



Via Email (intellectualproperty@omb.eop.gov)

Ms. Victoria Espinel, Esq.
United States Intellectual Property Enforcement Coordinator

Re: Strategic Plan for Dealing with Intellectual Property Infringement

Dear Ms. Espinel:

Microhits is an independent music publishing company that I founded in 2000. Microhits was founded in part to take advantage of the changing realities in the music industry brought about by the convergence of new and old media. The name Microhits was based on my view back in 1999 that the impact of new technology on the music industry would lead to a fragmentation of the market e.g. a greater number of artists would have more success than in the past but on a smaller scale. This is the situation that intellectual property holders find themselves in today. Part of it is a result of the technological evolution but another major detrimental side effect has been the lack of copyright enforcement and compensation by all of the new industries that exist due to the demand for the copyrighted material e.g. music, film, tv, videos, and games.

Given my legal background, creative music industry background, extensive experience dealing with international and domestic copyright issues at a major music company for four years, then dealing with the same issues for ten years as the chairman of an independent music company, and as a songwriter and musician myself, I am uniquely positioned to comment on the state of the industry and where the problems and solutions to the recurring problems including the massive copyright infringement that is decimating intellectual property creators and holders throughout the world. What I have witnessed over the past decade is the systematic misappropriation of the music industry's copyrights that have directly benefitted other industries. Entire new industries, technologies, and companies have been built on the back of our copyrights, in most cases, without any compensation to the copyright holders at all.

So it is certainly not news nor is it surprising that the music industry is in a state of severe decline. Gross revenue for the music industry is down from \$14.6 billion in 2000 to \$6.3 billion in 2010.¹ It's not because our product has become outdated or has been replaced by an improved form of entertainment not involving our copyrighted material. Instead what we have is our copyrights being ensconced in many amazing new technologies- without compensation. High-

¹ Per CNN citing Forrester Research in a from U.S. music sales and licensing plunged to \$6.3 billion in 2009, according to Forrester Research. In 1999, that revenue figure topped \$14.6 billion.

speed internet access is of little use without music, film, tv, videos, or games and yet the telecommunications industry and ISP's refuse to take any steps to protect the rights of intellectual property rights holders and instead ignore the infringement of intellectual property on their networks and/or abuse the safe harbor provisions of the DMCA. In economic terms, the new technologies are parasitic. These technologies such as software, hardware, websites, or other intellectual properties incorporate our intellectual property. The result of the new technology has been the ongoing systemic destruction of copyright because intellectual property holders' basic fundamental copyrights are not being protected. It's not just companies like Napster, BitTorrent, Kazaa, YouTube, Myspace that have or attempted to build billion dollar market capitalizations on the back of copyright owners but the list also includes telecommunications companies (internet connectivity/multimedia enabled cell phones demand driven by music demand), computer manufacturers, mass media storage device manufacturers, software developers. The driving force of demand for these new technologies are music, film, tv, games, and related content and yet none of these industries are compensating intellectual property rights holders.

In 1995, during law school, I authored a note entitled "Digital Phonorecord Deliveries and the Public Performance Right: Hey Man, Don't Sue Me I only Bought a Record". In that note I projected two future models for the music industry. One was people downloading songs off the internet and burned them onto cds. The second, was a kiosk that had access to a vast digital library of songs where people could just order cds or compilations on the spot. Fifteen years later, both of these models are available, and one has become the standard model.

Intellectual property is driving the growth and demand of the telecommunications industry, computer hardware manufacturers, iPhones, Ipods, Mp3 players, multi-media phones, high-speed internet etc. The degree to which intellectual property is driving all of these major industries is not reflected in the level of protection offered to intellectual property or in the license fees being collected by intellectual property holders.

As a leader in the development and monetization of intellectual property rights the U.S. must also be a leader in the protection of one of its most vital and cherished industries. There has been an inexplicable disconnect between industries created and supported by music copyrights and compensation of creators and copyright owners and each of their representatives for the use of that intellectual property. We are encouraged that this taskforce has been created and that you have been appointed to address the destruction of the music and other intellectual property based industries.

Microhits' Strategic Plan for Dealing With Intellectual Property Infringement:

There are five simple steps which are required under the Copyright Act and are absolutely necessary to preserve the U.S.A.'s leadership in the creative industry and, more importantly, to save the music, film, tv, and video industry. When I say simple, I mean simple in that the solutions to the problems are clear. What is unclear is whether the powerful interests and their respective lobbyists can be forced to face the reality that the music industry and other intellectual property holders are the primary drivers of the demand for their services and must be protected

and compensated accordingly. Does the now miniscule \$6.4 billion music industry stand a chance against the \$1 trillion telecommunications industry? Who knows.

