

International Policy Responses to Digital Intellectual Property Infringement: An Analysis of Recent Policy Responses in Sweden and France and how the United States is Following Suit

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Abstract: As the music industry continues to embrace the digital age and vice versa, and as physical music becomes something of the past, the legal landscape protecting the intellectual property of these digital creative works must also evolve to keep up with the rapidly changing industry. Up to this point in time, the legal landscape protecting digital intellectual property has been one step behind those infringing on the rights of these creative works. Piracy numbers have reached unprecedented levels and, in some countries, paying for music is a thing of the past. However, France and Sweden have recently enacted policy responses to digital intellectual property infringement, with initial results beginning to surface. The United States is also in the process of following suit, with legislation of its own. This study analyzes the details of these new policies and the impact they have had on their respective digital music industries. It will shed light on the true efficacy of anti-piracy legislation and the worth of attempting to pass such laws in the United States.

Introduction

Just as the introduction of the vinyl record and the introduction of the compact disc to the music industry marked a significant transition in how the consumer received the product of music, the entrance of digital music to the market in 2004, changed the landscape of the music industry once more. The digital music industry grew by over 1000% since its 2004 induction, and in 2010 accounted for an ever-rising 29% of the nearly sixteen billion-dollar global recorded music industry¹.

However, with the introduction of the newest and easiest way to enjoy and purchase music, came the newest and easiest way to copy and steal music. As digital music rapidly gained popularity in the years following its introduction, piracy became one of the industry's most pressing problems. Since 2004, the global recorded music industry declined by 31%, while the growth of the digital industry significantly slowed. Concurrently, estimates show that nearly 24% of all Internet traffic is infringing, and European estimates calculate that nearly 25% of active Internet users on the continent visit unlicensed sites monthly². There is not a decline in the number of people consuming music; the decline is in the number of people legally acquiring music. As Adrian Adermon and Che-Yuan Liang established in their 2010 paper "Piracy, Music and Movies: A Natural Experiment," digital illegal music is a strong substitute for legal music. Thus, we can attribute the limited growth of the digital industry and the steady decline of the total industry to persistent piracy problems. The piracy problem facing the industry is grave and is beginning to cripple the industry. The United States Chamber of Commerce estimates indicate that Hollywood studios, record labels and publishing houses lose \$135 billion in revenues each year from piracy and counterfeiting³. Initial law enforcement and governmental policy responses to piracy were unsuccessful; piracy rates continue to rise and revenue in the music industry continues its steady decline. We are currently at a point where the recorded music industry has been severely and negatively impacted. International governments are now sensing the urgency and the severity of the problem, and are attempting to combat digital piracy through groundbreaking policy responses.

Over the course of the past three years, Sweden and France implemented new legislation aimed at attempting to combat piracy in the creative arts industries. These examples of recent legislation, which have now been in place and active for at least a full year, can now be studied to better understand their impact on the music industry and their relative domestic effectiveness. Throughout the course of this paper, the provisions of each law will be detailed, and their impact on the music industry will be analyzed.

The United States has also recently introduced legislation in hopes of effectively protecting digital intellectual property, which will be detailed and analyzed. Transnational comparisons to both Sweden and France will help determine what the United States can learn from other countries as they embark on a policy response of their own.

Sweden

On April 9, 2004, the European Union, as part of the treaty of Rome, passed IPRED (Intellectual Property Rights Enforcement Directive), aimed at combating piracy and other infringements of intellectual property rights through criminal measures⁴. In March 2008, the Swedish government elected to turn this widely unenforced directive into Swedish law, in order to tailor the specific provisions to combat piracy domestically. The law passed in the Swedish Parliament in February of 2009.

1 IFPI Recording Industry in Numbers Report 2011; p.7

2 IFPI Digital Music Report 2011; p.14

3 "SOPA (Stop Online Piracy Act) Debate: Why Are Google and Facebook against It? - The Washington Post." The Washington Post. Washington Post, 17 Nov. 2011. Web. 05 Dec. 2011.

4 "The Criminal Measures IP Directive: Criminalizing the Industry." MainPage - IPRED. Web. 05 Dec. 2011. <www.ipred.org>.

The government implemented the law on April 1 of the same year.

