

Before the  
COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C.

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In the Matter of	)	
	)	
Music Licensing Study	)	Docket No. 2014-03
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COMMENTS OF THE NATIONAL MUSIC PUBLISHERS’ ASSOCIATION, INC. AND THE  
HARRY FOX AGENCY, INC.  
IN RESPONSE TO MARCH 17, 2014 NOTICE OF INQUIRY

The National Music Publishers’ Association (“NMPA”) and its wholly owned licensing subsidiary, The Harry Fox Agency, Inc. (“HFA”), respectfully submit these Comments pursuant to the Copyright Office’s Notice of Inquiry examining Music Licensing issues dated March 17, 2014 (the “Notice”). 79 Fed. Reg. 14739.

Introduction

NMPA and HFA are pleased that the Copyright Office has initiated a study to evaluate the effectiveness of existing methods of licensing music and look forward to participating in all stages of this study.

NMPA, founded in 1917, is the principal trade association representing the interests of songwriters and music publishers in the United States. As such, NMPA works to protect the interests of songwriters and music publishers and has served as the leading voice of the American publishing industry in Congress and the courts. NMPA represents both large and small music publishers throughout the United States.

HFA, which is solely owned by NMPA, is one of the nation’s leading providers of licensing, royalty calculation and royalty distribution services for the music industry. 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 87-year old business, HFA has developed additional service businesses 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 include the administration of 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.

NMPA and HFA respond to the specific topics that form the Notice of Inquiry as follows:

I. Musical Works

*1. Please assess the current need for and effectiveness of the Section 115 statutory license for the reproduction and distribution of musical works.*

A. There is No Longer a Compelling Need for the Section 115 Compulsory License

The Section 115 compulsory license to make a mechanical reproduction of a musical work is over 100 years old.<sup>1</sup> The need for this compulsory license has always been the subject of much debate, and in the digital age, the debate has become even more pronounced and heated.

As part of the Copyright Act of 1909, Congress expanded the scope of the exclusive rights protected by copyright to include mechanical reproduction of music.<sup>2</sup> This was a

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<sup>1</sup> Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909), *available at*

monumental step forward for songwriters and music publishers. However, some in Congress were also concerned about purportedly anti-competitive behavior between one aggressive player piano manufacturer - The Aeolian Company – and the music publishing community.

The concern was that the Aeolian Company was entering into exclusive licenses to mechanically reproduce a significant number of musical compositions on player piano rolls.<sup>3</sup> The concern about anti-competitive activity could, and probably should, have been remedied by direct action taken against the Aeolian Company. Anti-trust enforcement today is much more sophisticated and focuses on the parties actually engaged in the alleged anti-competitive activity, but that was not the approach taken by Congress in 1909. The purported monopoly in 1909, whether real or imagined, was regarded as a serious threat at a time when effective anti-trust regulation was still in its infancy.<sup>4</sup> Rather than focusing on punishing the player piano company for the alleged anti-competitive behavior, Congress instead punished all songwriters and music publishers. The Aeolian Company, on the other hand, like many distribution services today, was rewarded.<sup>5</sup>

Historical evidence supports the conclusion that adoption of the Section 115 compulsory license was much more a political compromise used to ensure passage of the 1909 Copyright Act, than it was a sensible or fair approach to music licensing. Many in the songwriting and music publishing community strongly opposed the compulsory license at the time, including

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<sup>2</sup> *Id* at § (1)(e).

<sup>3</sup> Statement of Marybeth Peters, The Register of Copyrights, Before the Subcommittee on Courts, the Internet and Intellectual Property of the House Committee on the Judiciary, United States House of Representatives, 108<sup>th</sup> Congress, 2d Session (March 11, 2004), *available at* <http://www.copyright.gov/docs/regstat031104.html>.

<sup>4</sup> Russell Sanjek, PENNIES FROM HEAVEN: THE AMERICAN POPULAR MUSIC BUSINESS IN THE TWENTIETH CENTURY 22 (1996).

<sup>5</sup> *Id.* at 23 (“Aeolian actually benefited from the legislation it had inspired. Instead of having to pay the 10 percent royalty it had promised, a fee of only two cents per reproduction was required. Thus the company continued to dominate the piano-roll business. [ . . . ] The compulsory-licensing requirement was punishment visited on the eighty-seven publishers (who owned 381,598 compositions) who had been party to the Aeolian plan and equally on the 117 music firms (controlling 503,597 pieces) which had not”).

such songwriting luminaries as John Philip Souza and Victor Herbert – both of whom testified against the bill in Congress.<sup>6</sup> This was not an anomaly. Such condemnation continued for decades from both music industry insiders<sup>7</sup> and politicians.<sup>8</sup> Songwriters and music publishers viewed the compulsory license as an unprecedented and unwarranted form of governmental price control and manipulation of an otherwise functioning music marketplace. They recognized the compulsory license would undercut their interests in a free and fair market in which they could control the fruits of their creative and financial investments, and songwriters and music publishers today share this view.

Several rate proposals were debated in Congress in 1909. Some legislators proposed a flat 2 cent rate, others a tiered system, and others a ten percent rate for certain categories of works. The ultimately successful bill set the rate at a flat 2 cents and was accompanied by a congressional report indicating that the compulsory license provision was “a compromise to placate the expressed fears regarding the Aeolian Co.”<sup>9</sup> As a result, the songwriters and music publishers were punished, while the Aeolian Company reaped the benefit of a lower compulsory

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<sup>6</sup> *Id.* at 22.

<sup>7</sup> See Study on the Compulsory License Provisions of the U.S. Copyright Law Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary. United States Senate, 86<sup>th</sup> Congress, 1<sup>st</sup> Session, Pursuant to S. Res. 53, 23-24, *available at* <http://www.copyright.gov/history/studies/study5.pdf> (quoting Nathan Burkan, legendary copyright attorney, as arguing that compulsory licensing was “an arbitrary, discriminatory class legislation which forced authors to do business with persons not of their choosing at terms contrary to those specified in section 1(e)” and ASCAP arguing “[a]ll that Congress was empowered to grant to an author was the exclusive right as a monopoly for a limited period in the work made the subject of copyright. Congress can give neither more or less. Freeing the work for use by manufacturers of mechanical records upon the payment of an arbitrary price fixed by Congress is not securing to the author a ‘monopoly for a limited period’ nor the exclusive right in his work. A copyright being private property, Congress had no power to fix the price for which private third parties might use the work. Even if the Government could appropriate or use it itself, it would have to pay just compensation, and the ascertainment of such compensation was a judicial question and not a legislative one, and Congress could not fix the price”).