The following changes must be made to save the music industry:

1. Codify ISP Liability: “Substantial Non-Infringing Use” test for new technology / websites / software / hardware must be replaced by “Substantial Infringing Use”. The Safe Harbor provisions of the DMCA are being abused. We have serial abuse by websites who are using copyright infringement protected through the abuse of the Safe Harbor provisions of the DMCA as part of their business model. Where there is “substantial infringing use” each party in the chain of such infringement must be required to take reasonable steps to prevent infringement, which would include the following:
 - a. *ISP Filtering Infringing WebSites* e.g. BitTorrent / Pirate Bay etc.
 - b. *ISP Filtering Unlicensed Copyright*
 - c. *Strict liability for ISPs for copyright infringement* taking place on their networks. If the ISPs can't be held responsible then copyright owners should be given access to their networks to monitor for unlicensed copyright material.
 - d. Regarding ISP Arguments that they can't be held responsible for infringing activities of their users: If there was an apartment building next to a bank and a tenant leased the ground floor apartment next to the bank and that tenant proceeded to dig a tunnel into the vault of the bank next door and granted access to their apartment/ bank vault to every criminal throughout the world, wouldn't the landlord have an obligation to evict the tenant and/or lock the door? That is all that we are asking of the ISPs. It's not overly burdensome and can be done with the click of the mouse. This action must be taken and it shouldn't require a small company like Microhits to spend hundreds of thousands of dollars in attorney's fees to do so.
2. Amend the Audio Home Recording Act to Cover Computers / Hard Drives / Memory Cards / MP3 Players / USB Cards / Audio Recording Software. The Audio Home Recording Act must be amended to include all storage devices capable of creating private copies of copyrighted material via a computer / cellphone / internet e.g. all computer hardware storage devices media manufacturers computers USB Media, Portable Storage, Re-writable Media (DVD-R/CDR/Blu-Ray Re-writeable), Hard Drives, etc.
3. Require DRM in All New Releases and all New Hardware: Robust Copyright Protection and Adaptable Digital Rights Management along the lines of Blu-Ray Digital Rights Management must be built into all storage devices and media.
4. Statutory Royalty for IP Holders Based on Gross Revenue of IP Based Websites: The Copyright Royalty Board should also set royalties to be paid to all copyright owners (not just major companies) as a percentage of gross revenue of intellectual property based web sites. In the U.K. mechanical royalty rates are based on the retail or wholesale price of a CD. If the royalty were to be based on a websites “net” income there would never be a royalty due. Not because they're not earning income but because in all probability it would be structured to avoid any net income. So far only the majors have had enough bargaining power or leverage to extract any sort of concession from a handful of the largest music based web sites e.g. deals with Myspace and Youtube are in place for most of the majors. Generally speaking, nothing is in place for the independents. Independent

companies have been largely ignored. The administrative burdens of pursuing claims against each web site or separately negotiating agreements with each website are burdensome could more efficiently and effectively met through a compulsory copyright office licensing scheme and creates an unfair advantage for major companies who are able to derive revenues from these additional sources that independent companies are unable to access.

5. Amend the “Safe Harbor” Provisions of the DMCA: The DMCA must be amended to remove the “safe harbor” protection for websites and ISP’s that are habitual/repeat infringers. A copyright owner should not be required to send a new notice and takedown under the DMCA each day to the same website for a hundred or a thousand separate violations. That is impossible.

Make no mistake. If the changes listed above are not made there will not just be an additional decline in the music industry the music, television and film industries will no longer be one of the U.S.A.’s most influential exports. What will remain will be an industry populated by amateurs, hobbyists, pirates and by two or three major media companies that will control 90% or more of the market. However, if these changes are made they will lead directly to a healthy independent media industry, increasing U.S. exports, and will insure that future generations of artists will be able to pursue their vision and make a living.

Industry Consolidation:

The cannibalization of the major music companies is not a sign of strong competition or a healthy industry. It means that the only means for growth has become through downsizing staffs and the inefficient marginalization of existing catalogs through extreme cost-cutting and service cutting. We’ve seen it with the merger of Sony/BMG and BMG Publishing/Universal Music Publishing and now with the possible merger of Warner and EMI. These are not the signs of a healthy industry. These are the signs of decline.

