

From: [REDACTED]
To: [FN-OMB-IntellectualProperty](#)
Cc: [REDACTED]
Subject: Beggars Group Response to the Request of the Intellectual Property Enforcement Coordinator for Public Comments Regarding the Joint Strategic Plan
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Attachments: [obama_administration_response.pdf](#)
[ATT167294.htm](#)
Importance: High

Dear Ms Espinel

Please see the attached.

Yours sincerely

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Beggars Group

Beggars Group Response to the Request of the Intellectual Property Enforcement Coordinator for Public Comments Regarding the Joint Strategic Plan

The Copyright Alliance and A2IM (the U.S. independent music label trade organization) have informed us of this welcome invitation from the Obama Administration to share our thoughts on our rights as a creator.

- **Who We Are:**

We are a leading independent recording company headquartered in the UK but with a significant presence in the USA. We employ about 40 people in the USA and recently had a number one album in the USA, “Contra” by the US artist Vampire Weekend. We invest in recording artists principally from the USA and the UK.

Our view is that digital piracy represents a very serious threat to the music industry and all participants in the music industry, and we believe that state based intervention is the only way to effectively deal with that threat.

Physical record sales are in steady decline and if the digital market does not increase sufficiently to offset those losses, one by one recording companies such as ourselves could go out of business. Certain sectors applaud the decline of recording companies, and consider them to be an anachronism in today’s digital and disintermediated world. Artists and their managers themselves however still value the investment, support and infrastructure recording companies bring to them, as they have skills that are not easy to replicate and are willing to invest in ways that financial institutions or private funds would not contemplate.

- **Problems:**

In our opinion, aside from the enabling technology (which we can do nothing about), the principal reason we have arrived at this point of very widespread digital piracy is the legislation of the 1990s which provided technology companies with immunity from prosecution for copyright infringement: the DMCA safe harbour protection.

We appreciate that the reasoning at the time was that telecommunication companies should not be responsible for what happens over their networks, just as telephone companies should not be liable for what people say to each other over their telephone lines, but we do not believe that that analogy has been borne out by subsequent events.

The operators of telephone lines are a very different proposition to broadband operators or companies such as Google. The way the Internet has developed since that legislation was introduced has clearly shown that broadband operators and digital services companies have

far more control and visibility over what happens on their networks than telephone companies ever did.

The problem with the safe harbour legislation is that it encouraged entire new businesses to be built under the protection it afforded. The classic example of this was YouTube, which has always operated under the umbrella afforded by the DMCA and has structured its business very precisely on that legislation. Relying on this umbrella, these companies have been reluctant to license copyright owners.

These new businesses have grown into enormous companies with revenues equivalent to the GDPs of small countries. With their vast size, which dwarfs the music industry, they are able to push to the very limits the copyright laws and spend millions of dollars in litigating any claims.

The result is that there has developed a huge divergence between the content creators/investors on the one hand and the persons who actually earn revenues from the exploitation of the content on the other, i.e. the broadband operators and the user generated content websites. Their interests are completely at odds with each other, when there should really be far more of an overlap in their interests since the technology companies are massive users, compilers and exploiters of content but create none themselves.

Consumers have tended to side themselves with the Googles and broadband operators, who have provided for free the content of owners who have not given any permission for such use. The ability to access on demand all the music you could ever want for free is clearly very attractive. And unfortunately, industry attempts to take or threaten legal action against consumers (which we have never supported) has pushed public opinion further away from the music industry, although given the protection afforded technology companies by the safe harbour legislation it is understandable why the customers were targeted by content owners in their attempts to reduce digital piracy.

And national governments have so far been ambivalent on this issue, presumably influenced by public opinion, the lobbying of the very powerful technology companies and by the arguments of the so called “freetards” who believe everything should be free online.

In addition to the protection afforded by the DMCA, we have a very serious problem with the way the safe harbour provisions in the DMCA places the onus on the copyright owner to find the infringement before the technology company needs to take action. We, like all SMEs, have very limited resources, and we simply do not have the manpower to send takedown notices to every site with infringing copies of our recordings.

The only way effective action can be taken is via a technological or systems based solution at source, implemented by the technology company. But because of the law as it stands there is little incentive on technology companies to implement such solutions. And some such companies provide content filtering software but only to content providers who have first signed up to onerous terms with them.