<sup>8</sup> *Id.* at 29, quoting Senator Herbert in S. Rept. 1782, 71<sup>st</sup> Cong., 3d sess., pp 26-27 (1931), (“There appears to be no valid reason for any distinction between the author or owner of a musical composition and the author or owner, or producer of any other kind of property or work. As a result of the enactment of the provision in the law of 1909, owners of musical works are at the mercy of those engaged in mechanical reproduction with whom they have no contractual relations and who may be wholly irresponsible. The author is forced to permit the use of his work whether or not he desires to do so and at a price which is fixed by law and over which he has no control”).

<sup>9</sup> Study on Compulsory License, *supra* note 7, at 11.

license rate than their “exclusive” arrangement with publishers that triggered all of the concern in the first place.<sup>10</sup> Consequently, the player piano company in 1909 – like music services today – paid a below-market rate resulting from governmentally imposed price controls.

Eventually, the strong public criticism of the compulsory license subsided and acquiescence to the status quo developed. More recently, that acquiescence has transformed into a two-pronged myth of sorts whereby the compulsory license is viewed, on the one hand, as essential for maintaining an efficient music marketplace, and, on the other, beneficial and empowering to the music community. Considering the compulsory license was barely used throughout the twentieth century<sup>11</sup> other than to set a below market “cap” for negotiated licenses, it is odd that any opinion about the compulsory license other than obsolescence could gain traction.

Indeed, the Register of Copyrights, Marybeth Peters recognized as much:

[T]he evolution of technology and business practices has eroded the effectiveness of this provision. Despite several attempts to amend the compulsory license and the Copyright Office’s corresponding regulations in order to keep pace with advancements in the music industry, the use of the Section 115 compulsory license has steadily declined to an almost non-existent level.

A fundamental principle of copyright law is that the author should have the exclusive right to exploit the market for his work, except where doing so would conflict with the public interest. While the Section 115 statutory license may have served the public interest well with respect to a nascent music reproduction industry after the turn of the century and for much of the 1900’s, it is no longer necessary and unjustifiably abrogates copyright owners’ rights today.

Our compulsory license in the United States is an anomaly. Virtually all other countries which at one time provided a compulsory license for reproduction and

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<sup>10</sup> Sanjek, *supra* note 4, at 22-23.

<sup>11</sup> See Statement of Marybeth Peters, The Register of Copyrights, Before the Subcommittee on Courts, the Internet and Intellectual Property of the House Committee on the Judiciary, United States House of Representatives, 108<sup>th</sup> Congress, 2d Session (March 11, 2004), *available at* <http://www.copyright.gov/docs/regstat031104.html> (“[S]tringent requirements for use of the compulsory license did not foster wide use of the license.”).

distribution of phonorecords of non-dramatic musical works have eliminated that provision in favor of private negotiations and collective licensing administration.<sup>12</sup>

Register Peters was quite candid in her conclusion:

The more time I have spent reviewing the positions taken by the music publishers, the record companies, the online music services, the performing rights societies and all the other interested parties, the more I have become convinced that as a matter of principle, I believe that the Section 115 license should be repealed and that licensing of rights should be left to the marketplace, most likely by means of collective administration.

The Copyright Office has long taken the position that statutory licenses should be enacted only in exceptional cases, when the marketplace is incapable of working. After all, the Constitution speaks of authors' *exclusive* rights and a compulsory license abrogates such rights. We cannot say that the marketplace has failed with respect to reproduction and distribution of non-dramatic musical works because the marketplace has never been given a chance to succeed. The moment the copyright owner's right to control mechanical reproductions of a non-dramatic musical works in the form of phonorecords was adopted it was regulated by the compulsory license. Indeed, if commentators believe mechanical licensing is not working, the blame must rest squarely on the 100-year history of government price controls established by the compulsory license, which incentivizes legislative or regulatory fixes at the expense of marketplace solutions.<sup>13</sup>

NMPA and HFA agree with the Register's conclusions.

The historical record suggests there was little or no need for a compulsory license in 1909. Over 100 years later, there is even less of a need for a compulsory license. As Register Peters points out, only the United States and Australia continue to use a compulsory mechanical license.<sup>14</sup>

Furthermore, successful free market alternatives to a compulsory licensing system exist. Clearing rights for digital samples is a perfect example. A digital sample licensing market has already been created, and the market allows for efficient and reasonable licensing of such

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<sup>12</sup> Statement of Marybeth Peters, the Register of Copyrights, Before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary (June, 21 2005) *available at* <http://www.copyright.gov/docs/regstat062105.html>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

samples. Users of digital samples use clearance companies to find sound recording and musical work owners, to secure quotes, and to clear rights if the parties agree upon the terms of the license.<sup>15</sup> In this instance, an efficient and economical marketplace developed and is fully functioning. Similarly, if the Section 115 compulsory license is eliminated, a functioning licensing market would most assuredly develop and flourish.<sup>16</sup>

Another example of market success despite calls for government intervention is the recent agreement between music publishers and YouTube. Although the market for user-generated content seems new, it is simply a broadening of the synchronization market in which songwriters and music publishers have been active for decades. Recently, over 3,000 music publishers entered into a settlement and licensing agreement with YouTube, allowing for the use of compositions in user-generated content on the service in exchange for ongoing license payments.<sup>17</sup> According to Google, “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.”<sup>18</sup> 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.<sup>19</sup> 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

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<sup>15</sup> *Comments of the National Music Publishers’ Association et. al. in response to USPTO & NTIA, Request for Comment on Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy* 3-4 (November 13, 2013), available at [http://www.uspto.gov/ip/global/copyrights/comments/National\\_Music\\_Publishers\\_Association\\_et\\_al\\_Comments.pdf](http://www.uspto.gov/ip/global/copyrights/comments/National_Music_Publishers_Association_et_al_Comments.pdf).