The law has three main parts regarding digital intellectual property, which are the points of focus here. (1) The law allows intellectual property owners to demand details and information from Internet Service Providers (ISP's) regarding certain IP addresses with reasonable suspicion of infringement. (2) To obtain the information, the holder presents the evidence to the courts, and the courts can then order the ISP to access the information withheld in the IP address. (3) The court will then take action based on the evidence presented; however, the courts have indicated that they will not take action in cases of small download volume, but only with respect to larger scale infringement⁵.

The main portion of this law that increases its efficacy is the role of the ISP in this process. ISP's are private companies, who provide Internet access to members of the Swedish population. The ISP's were, and still are apprehensive of this mandate, for it leads to added expenses and responsibility. This drives up their cost of doing business and, consequently, drives up the price of their service to consumers. Originally, in response to the implementation, multiple large Swedish ISP's voiced their intention to destroy their IP logs to protect the identities of their customers and, therefore, hamper the enforcement process. Further, VPN (Virtual Private Network) services were introduced to the market to impede the effectiveness of the law, and proved to be very popular. VPN services offer a masking of a user's IP address for a mere seven dollars a month. Without access to the users IP address, enforcement is made significantly more difficult as users become more protected. On the political front, in a highly publicized June 2009 election, the single-issue anti-IPRED Pirate Party received 7% of the Swedish vote and a seat in Parliament⁶.

Despite the initial negative public reaction, the true effectiveness of the law is beginning to emerge. After implementation of the law, for each percentage point that piracy decreased, physical music sales increased by .72% and digital music sales increased by 1.31%. By the end of 2009, physical music sales increased by 27% and digital music sales increased by 48%. Overall, Swedish music revenue actually increased from the previous year by 11.9% for the first time in over five years⁷. In 2010, Swedish digital music revenue reached \$37.5 million, indicating a 72.8% increase from 2009 revenue numbers and a 278% increase from 2008 revenue numbers⁸. This significant positive shift in revenue is remarkable. Although it may be difficult to attribute the substantial increase in revenue wholly to IPRED, its impact was certainly felt by the Swedish music market in terms of generating increasing revenue from legal digital music.

Much of this data may be a result of a fear-based response prompted by the legislation. Few court cases have actually been settled since its implementation, which could hamper the effectiveness of the legislation. If people realize the consequences are limited, then piracy rates could return to pre-IPRED numbers. However, a recent MediaVision report showed that this has not been the case to date. Piracy levels dropped 25% compared to pre-IPRED levels, which should be very encouraging for the industry and for advocates of IPRED⁹.

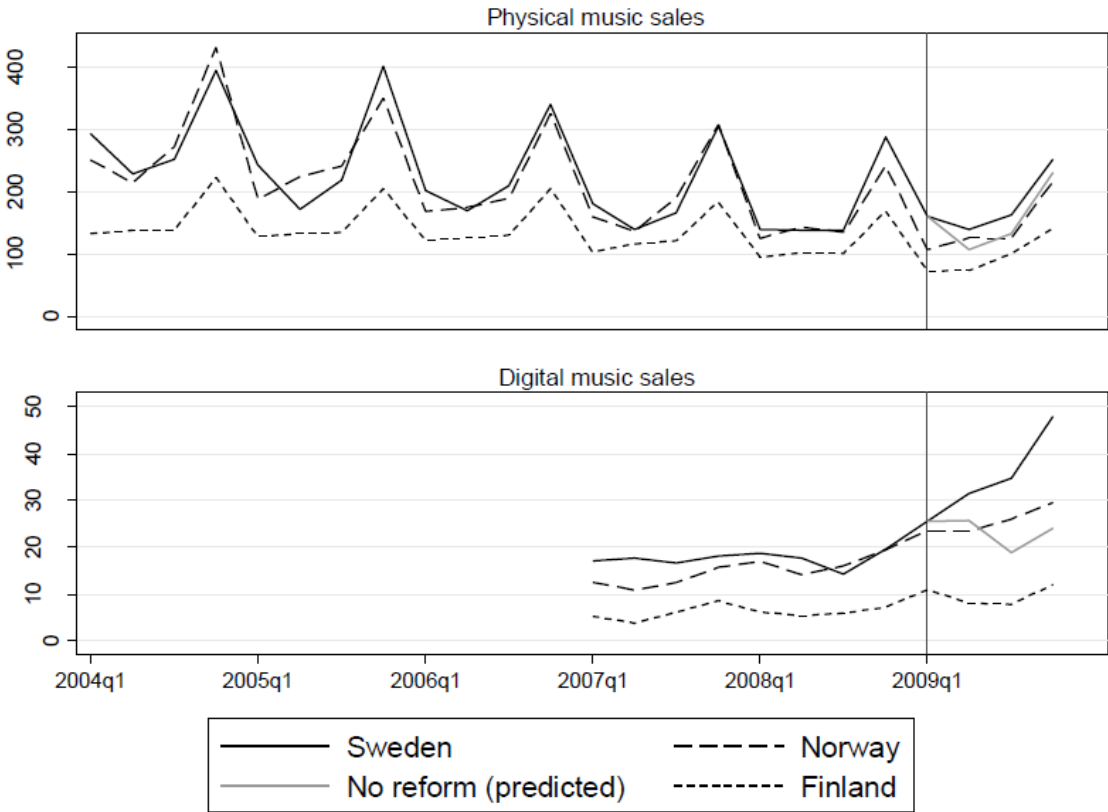
5 Adermon, Adrian, and Che-Yuan Liang. Piracy, Music and Movies: A Natural Experiment. Working paper no. 854. Stockholm, Sweden: Research Institute of Industrial Economics, 2010. pp. 5-6.