The other side of the coin to piracy is the licensing of new innovative digital services that will provide consumers with a service that persuades them to switch from free. We have

been licensing such services for over 10 years. The Association of Independent Music (a UK organisation representing independent record labels) licensed the original Napster service, at the time it was trying to become a legitimate service, and we fully supported that. Looking back at that time, we think that even certain people within the major record companies would now accept that killing off the original Napster by the majors through litigation was a mistake (and of course one of the majors (BMG) was supporting and funding it), since it spawned a whole new set of illegitimate music services that used different technologies to evade legal sanction. And the key was that the original Napster was trying to become properly licensed. This has been a feature unfortunately of the decade: the major record labels have been incredibly loath to license new services. Independent record labels, as natural licensors, have in marked contrast been very supportive of the new services.

In our view, the major record labels' perspective has been that they must retain their collective hegemony over the industry, even at the cost of damaging the emerging digital market. That hegemony is largely premised on a business model based on physical record sales, with few channels available to market, large infrastructures required for distribution, and dominance of retail and promotion (radio, television and magazines) space. New digital services have obviously posed a threat to that hegemony and the majors' response has been to either not license the service and litigate it or to set up their own service, owned and controlled by them, thus maintaining their power and control over the market. The services that were formed by the majors to date have been unsuccessful (e.g. Pressplay) and so a third response has been to license key services (e.g. YouTube) or to enter into joint venture deals with digital services (e.g. Myspace Music and Vevo).

From what we understand, the majors' licenses and joint ventures with the digital services contain terms that are designed to maintain their hegemony over the music market. For example, a common provision in these deals is that the digital service must give the major licensor the same retail space or web presence on the service as is commensurate with (or even greater than) its market share (which will be based on overall market rather than just digital thereby inflating the larger companies' digital shares) and which in some cases will be a fixed minimum percentage.

This presents problems for us as an independent record label. For a start there is obviously the problem in getting shop window space where the largest proportion of sales are transacted, and secondly it means that the digital services, having concluded their licenses with the majors, treat the other licensors as the place where they can make back some margin, resulting in far poorer terms being offered to non-major record labels. An example of this was YouTube. Before it was purchased by Google, licenses were concluded with all the major record labels. The terms of those licenses were never made public but we believe they involved large upfront payments in return for a waiver of claims. No independent label we are aware of agreed licenses on such terms, and many still remain unlicensed on YouTube. From YouTube's perspective, having secured the major label licenses, they could sit back and use the billion dollar litigation fund we understand they have to fight any claims that any remaining content owners were brave enough to try.

We in contrast are very open to licensing new digital services. As mentioned we licensed the original Napster through AIM, and we currently have over 100 digital licenses. These range from standard download a la carte services such as iTunes to advertising supported services

such as Spotify. We licensed eMusic, a subscription service begun in the USA over 7 years ago. This is a service which the majors (with the exception of Sony and Warner who recently started providing them with their catalogue releases) steered clear of on the basis that it made available unprotected mp3 files, which format the majors only finally reconciled themselves to in the last couple of years.

- **Suggested Solutions:**

- We recommend a wholesale revisiting of the safe harbour legislation to make the interests of the technology companies more in line with the protection of copyright and with the interests of the content creators and investors. We are aware of and indeed support the various legislative initiatives which are attempting to deal with digital piracy (e.g. in the UK and France), but those initiatives seem fixated on the liability of the consumer rather than the technology companies, who are the ones with the power and control to really change the market. Only when the technology companies' interests are more aligned with creators and copyright owners will any serious inroads be made into decreasing digital piracy.
- In order to tackle the ongoing problems digital services have in licensing from the major labels and that smaller labels have in licensing the digital services, we would advocate greater transparency in deal making. We are aware of competition law concerns, but it would be beneficial to digital services and indeed all players if there was greater visibility over the licenses being concluded, which would hopefully lead to greater standardisation of terms. At the moment the terms of these deals are confidential but we believe that in order to get the market to grow more sunlight is required in this area.
- We also believe that the USA should relax the laws on competition to allow single licensing entities to operate with more freedom. By way of example, we were partly instrumental in setting up Merlin, a body which was designed to obtain for independent labels the kinds of digital licenses and settlements previously only available to the majors. But because it represents a collection of many separate labels, rather than the one corporate person, it is hemmed in and restrained by competition law to the detriment of its effectiveness. Greater flexibility could be accompanied by greater transparency, since the independent sector as a whole is far more comfortable with greater openness.

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