<sup>16</sup> *See id.*

<sup>17</sup> Ben Sisario, YouTube and Music Publishers Reach Ad Accord. N.Y. Times (August 17, 2011), available at [http://mediadecoder.blogs.nytimes.com/2011/08/17/youtube-and-music-publishers-reach-ad-accord/?\\_r=0](http://mediadecoder.blogs.nytimes.com/2011/08/17/youtube-and-music-publishers-reach-ad-accord/?_r=0).

<sup>18</sup> *Comments of Google in response to USPTO & NTIA, Request for Comment on Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy* 3-4 (November 13, 2013), available at [http://www.uspto.gov/ip/global/copyrights/comments/Google\\_Comments.pdf](http://www.uspto.gov/ip/global/copyrights/comments/Google_Comments.pdf).

<sup>19</sup> *Id.*

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.

Many songwriters and music publishers believe the compulsory license should be phased out to allow the market the chance to operate freely- a chance it has never been given. We hope the Copyright Office will reach the same conclusion and recommend the elimination of the compulsory license so that licensing can occur in the free market. It is not difficult to imagine a market in which major publishers might undertake the administration of their rights on their own and smaller publishers and songwriters might authorize administrators to represent them. NMPA and HFA believe that the repeal of the compulsory license will result in further cooperation among publishers, songwriters, rights administrators, and music retailers (as in the YouTube example) and will foster the development of a robust and innovative digital music market.

B. The Section 115 Statutory License Has Not Proven Effective, and, if Not Repealed, Should Be Modified

1. Licensing is One Step in a Process Required to Pay Copyright Owners Accurately for All Uses of their Works; Section 115 Does Not Account for the Non-Licensing Steps

Music publishers seek a robust and successful digital music marketplace providing fair market royalties when their musical compositions are exploited. As discussed above, we firmly believe this is best accomplished in the free market by wholly eliminating the compulsory license. In the event the compulsory license is not eliminated, however, significant improvements must be made.

One important concern is that publishers seek transparency so they can be confident that they know who is using their music, when it is used and how much is used. Others have different concerns. Music users have complained that the song-by-song licensing process under

Section 115 is inefficient and does not provide sufficient liability coverage (i.e. protection against infringement actions where a large volume of music is used, particularly where content is posted by users). This concern has been the central focus of most discussion and studies in the past. The focus on licensing efficiency and limiting liability coverage obscures 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.

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. Traditionally, performing rights organizations, on the other hand, have principally relied upon survey-based reporting and payment, but are increasingly using census-based approaches to distribute royalties received for online uses of music.<sup>20</sup> In the digital age, music publishers justifiably expect that each distribution of a recording will be tracked, reported, and 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.<sup>21</sup>

Licensing digital music services, therefore, is just the first step in a process characterized by exchanges and matching of data with the goal of quantifying music usage, identifying ownership and executing payment instructions. The current Section 115 compulsory licensing provisions do not address these other (non-licensing) processes.

## 2. Any Revision of Section 115 Should Take Into Account The Licensing and Royalty Payment Process Requiring Partners to Exchange and Update Data on a Continuous Basis

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<sup>20</sup>See ASCAP Payment System, Keeping Track of Performances, ASCAP.com, *available at* <http://www.ascap.com/members/payment/keepingtrack.aspx>.

<sup>21</sup> See generally Randall D. Wixen, THE PLAIN & SIMPLE GUIDE TO MUSIC PUBLISHING 106-13 (3rd ed. 2014).

The Music Licensing Study must be informed by 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. That process can be summarized at a very general level in five steps:

a. Musical compositions catalog registration and management

In the initial step in the process, an administrator of any existing or new database of songs, such as HFA or a music publisher, must frequently ingest and manage 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.<sup>22</sup>

b. 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 and compositions 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 or, where the use is covered by Section 115 and no licensing authority exists, a Notice of Intent can be served.

c. 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.

d. Usage and Royalty Calculation

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<sup>22</sup> See generally Al Kohn & Bob Kohn, KOHN ON MUSIC LICENSING 73 (4th ed. 2010).

Once the digital music service or its administrator has received and ingested the license or matching results, the 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.

e. 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.

Clearly, 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. Additionally, 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.<sup>23</sup>

Section 115's requirement that Notices of Intent be served for each track used by a music service, therefore, is effective at encouraging compulsory licensees to make the links necessary to accurately account for royalties on a track-by-track basis at the beginning of the process. The fact that a Notice of Intent does not need to be served on every owner of the copyrighted song, however, limits the completeness of the link and reporting under the Section 115 statutory license. Moreover, the assumption that an owner of a musical composition has more knowledge about the co-owners than anyone else in the marketplace is outdated after decades of catalog sales, estate transfers, bankruptcies, mergers and other transfers. Indeed, administrators, such as HFA, spend vast resources independently researching and updating ownership information related to musical compositions.

The pass-through license represents an additional break in the payment chain. To the extent compulsory licensees pass through mechanical rights to a third-party digital music distributor and do not report who the third-party distributor is, songwriters and music publishers do not even know how their compositions are being used and cannot evaluate the accuracy of the compulsory licensees reporting.<sup>24</sup> On a related note, a compulsory licensee is not required to accrue royalties with respect to Notices of Intent served on the Copyright Office. This means that copyright owners are not being compensated for certain uses of their works even if they later

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<sup>23</sup> Matching processes are never 100% accurate. To the extent exceptions result from an automated process, human review is necessary and such review is part of the cost associated with administering copyrighted works.

<sup>24</sup> See *Comments of National Music Publishers' Association and Harry Fox Agency in the Matter of Mechanical and Digital Phonorecord Delivery Compulsory License, Statement of Accounts* (December 10, 2012), available at [http://www.copyright.gov/docs/docket2012-7/comments/reply/nmpa\\_fox.pdf](http://www.copyright.gov/docs/docket2012-7/comments/reply/nmpa_fox.pdf).

record their interests with the Office. These broken links in the royalty accounting chain should be fixed.