6 "Swedish Pirate Party Headed for Brussels - The Local." The Local - Sweden's News in English. The Local, 7 June 2009. Web. 05 Dec. 2011. <<http://www.thelocal.se/19928/20090607/>>.

7 Adermon, Adrian, and Che-Yuan Liang. Piracy, Music and Movies: A Natural Experiment. Working paper no. 854. Stockholm, Sweden: Research Institute of Industrial Economics, 2010. pp.9-10, 15

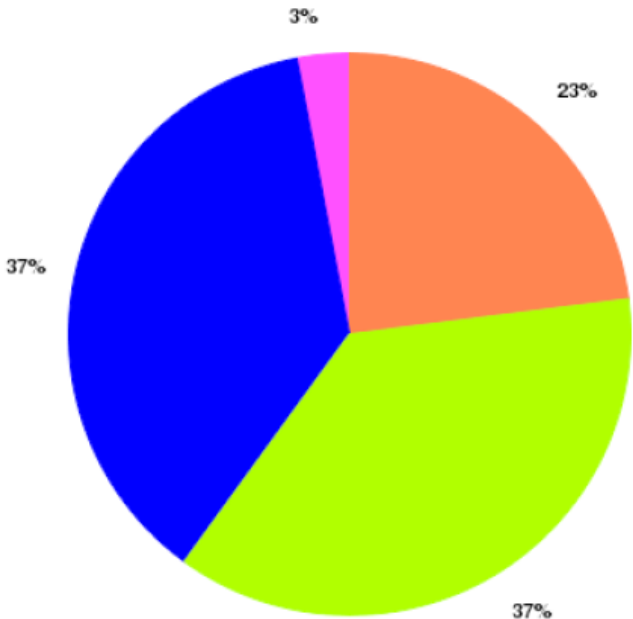
8 IFPI Recording Industry in Numbers Report 2011; p.58

9 Clayton, Nick. "Piracy Falls, But Not All Musicians Are Happy - Tech Europe - WSJ." WSJ Blogs - WSJ. Wall Street Journal, 30 Sept. 2011. Web. 05 Dec. 2011.



Has the IPRED law changed your use of file sharing sites? (2009 n=429)

- I have stopped using file sharing sites
- I use file sharing sites as much as before
- I use file sharing sites less
- I use file sharing sites more



One of the most interesting phenomenon associated with this legislation is the deterrence from piracy to new innovative legal digital music models, more specifically, the streaming model. The availability of new, legal and attractive alternatives to more conventional legal music, such as the pay-per-download model, strongly bolstered the success of the law, especially for the non-serious pirate. Sixty-one percent of Sweden's \$37.5 million digital music revenue is attributed to legal online streaming services, with Spotify being the major player under the new streaming model. In a survey done by GfK, 56% of those surveyed noted Spotify as one of many reasons for their decreased use of file-sharing sites. Only 34% attributed their drop in file sharing to IPRED¹⁰.