The “Free Music” Model:

Free music is not a business model. It is a near death sentence for authors and companies that create, develop, support, market, promote, protect and maximize the value of intellectual property. The “free model” or variations thereof are embraced by those with no understanding of the historical function and amazing success of the United States’ Copyright Act up until 2000 in promoting and protecting the arts. Free music is an adolescent fantasy supported by those who simply want something for nothing. Who can blame them? There is not a kid on this planet that would choose to buy a candy bar if they can get it for free. If free music is readily available via the internet why would a child, adolescent, or child-like adult ever pay for music? Likewise there is no multi-national conglomerate that is a leader in a trillion dollar industry such as the telecommunications industry that will pay a penny for copyrighted material being wilfully infringed on a daily basis on their high-speed internet networks when they can use it for free.

Free is an insult to the Founders of the United States and to every author, and creator that has ever lived.

Direct Economic Impact:

Microhits catalog has increased from a few hundred copyrights in 2000 to several thousand copyrights today. Despite a recent four hundred percent (400%) increase in the size of Microhits catalog income is up only incrementally year-to-year over the past few years. Translated we are working three times as hard just to stay at the same basic level. This is true of both majors and independents. Currently, Microhits staff includes three people. Myself, handling business affairs and creative, a film/tv person, and a royalty administrator. Last year we had two film/tv people. If piracy were eliminated and we were compensated for all the uses of the songs and recordings in our catalog we project that income would, at a minimum increase by 50% if not double. An accurate estimate of what our existing catalog should be generating now is to look at what our catalog would be generating back in 1998 based on an inverse adjustment of the decline from 2000 to 2010. That would give us income of nearly double what we are earning today. With the changes suggested we would easily be able to double our workforce, which would also enable us to grow much more rapidly than we can in this environment and would likewise increase our international income and exports.

Despite all of these problems, I am still optimistic that President Obama, as a music lover, will take the necessary steps to preserve, protect and grow what is undoubtedly one of the greatest natural resources of the United States of America, Music.

Thank you for the opportunity to discuss these issues.

Sincerely,

A handwritten signature in black ink, appearing to be 'A. Barlo', enclosed within a hand-drawn oval border.

Anthony G. Barlo, J.D.

About Microhits

Microhits Music Corp. is a leading independent music company founded in 2000 and based in Los Angeles. Songs and recordings in Microhits catalog have sold over 100,000,000 copies. Microhits catalog includes songs recorded by Donny Hathaway, Alicia Keyes, T.I., Missy Elliott, Harry Connick, Jr., Christina Aguilera, Muddy Waters, Aretha Franklin, Billie Holiday, Marvin Gaye, Sam Cooke, and many others as well as new artists such as The Morgansterns, Frankmusik, Vanessa Hudgens, Cheetah Girls, Imani Coppola, Rollo (Dido's producer/brother and member of Faithless) and others. Microhits catalog includes that of Rock 'n Roll Hall of Fame inductee Ralph Bass (discovered/produced James Brown, Etta James, Aretha Franklin, Muddy Waters and many others) and 10 time Academy Award nominated and Emmy Award winning composer Walter Scharf. Microhits also controls many important original master recordings including "West Coast Poplock" by Ronnie Hudson (song is sampled in Tupac's 20X platinum "California Love"), "I Wanna Be A Cowboy" by Boys Don't Cry (Top 10 1985), "The Fanatic" by Felony (#42 in 1982), "Land of 1,000 Dances" by Cannibal and the Headhunters, and classic and contemporary masters featuring the performances of Snoop Dog, Dr. Dre, Ice T, Jimmy Jam & Terry Lewis, Jennifer Paige, Roaring Lion, and others.

Recent Film Placements:

Faster (2010) (starring The Rock), The Runaways (2010) (starring Kristin Stewart), Welcome to the Rileys (2010) (Starring Kristin Stewart and James Gandolfini), The Blindside (2009) (Academy Award Nominated), Up in the Air (2009) (Academy Award Nominated), Seventeen Again (2009)(starring Zac Efron), I Love You, Man (2009), Young Americans (2010)(Starring Topher Grace/ Anna Faris).

Recent Ad Placements:

M&M's, Honda CRV, Monsters vs Aliens, Revlon, Sprint, Range Rover, Acura, Fidelity Investment, Singstar, X-Games, Bacardi and others.

Recent TV Placements:

GLEE, Weeds, One Tree Hill, NCIS, ER, United States of Tara (HBO), Futurama, and others.