Some commentators are likely to complain that the imposition of liability for failure to license up front is too draconian given the size and scope of the catalogs digital music services believe they must offer to consumers, however, this argument is incorrect. Digital music services are responsible for designing their offerings and shaping the catalog they choose to make available. The decisions services make impact the costs they incur in successfully licensing the catalogs to be offered as well as the success of the automated data matching involved in the licensing and payment process.

For example, we understand that, in any two to three-year period, one to two million tracks (sound recordings) account for almost 95% of usage through a typical digital music service. A third of the tracks made available through a typical digital music service have between one and ten plays, and a third or more of the tracks never receive a play. The tracks that account for the vast majority of usage on such digital music services are readily identifiable and licensable because they are generally commercial releases by major and independent record labels. Track-by-track licensing of these recordings, as required under Section 115, ensures that music distributor invest sufficient resources in creating the links necessary for accurate, track-level reporting and payment for the bulk of the usage and royalties flowing through the system.

To the extent commentators suggest that track-by-track licensing as required by Section 115 does not work well for the two-thirds of a typical digital music service's broader offering where the recordings have few, if any, plays, the Office should consider examining the supply chain that places such recordings into the hands of the digital music service. Such a review would include the sources of those tracks (e.g. labels, aggregators, the recording artists

themselves), the agreements in place between the digital music service and the parties that provide the tracks and the controls in place regarding how information about the musical work information is obtained and encoded by those suppliers. In so doing, we hope that this Study will dissect the issues related to the different types of and sources of recordings distributed by digital music services and will conclude that track-by-track licensing is preferable.

### 3. Any Revision to Section 115 Should Provide for a Right to Audit the Annual Statements

The Section 115 compulsory license provisions of the Copyright Act create an honor system for licensing in which compulsory licensees self-license, self-report and self-assess.<sup>25</sup> As a result, the information reported on the Statements of Account is the only mechanism for copyright owners to adequately understand the usage and payment for their works. At no point are songwriters or music publishers allowed to directly evaluate the reporting and payment made by the compulsory licensee. As a result, songwriters and publishers never have the opportunity to confirm that they are being paid correctly. Although Annual Statements are certified by CPAs, songwriters and publishers are concerned that no one can conduct as thorough an examination of a licensee's reporting and payment as the owners of the works being exploited under the compulsory license.<sup>26</sup> The Section 115 statutory license, therefore, is not effective in providing sufficient transparency to songwriters and music publishers in an instance where they are not allowed to select their business partner or to negotiate appropriate checks to validate that partner's royalty reporting and payment. In addition, we are confident that the risk of a direct

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<sup>25</sup> See 17 U.S.C. §15(b)-(c).

<sup>26</sup> NMPA and HFA have submitted a proposal for certification of the Annual Statement under Section 115 that we believe provides certain assurance under current law, but nothing can substitute for direct involvement of songwriters and music publishers. See *Comments of National Music Publishers' Association and Harry Fox Agency in the Matter of Mechanical and Digital Phonorecord Delivery Compulsory License, Statement of Accounts* (December 10, 2012), available at [http://www.copyright.gov/docs/docket2012-7/comments/reply/nmpa\\_fox.pdf](http://www.copyright.gov/docs/docket2012-7/comments/reply/nmpa_fox.pdf).

examination will help ensure compliance with the statutory license in the first instance. We, therefore, request that the Office include in the Study an analysis of the feasibility of providing copyright owners with a statutory right to conduct a royalty compliance examination of compulsory licensees after receipt of the certified Annual Statement.

The inability to select business partners has an additional implication. Songwriters and music publishers are concerned that statutory licenses are available to businesses whose creditworthiness would have prevented any prudent publisher from entering into a license agreement without sufficient security or an advance against future royalties. Section 115, therefore, is ineffective at limiting the issuance of licenses to creditworthy licensees making the available remedies of limited use. We, therefore, request that the Office study the ways creditworthiness is addressed in commercial contracts and analyze the feasibility of requiring security or advances that will guaranty songwriters and music publishers are paid for the use of their music even if the compulsory licensee goes out of business.

*2. Please assess the effectiveness of the royalty ratesetting process and standards under Section 115.*

The failure of the rate-setting standards to even attempt to approximate a fair market royalty overwhelms the modest benefits that a somewhat streamlined process for setting rates and terms may have. The Copyright Royalty Board considers four objectives in determining the Section 115 statutory rates: (1) to maximize availability of song uses; (2) to afford a fair return to the copyright owner and a fair income to the song user that reflect the roles of each; (3) to reflect the relatives roles of the copyright owner and copyright user in the product made available to the public with respect to investment and risk; and (4) to minimize the disruptive impact on the structure of the industries involved.<sup>27</sup> Continued application of the 801(b) standard

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<sup>27</sup> 17 U.S.C. §801(b)(1).

will ensure that the statutory royalty rate is held artificially low, and that songwriters and music publishers will continue to be treated unfairly in the marketplace.

The allocation of income from a typical iTunes download presents a perfect example of the failure of the rate setting process. Out of \$1.29 cent download, iTunes receives 40 cents. A publisher receives 9.1 cents, which is split with a songwriter.<sup>28</sup> And the remaining 80 cents is split between the label and the recording artist. This results in a royalty split between the sound recording and musical composition in the ratio of approximately 9 to 1. However, a synchronization agreement, negotiated in the free market, generally results in a 50/50 split between the sound recording and music publishing owner.<sup>29</sup> Thus, in the free market, the royalty split is 1 to 1. Under the compulsory license model used by iTunes, the royalty split is 9 to 1, and in the public performance world, the differential is even greater. The Songwriter Equity Act – discussed in another section of this comment – may at least in the short-term help to address this problem.

The ratesetting process has been more effective at implementing reasonable commercial terms in connection with the compulsory license. For example, the awarding of a “late fee” in 2008 provided an additional deterrent to and compensation for late payment of mechanical royalties by users of the compulsory license, and it also led to the unprecedented “Late Fee Settlement” entered into between the NMPA and the RIAA.<sup>30</sup> This Late Fee Settlement has done much to rectify the problem regarding “pending and unmatched” mechanical royalties held by the major record labels.