Initially, Sweden's IPRED law certainly appeared to have had a drastic impact on the Swedish internet population, the pirate population, and the digital music industry in general. The data presented indicates that the legislation was effective in increasing digital revenue, and lowering piracy. However, we must be wary in overstating the direct impact of this law on this data. The role of new digital music models, such as Spotify, which came to market at around the same time as the introduction of legislation, should not be understated. Moreover, just sixteen days after the implementation of the IPRED law, arguably the most notable file sharing verdict in history was delivered by a Swedish District Court, blocking the widely popular file sharing website, "The Pirate Bay", and punishing the operators of the website with jail time and a \$2.7 million fine¹¹. This case was unrelated to IPRED, but overarching media coverage of the case certainly added to Swedish fears about possible consequences for file sharing and could have had an effect on the direct correlation between the legislation and the data. Fearful responses elicited by the legislation and deterrence to new legal alternatives have been the main outcome in Sweden; but as the initial scare of the legislation wears off, it remains to be seen whether piracy rates can be maintained at the current low levels, and likewise, whether digital revenue can continue to grow.

France

On October 2, 2009 the French intellectual property infringement response law was constitutionally approved, creating the Haute Autorité pour la Diffusion des œuvres et la protection des Droits sur Internet (HADOPI), or the High Authority for the Transmission of Creative Works and Copyright Protection on the Internet. HADOPI is a gradual response, three strikes law, aimed at protecting digital intellectual property in France.

The law has three main provisions. (1) An email is sent to the infringer by the agency specifying only the time of infringement. The ISP is required to then monitor the infringer, and the infringer is offered a content filter for his or her computer to avoid mistakes. If the user infringes again within six months, step two is enacted. (2) A certified letter is sent to the infringer, quite similar to the first letter. This is the infringer's last warning. If the user infringes again within the next twelve months, step three is enacted. (3) The ISP and the agency refer the infringer to the courts, where the court can enact consequences ranging from a fine to a suspension of Internet. The user can appeal after the verdict is received. The burden of proof for appellate cases is solely on the appellant¹².

Initially, this law was not widely accepted. The immediate response to the passage of the law was referral to the high French Constitutional Court for constitutional review by opponents of the legislation. The Court originally blocked the law, deeming it as a violation of free speech. However, after the law was amended, requiring a judge to sign off on all suspensions, the constitutional court

10 Adermon, Adrian, and Che-Yuan Liang. Piracy, Music and Movies: A Natural Experiment. Working paper no. 854. Stockholm, Sweden: Research Institute of Industrial Economics, 2010. p.15

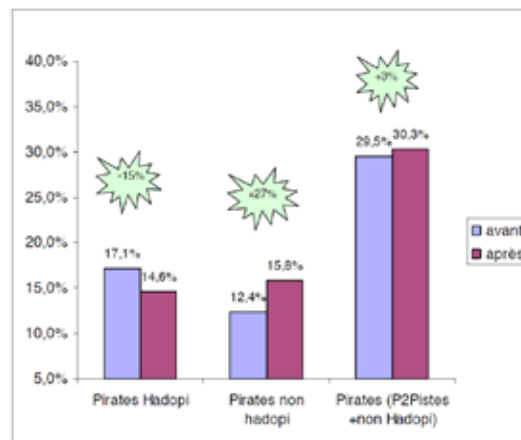
11 Anderson, Nate. "The Pirate Bay Verdict: Guilty, with Jail Time." *Ars Technica*. 17 Apr. 2009. Web. 05 Dec. 2011.

12 "En Savior plus Sur La Response Graduee." *Hadopi | Haute Autorité Pour La Diffusion Des œuvres Et La Protection Des Droits Sur Internet*. 22 Oct. 2009. Web. 07 Dec. 2011. <<http://hadopi.fr>>.

finally offered their approval, which came on October 2, 2009¹³.

