New York, NY 10005

Contact:
Christos P. Badavas
Deputy General Counsel, Legal and Regulatory Affairs
cbadavas@harryfox.com