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<sup>28</sup> See Steve Knopper, *The New Economics of the Music Industry*, ROLLING STONE, available at <http://www.rollingstone.com/music/news/the-new-economics-of-the-music-industry-20111025>.

<sup>29</sup> See Chris Castle, *20 More Questions for Artists: License fee splits for TV and film*, MUSIC TECHNOLOGY POLICY, available at <http://musictechpolicy.wordpress.com/2012/03/17/20-more-questions-for-artists-license-fee-splits-for-film-and-tv/>.

<sup>30</sup> See Late Fee Settlement overview, available at <http://www.nmpalatefeesettlement.com/>.

Similarly, the ability of the Copyright Royalty Board to adopt settlements has allowed the participants to negotiate a rate without the expense associated with litigation before the Copyright Royalty Board. For example, the new rates for “interactive services” were the result of settlement negotiations conducted in connection with the most recent Section 115 statutory rate proceeding and then adopted by the CRB. One must keep in mind, however, that even the negotiated rates were depressed because of the continued specter of litigating the statutory rate under a standard that does not provide for a free market royalty and the associated costs.

During the 100 years the compulsory license has been in existence, the statutory royalty rate for physical/DPDs has risen from 2 cents to 9.1 cents.<sup>31</sup> In real terms, taking into account inflation, the value of a musical composition has dropped by over 80%. By that measure, no process can be deemed effective. The compulsory licenses and the associated rate standards have denied the creators of and investors in new copyrighted works any meaningful control over the return on their investment and stripped them of virtually all bargaining authority in the marketplace. By limiting the return on investment in musical works, Section 115 is depressing the investment in great songwriting and reducing the production of great songs.

3. *Would the music marketplace benefit if the Section 115 license were updated to permit licensing of musical works on a blanket basis by one or more collective licensing entities, rather than on a song-by-song basis? If so, what would be the key elements of any such system?*

Section 1, above, explains that Section 115’s requirement that Notices of Intent be served for each track used by a music service encourages compulsory licensees to make the links necessary to accurately account for royalties on a track-by-track basis at the beginning of the licensing and royalty distribution process. It also explains that the matching process required to track and pay royalties accurately will only be successful if all parties involved in providing and

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<sup>31</sup> Copyright Royalty Rates, Section 115, the Mechanical License, *available at* <http://www.copyright.gov/carp/m200a.html>.

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.<sup>32</sup> A blanket license is likely to reduce the incentives for compulsory licensees to invest in and operate the processes necessary to accurately account for their use of musical works on a track-by-track basis. Songwriters and music publishers, therefore, believe a blanket license would not be an improvement, but rather a step backwards by limiting the transparency available in the digital age.

*4. For uses under the Section 115 statutory license that also require a public performance license, could the licensing process be facilitated by enabling the licensing of performance rights along with reproduction and distribution rights in a unified manner? How might such a unified process be effectuated?*

Digital music services have complained in the past that the inability to obtain the complete bundle of reproduction, distribution and public performance rights necessary to operate an on-demand music service either directly from licensing administrators or under Section 115 is inefficient. The complaint, however, is likely motivated by their desire to subject more rights to compulsory licensing at non-market based rates, rather than by their desire to achieve any significant efficiency. Compulsory licensing is not needed to achieve the efficiency of bundled licenses. Digital music services today can and do obtain the complete bundle of necessary rights directly from music publishers, including self-published songwriters. In addition, the only thing stopping performance rights organizations such as ASCAP and BMI from offering a bundle of reproduction, performance, and distribution rights from songwriters/publishers willing to appoint them as their agents for such rights are outdated consent decrees. The most efficient, free market way to enable efficient transactions that benefits all parties is to modify those decrees and to

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<sup>32</sup> *Supra* at note 24.

subject fewer licensing rights to government control. The existence of the compulsory license and its concomitant non-market rate for certain rights, however, encourage music users to seek inclusion of additional rights within the purview of governmental price controls rather than working on technological innovation and market-based solutions.

The desire of certain participants in the digital music business to expand the 100-year old compulsory license, and to go to court to limit the flexibility of performing rights organizations under their consent decrees reveal that their true motivation is to reduce compensation to the creators of music. Music publishers and songwriters seek an efficient digital music marketplace, but placing more rights under government price controls does not create efficiency. Removing artificial controls so that market participants are incentivized to collaborate and innovate, rather than litigate, does.

Importantly, bundling public performance rights under the Section 115 compulsory license will not make it easier for digital music services to obtain licenses for sound recordings, nor will it make it easier for them to obtain licenses for uses outside of the United States. Yet there has been no outcry to “fix” by federal legislation supposed licensing problems related to sound recordings and global licensing. This suggests that, where the free market is allowed to work, solutions will arise.

The uneven playing field created by the compulsory license and performing rights organization consent decrees should not be perpetuated by legislation that would further extend government price controls over music publishers and songwriters, while owners of sound recordings and music services continue to operate in a free market. The bundle of rights necessary to operate a digital music service is already available from each and every songwriter

and music publisher. Marketplace participants should be working with them to create efficient licensing mechanisms instead of petitioning courts and regulators.

5. *Please assess the effectiveness of the current process for licensing the public performances of musical works.*

Putting aside concerns about the rate-setting process itself, which will be addressed below, the recent decision preventing publishers from withdrawing their digital rights from ASCAP to enter into direct licenses is a clear example of governmental control driving inefficiencies.<sup>33</sup> The rate court's decision to mandate what rights a copyright owner can or must grant to an agent such as ASCAP not only conflicts with established agency law, but also the fundamental principle of divisibility of copyright provided in the Copyright Act. This "all-in or all-out" mandate limits the flexibility of music publishers, their representatives and even licensees to determine the most effective manner in which to license a music service. It, paradoxically, seems to favor, or even force, collective licensing, instead of allowing individual music publishers the opportunity to experiment gradually with direct licensing. After decades of relying upon performing rights organizations, the risks of the Court's all or nothing approach to public performance licensing presents a Hobson's choice for music publishers- either pull out of ASCAP completely (and take on the difficult burdens of general licensing, e.g., licensing to small music users such as bars and clubs), or forfeit the right to negotiate agreements at market rates with digital service providers. This dilemma will only become more pronounced as the market further shifts away from physical goods and digital downloads towards a "rental"-like streaming market.