Initial data on the outcome and effectiveness of HADOPI is very interesting. There have been 18 million instances of illegal downloading as monitored by HADOPI. Considering that there are 22 million total Internet connections in France, this number is astounding. HADOPI has sent 650,000 initial warning letters, which has resulted in 44,000 second warning letters and 60 referrals to the court¹⁴. These numbers are interesting for various reasons. First, 3% of all internet users have received at least one notice, which shows both the outreach capacity of HADOPI, and the magnitude to which illegal downloading exists. Second, the three strike warning system seems to be quite effective for those who received warnings. Out of the 650,000 users who received initial warnings, only 6.8% of infringers repeated. Moreover, of the 44,000 who received second warnings, only 0.14% of users infringed a third time, requiring court referral. Lastly, HADOPI acknowledged that there were 18 million instances of infringing activity, yet, only 650,000 initial warnings were sent, indicating fairly significant limitations on HADOPI's enforcement capabilities.

The effect of the legislation on piracy levels, however, presents an interesting shift in the success of HADOPI. Piracy levels have slightly increased according to a University of Rennes study. The reason for this deterrence is a switch to other methods of obtaining illegal content that are not made illegal by the law or enforced by HADOPI. The legislation criminalizes certain types of piracy, and enforces the letter of the law. However, the law does not cover every method of digital intellectual property infringement. Although forms of piracy that are covered under the law have decreased, the increase in forms of piracy not covered by the law has negated the success of the HADOPI. The graph below compares piracy levels before and after the implementation of HADOPI, for both piracy covered and not covered by HADOPI¹⁵.



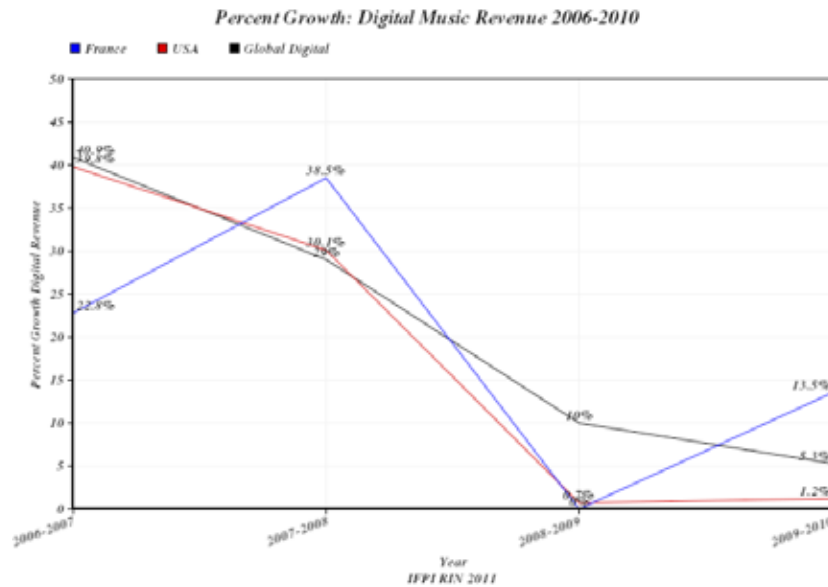
Although enforcement has proved to be seemingly successful, overall piracy rates have not fallen. How does all this translate into digital revenue in France? Between 2009 and 2010, French digital music revenue increased by 13%, to \$146 million. Compared to the United States, and the global digital market, the jump in French revenue from 2009 to 2010 is significantly greater than increases in the United States and globally. In the United States, digital revenue increased by 1.2%,

13 Gustin, Sam. "World's Toughest Anti-piracy Law: French High Court Upholds Three-strikes Policy - DailyFinance." Daily Finance, 23 Oct. 2009. Web. 06 Dec. 2011.

14 Peoples, Glenn. "Business Matters: 700,000 French ISP Subscribers Have Received an Infringement Warning | Billboard.biz." 4 Oct. 2011. Web. 06 Dec. 2011.

15 Dejean, Sylvain, Thierry Penard, and Raphael Suire. Une Première évaluation Des Effets De La Loi Hadopi Sur Les Pratiques Des Internautes Français. Publication. Rennes, FR: University of Rennes, 2010. Print.

and globally, digital revenue increased by 5.3%¹⁶.