6. *Please assess the effectiveness of the royalty rate setting process and standards applicable under the consent decrees governing ASCAP and BMI, as well as the impact,*

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<sup>33</sup> *In re Petition of Pandora Media, Inc.*, 12 Civ. 8035 (DLC) (S.D.N.Y. Sept. 17, 2013), available at <http://www.scribd.com/doc/169018381/Pandora-v-ASCAP-rights-withdrawal-ruling>.

*if any, of 17 U.S.C. § 114(i), which provides that “[l]icense fees payable for the public performance of sound recordings under Section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works.*

The decrees governing ASCAP and BMI are clearly historic relics that, as with the Section 115 compulsory licenses, establish governmental price controls resulting in royalty rates disconnected from the free market. In addition, it is difficult to imagine a process with higher transactions costs than a rate proceeding before a federal district court. The absurdity of using a trial to set music royalty rates is clearly obvious. This inefficiency is brought into clear relief by the fact that a licensee can publicly perform musical works under a rate-less “interim license” until a rate is determined by a trial in the applicable rate court.<sup>34</sup> Songwriters and music publishers wait years for their royalty income pending resolution of rate cases, lessening investment in the creative process or, worse, preventing songwriters from supporting their families.

Moreover, the restriction on evidence being presented to the rate court via Section 114(i), however, results in an untenable disparity between the rates paid to songwriters and music publishers under the consent decrees, and the rates paid for the use of sound recording rates under Section 114. The rate courts are currently forbidden from taking into account the royalty rates established under the “willing buyer/willing seller” public performance rate standard used for some services under Section 114 when setting public performance rates for musical works used in digital radio and in other contexts.<sup>35</sup> And more importantly, they are precluded from even considering the Section 114 rates.<sup>36</sup>

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<sup>34</sup> See 2-8 NIMMER ON COPYRIGHT § 8.19(C)(2).

<sup>35</sup> 17 U.S.C. § 114(i).

<sup>36</sup> *Id.*

Originally, songwriters and music publishers wanted the evidentiary restriction because they thought the 114 rate would be used to artificially lower the royalty rates obtained by ASCAP and BMI. In fact, the opposite has occurred. A comparison of the royalties paid for the use of sound recordings and royalties paid for the use of musical works by non-interactive streaming music services shows that relationship between the rates is 12 to 1,<sup>37</sup> a gross disparity that could only be imposed by a rate court forced to act in a vacuum. To the extent rate courts continue to exist, they should be required to consider market-rate benchmarks or, in their absence, benchmarks established by a tribunal required to approximate a market rate.

With that said, the underlying lesson is that a free market, with all participants on equal footing and no one party disadvantaged by the interposition of legislative or judicial fiat, is the best way to ensure that every stakeholder is entitled to bargain for and obtain the market's real value for their work. The Songwriter Equity Act ("SEA")<sup>38</sup>, which is also addressed below, tries to address this disparity of treatment, and attempts to resolve the inequity by allowing for the introduction of such evidence in a rate court proceeding.<sup>39</sup>

*7. Are the consent decrees serving their intended purpose? Are the concerns that motivated the entry of these decrees still present given modern market conditions and legal developments? Are there alternatives that might be adopted?*

Please see our response to Question 6 above.

## II. Sound Recordings

*8. Please assess the current need for and effectiveness of the Section 112 and Section 114 statutory licensing process.*

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<sup>37</sup> See Pandora Form 10-K, *infra* note 56.

<sup>38</sup> Songwriter Equity Act of 2014, H.R. 4079, 113<sup>th</sup> Cong. 1<sup>st</sup> Sess. (2014).

<sup>39</sup> "The Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In establishing such rates and terms, the Copyright Royalty Judges shall base their decision on marketplace, economic, and use information presented by the participants. In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable uses and comparable circumstances under voluntary license agreements." *See id.*

Songwriters and music publishers are not typically licensors or licensees of sound recordings subject to the Section 112 and 114 statutory licensing and royalty distribution process. As a result, our comments will be limited to concerns regarding how the development of new digital music services that blur the line between interactive and non-interactive do not fit neatly into the statutory distinctions created by the Section 114 and 115 compulsory licenses and how the rates set pursuant to Section 114 are inequitable when viewed in relation to public performance royalties paid for the use of musical works. The concerns are addressed in the following sections.

9. *Please assess the effectiveness of the royalty ratesetting process and standards applicable to the various types of services subject to statutory licensing under Section 114.*

Please see our answer to Question 12 below.

10. *Do any recent developments suggest that the music marketplace might benefit by extending federal copyright protection to pre-1972 sound recordings? Are there reasons to continue to withhold such protection? Should pre-1972 sound recordings be included within the Section 112 and 114 statutory licenses?*

Artists releasing pre-72 recordings deserve to be paid for exploitation of their works, including by non-interactive services. Songwriter and publishers, however, are concerned that a lack of clarity created by including a new class of works within federal copyright protection could result in ownership disputes, particularly those related to termination, that make it difficult for music publishers to get paid because the responsible party is undetermined. In particular, when there are contrary claims of sound recording ownership, royalties owed to songwriters and music publishers are oftentimes held until the claims are resolved. Songwriters and music publishers, therefore, will need to consider the unintended impact to timely payment of publishing royalties of proposals made in response to this issue.

11. *Is the distinction between interactive and noninteractive services adequately defined for purposes of eligibility for the Section 114 license?*

Section 114 and 115 of the Copyright Act are now directly linked because digital music services deemed “non-interactive” are eligible for the Section 114 statutory license and are not required to pay mechanical royalties to music publishers under Section 115. On the other hand, services deemed “interactive” are ineligible for the Section 114 statutory license and are required to pay mechanical royalties under Section 115, in addition to sound recording royalties paid pursuant to direct licenses with record labels.<sup>40</sup> Section 114 defines an “interactive service” as “one that enables a member of the public to receive a transmission of a program specifically created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected on behalf of the recipient.”<sup>41</sup>

In *Arista Records v. Launch Media*, 578 F.3d 148 (2nd Cir. 2009), the Court examined whether a digital music service was “interactive” under Section 114. The LAUNCHcast service at issue allowed users to choose artists, songs, and genres they liked, which LAUNCHcast used to create customized playlists for users from the songs in its catalog. Users did not have the ability to request particular songs, or to request that songs be played in a specific order.