The future and ultimate success of HADOPI will be an interesting tale. Intellectual property protection is turning into a heated political debate in France. It is not popular among the public; they have very limited incentive to support these harsh measures. The citizens of France fail to see the consequences of piracy on the digital creative arts industry, which affects the overall economy. As recently as October 2011, popular French Socialist Presidential Candidate, Francois Hollande, made clear his intentions to repeal HADOPI, while keeping limited Internet surveillance. Conversely, current President Nicolas Sarkozy, at a recent G8 conference, pressed for further regulation of the Internet, or what he referred to as the “wild west”¹⁷.

In summary, HADOPI law in France has proved to be well enforced, which is one of the most difficult parts of implementing successful digital intellectual property infringement legislation. However, the question remains whether this effective enforcement will lead to a drop in overall piracy and subsequently an increase in digital revenue; or, whether the increased prominence of other forms of piracy coupled with a lack of public support for the bill will make HADOPI seemingly irrelevant, and ultimately lead to the demise of the law.

United States

In 2011, the United States followed suit by introducing two similar bills in both the House of Representatives and the Senate. The Stop Online Piracy Act (H.R. 3261), which combines two prior Senate bills into one, more expansive House bill, was introduced to the House by Lamar Smith (R-TX), on October 26, 2011. H.R. 3261 takes an approach to combating digital piracy that is not seen in Sweden or France. In contrast to Sweden and France, whose respective bills target individual infringers, this bill does not target the individual, but instead seeks to attack the problem at its source and penalize the websites that host, stream, and offer copyrighted material illegally.

H.R. 3261 places enforcement obligations under the United States Department of Justice

¹⁶ IFPI Recording Industry in Numbers Report 2011; p.7, 37, 45

¹⁷ “Leading French Presidential Candidate Would Repeal HADOPI But Keep Net Surveillance | Techdirt.” 25 Oct. 2011. Web. 06 Dec. 2011.

(DOJ) and the Attorney General. If passed, the bill would allow both copyright holders and the DOJ alike to identify sites and take legal action against any foreign or domestic site they deem to have “only limited purpose or use *other* than infringement” and hosts intellectual property held by US companies or individuals. Once this determination is made, the DOJ or the copyright holder can seek a court order to have consequences implemented. Possible consequences include: not allowing payment network providers such as PayPal to do business with the site, not allowing search engines to link to the site, ordering domain name registrars to take down the infringing site, requiring ISP’s to block subscriber access to the infringing site and not allowing internet advertising services to advertise with the site¹⁸.

Aside from the predictable industry advocates, initial reactions to the bill have been far from supportive. Internet giants such as Google, Facebook, Ebay, and Yahoo have all voiced their strong opposition to this bill. Eric Schmidt, Google Executive Chairman, said, “The solutions are draconian. There’s a bill that would require [Internet service providers] to remove URLs from the Web, which is also known as censorship last time I checked.” However, proponents of the bill see it differently. With the creative arts industries losing out on an estimated \$135 billion annually in revenues, Michael O’Leary, representative for the Motion Picture Association of America, argues, “Fundamentally, this is about jobs.”¹⁹

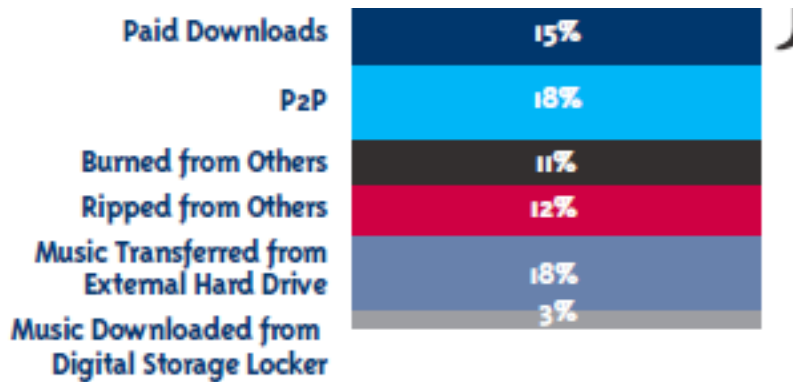
The two major roadblocks standing before this bill are the American public and the American constitution. After seeing extreme negative public responses in both Sweden and France, the American public condemnation of the bill is not surprising; the bill ultimately failed due to a strong lack of public support. In Sweden, ISP’s immediately voiced ways to protect their customers from enforcement of the legislation, and the public started a political campaign against the legislation and won a seat in the European parliament. The same is true in France, as a new presidential candidate is gaining support from the masses as he publicly voices his intention to repeal the bill. The condemnation of anti-piracy bills in France and Sweden, both representative democracies similar to the U.S., may offer warnings to the U.S. Congress as to the potential dangers of similarly implementing anti-piracy law. Thus, if other national models are considered in the creation and adoption of said law, the hope of effectively protecting intellectual property in America could be devastated. Second, if H.R. 3261 had become law, it would have undoubtedly been a target of constitutional challenge, as some consider the law to be Internet censorship and, inherently, a violation of free speech. This was the case in France, where the court struck down the bill as a violation of free speech, forcing it to be amended before becoming institutionalized.