The Court determined that a service is “interactive” “if a user can either (1) request – and have played – a particular sound recording, or (2) receive a transmission of a program ‘specially created for the user.’”<sup>42</sup> It concluded that LAUNCHcast’s service did not meet the first definition of ‘interactive service’ because users could not request or expect to hear a particular song on demand.<sup>43</sup> In considering whether a LAUNCHcast program was “specially created for the user,” the Court stated: “[i]f the user has sufficient control over the interactive service such that she can

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<sup>40</sup> See 37 C.F.R. 385.11.

<sup>41</sup> 17 U.S.C. §114(j)(7).

<sup>42</sup> 578 F.3d at 161.

<sup>43</sup> *Id.*

predict the songs she will hear, much as she would if she owned the music herself and could play each song at will, she would have no need to purchase the music she wishes to hear.”<sup>44</sup> The Court, however, determined that the degree of control exercised by LAUNCHcast users was “no different from a traditional radio station listener expressing a preference for a country music station or a class rock station.”<sup>45</sup> Moreover, users were not able to preview an upcoming song list and, therefore, could not be ready to record a specific song.<sup>46</sup>

The Second Circuit, therefore, attempted to determine whether a digital music service was acting as a substitute for the sale of a record or was more akin to terrestrial radio when evaluating whether the service was “interactive” for purposes of Section 114 (and now Section 115). As interpreted by the Second Circuit, “interactivity” seems adequately defined even though the Office will undoubtedly hear complaints that the fact specific nature of the test creates uncertainty that hinders the development of digital music services. As new digital music services that blur the line between interactive and non-interactive transmissions emerge, negotiations that reflect the actual value of those music services should determine the royalty rates, not courts enforcing the artificial boundaries of Section 114. Maybe a digital music service that integrates the best attributes of interactive and non-interactive streaming, and the copyright owners that license it, would agree upon a blended rate in a well functioning market.

### III. Platform Parity

*12. What is the impact of the varying ratesetting standards applicable to the Section 112, 114, and 115 statutory licenses, including across different music delivery platforms. Do these differences make sense?*

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 163.

<sup>46</sup> *Id.*

The music industry labors under several different statutory ratesetting standards, resulting in a varying and inequitable allocation of revenue generated by the distribution of recordings embodying musical compositions. The variety of different rate setting standards means that music publishers and songwriters receive different royalties than labels and artists do for the same platforms. For example, under Section 115, the Copyright Royalty Board relies on the Section 801(b) standard to determine royalty rates to be paid to songwriters and publishers for digital phonorecord deliveries (“DPDs”) and physical reproductions while the royalties paid to artists and labels for the same is determined by the free market. As mentioned above, when a single song is sold on iTunes for \$1.29, the label and recording artist receive 80 cents while the songwriter and publisher receive a mere 9.1 cents.<sup>47</sup> After 100 years of governmental price control, we do not know what relationship these two royalty rates would bear in the free market. However, it is clear that such a gross discrepancy is caused by governmental price controls and enhanced by the Section 801(b) standard that does not even attempt to approximate the royalty rate owners of musical compositions and licensees would agree to in a free market.

In response to this discrepancy, the music industry has worked together to draft and support the Songwriter Equity Act,<sup>48</sup> which would ensure that the government applies a market-based rate standard when setting licensing rates for the reproduction of musical compositions under Section 115. The Songwriter Equity Act acknowledges that it is fundamentally unfair to continue to subject the reproduction rights of songwriters and publishers to both a compulsory license and a below-market rate standard.<sup>49</sup> It responds by eliminating the applicability of the current substandard rate to mechanical royalties and directs the Copyright Royalty Board to apply a “willing buyer, willing seller” standard that would approximate the free market value of

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<sup>47</sup>Knopper, *supra* note 30.

<sup>48</sup>H.R. 4079, 113<sup>th</sup> Cong. 1<sup>st</sup> Sess. (2014).

<sup>49</sup> *See id.*

compositions rather than using the 801(b) standard, which consistently results in below-market rates.<sup>50</sup>

The issue of rate standard parity also arises in the context of public performance. Section 114(i) currently explicitly prohibits the ASCAP and BMI rate courts from considering the sound recording public performance rates established under that Section. Under the current scheme, in 2013, Pandora, for example, paid 48% of its revenue to artists and labels using the willing buyer willing seller standard and only 4% of its revenue to publishers and songwriters using rates set by the rate court.<sup>51</sup> Royalties for the public performance of sound recordings and musical compositions, of course, represent Pandora's and other webcasters' single largest operating expense.<sup>52</sup> In addition, such webcasters view music publishing royalties and sound recording royalties as two components of a singular content expense.<sup>53</sup> As a result, the rate courts are unable to evaluate the single largest component of webcaster's royalty expense when establishing public performance royalties for the use of musical compositions by the same service. Moreover, the rate established under Section 114 approximates a market rate and, therefore, could be used as a benchmark for music publishing rates. Similar to the discrepancy under Section 115, sound recording owners operate under a standard intended to approximate the free market, while publishers are handicapped by being precluded from even presenting relevant evidence to the rate courts.

The Songwriter's Equity Act would address this by allowing the court to consider the royalty rates that record labels and artists receive for digital performances under a willing buyer

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<sup>50</sup> *See id.*

<sup>51</sup> Pandora Media, Inc., Annual Report (Form 10-K), at 23 (Feb. 14, 2014).

<sup>52</sup> *In re Pandora Media, Inc.*, 2014 U.S. Dist. LEXIS 36914 (S.D.N.Y. Mar. 14, 2014)

<sup>53</sup> *Id.*

willing seller standard when the court is determining public performance rates for musical compositions.