The need for effective copyright protection in the United States cannot be overstressed. Not only does the United States rank as the world’s leading country in terms of music revenue and consumption, it is the leader in music production and exports, with a large portion of the world’s music originating in the United States. United States copyright industries surpass the chemical industry, the aircraft industry, the auto industry, the agricultural industry and the pharmaceutical industry in terms of exports. The effect of piracy on the economy is immense. As an Institute of Policy Innovation study indicates, the domestic economy loses \$12.5 billion in total output annually as a result of sound recording piracy alone. As a result of sound recording piracy, the United States economy loses 71,060 jobs and industry workers lose \$2.7 billion in earnings annually. Federal, state and local governments suffer as well, losing \$422 million in tax revenue annually²⁰. In the United States, as of 2009, the percentage of music consumed legally was 37%.

18 Stop Online Piracy Act, H.R. 3261, 111 Cong. (2011). Print.

19 Peralta, Eyder. “Proposed Piracy Legislation Puts Internet Giants On Defensive : The Two-Way : NPR.” NPR. 16 Nov. 2011. Web. 06 Dec. 2011.

20 Recording Industry Association of America. Let’s Play: The American Music Business. Rep. Washington, DC: RIAA, 2011. Print.



Source: NPD Digital Music Study December 2009
(U.S. Internet Population)

If the United States wants to remain the largest exporter of copyrighted material in the world, the legal environment that protects the industry must be changed to effectively protect the rapidly declining copyright industry against rampant piracy. The Stop Online Piracy Act is an important first step in this process. Not only does it put this grave problem at the forefront of American policy, but also, it is a crucial first step in attempting to attack the piracy problem at its source in hopes of moving towards providing a legally sound, safe, innovative digital environment.

Conclusion

As digital piracy becomes an increasingly serious problem, and as more and more countries begin to take policy measures to protect digital intellectual property, we will be able to better analyze which policies and methods of protecting digital intellectual property are most effective. However, those who know the industry realize that effective legislation is not the one stop solution for ending piracy and monetizing digital music to its full potential. Effective legislation is an important first step in bringing about more positive results for the digital music industry; but, as Sweden and France have shown us, we must be aware that this is not the full solution.

The mindset surrounding music is evolving. As newer generations begin to consume music, digital music is no longer seen as a commodity. Consumers view music as something that is listened to, not something that is bought. New digital music platforms have surfaced, and need to continue to emerge, to adapt to the changing attitudes that persist in the digital music world. With that said, the importance of effective legislation protecting these creative works cannot be emphasized enough. In order for these new digital models to be able to innovate and gain traction, they need to be in a market competing with other digital legal models, and not with free music. It is economically impossible to effectively compete with free music; and, indeed, that is the root of the problem facing the digital creative arts industries today. The case studies on policy in Sweden and France have taught us a great deal about governmental responses to intellectual property infringement. They have furthered our understanding of the problems that emerge in response to policy development. One of the most important lessons that can be taken from Sweden and France's policy responses is proof that these laws are a crucial first step in changing the mindset and legal culture of digital music, but certainly not the only step. The results are not convincing enough to conclude that effective legislation will

solve the piracy problem and reverse the decline of the digital creative arts industries on its own. Digital intellectual property rights are going through an international legal revolution. Sweden and France have taken the first steps with their respective policy responses, but now is the time for other national governments to follow suit, and take the crucial first step in creating a new global standard and awareness that intellectual property must be effectively protected as the world fully enters the digital age.

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