The rate standards applicable to statutory licenses under Sections 112, 114, and 115 must be reconciled to ensure that songwriters, publishers, artists, and labels receive just compensation for their efforts, but not inequitable compensation. In the one area in which musical compositions and sound recordings are not regulated in some way, the synchronization of music to audiovisual content, the market has clearly recognized that the songwriter and artist deserve equal royalties. If mechanical and public performance rights continue to be regulated, the standards for determining royalty rates must be adjusted to acknowledge the fact that songwriters and artists deserve equity for their efforts instead of continually subjecting them to a number of different standards and ratesetting schemes.

*13. How do differences in the applicability of the sound recording public performance right impact music licensing?*

Please see answer to Question 12 above.

#### IV. Changes in Music Licensing Practices

*14. How prevalent is direct licensing by musical work owners in lieu of licensing through a common agent or PRO? How does direct licensing impact the music marketplace, including the major record labels and music publishers, smaller entities, individual creators, and licensees?*

Music publishers of all sizes have increasingly engaged in direct licensing in lieu of collective licensing, particularly with respect to mechanical rights for chart-topping hits sold in physical configurations and as permanent digital downloads. In addition, major music publishers and some independent music publishers regularly license their catalogs directly to interactive digital music services. Smaller music publishers, including self-published writers, also frequently license digital music services directly. However, in most cases, such direct licenses

are offered to the publishing community on a more or less non-negotiable basis through copyright administrators like HFA or Music Reports, Inc.

Direct licensing allows music publishers to save agency fees, develop direct relationships with their licensees, license interactive digital music services that do not fall within the Section 115 statutory license (such as music video services or lyric services), and, for services that may fall within the Section 115 statutory license, but for which rates have not been established, the ability to establish a rate for that new offering. Direct licensing impacts the broader market mainly by serving as a model for the direct licenses offered to smaller music publishers noted above. Similarly, direct licenses serve as models for statutory rates related to new offerings under Section 115.

With respect to public performance royalties for the use of musical works, there is consensus within the music publishing community that rates established under the ASCAP and BMI consent decrees are so far below market value, that engaging in free market direct licensing is the only way to even the playing field.<sup>54</sup> BMI's Del Bryant noted "by working outside of the major PROs' regulatory framework, Sony/ATV was able to increase their fees from Pandora by 25% versus the current rates of U.S. Performing Rights Organizations."<sup>55</sup> Similar to the manner in which direct licensing works in connection with interactive services, direct licenses authorizing the public performance of musical works could be used as models for ASCAP and BMI when dealing with non-interactive services or as benchmarks in rate court proceedings.

To the extent small music publishers or self-published songwriters wish to remain independent of the larger market participants, they may need to continue their reliance on

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<sup>54</sup> See Ben Sisario, *Pandora Suit May Upend Century-Old Royalty Plan*, THE NEW YORK TIMES (Feb. 13, 2014), available at [http://www.nytimes.com/2014/02/14/business/media/pandora-suit-may-upend-century-old-royalty-plan.html?\\_r=0](http://www.nytimes.com/2014/02/14/business/media/pandora-suit-may-upend-century-old-royalty-plan.html?_r=0).

<sup>55</sup> Del R. Bryant, *BMI on Rights Withdrawal: an Open Letter to the Music Industry*, BMI (Feb. 11, 2013), available at [http://www.bmi.com/news/entry/bmi\\_on\\_rights\\_withdrawal\\_an\\_open\\_letter\\_to\\_the\\_music\\_industry](http://www.bmi.com/news/entry/bmi_on_rights_withdrawal_an_open_letter_to_the_music_industry).

voluntary participation in HFA, PROs and other organizations that can aggregate the interests of thousands of similarly-situated songwriters and music publishers and facilitate licensing for digital music services. However, we expect direct licensing to increase in the future and that direct licensing will benefit the broader market by providing free market models and benchmarks by organizations attempting to facilitate licensing by aggregating copyright interests.

15. *Could the government play a role in encouraging the development of alternative licensing models, such as micro-licensing platforms? If so, how and for what types of uses?*

The government should encourage, but should not play a direct role in, the development of alternative licensing methods. As noted above, statutory licenses and other government imposed licensing regimes, along with the possibility that they could be extended into new markets, have distorted the digital music marketplace and likely hindered the development of new business models. Instead, these models should be developed in the private marketplace. That is not to say government does not have a role. The Copyright Office's mandate and expertise is to maintain the database of record for copyright ownership.<sup>56</sup> To the extent the Office registration and recordation databases were updated such that the information was accessible to participants in the music business, such as through an API, it would encourage and facilitate the development of the digital music marketplace.

We understand that micro-licensing is a concern of the Office and, indeed, the RIAA and NMPA, among others, have been actively engaged in a project to facilitate micro-licensing.<sup>57</sup>

The parties are meeting vendors and there is a serious commitment to continue exploring the

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<sup>56</sup> UNITED STATES COPYRIGHT OFFICE, A BRIEF INTRODUCTION AND HISTORY, *available at* <http://www.copyright.gov/circs/circ1a.html> ("The Copyright Office is an office of record, a place where claims to copyright are registered and where documents relating to copyright may be recorded when the requirements of the copyright law are met").

<sup>57</sup> See Ed Christman, *RIAA & NMPA Eyeing Simplified Music Licensing System, Could Unlock 'Millions' in New Revenue*, BillboardBiz (Jun. 13, 2013), *available at* <http://www.billboard.com/biz/articles/news/record-labels/1566550/riaa-nmpa-eyeing-simplified-music-licensing-system-could>.

ways micro-licensing and other licensing platforms may be introduced into the overall music ecosystem.

*16. In general, what innovations have been or are being developed by copyright owners and users to make the process of music licensing more effective?*

Making music licensing “effective” means many different things to many different people. For music publishers and songwriters, music licensing is only effective if it provides a fair market royalty for the use of their songs and an accurate accounting of the proceeds from those licenses. For others, effective licensing means obtaining complete liability coverage for massive catalogs of music they are offering to the public. Yet for others, it means being able to use a particular song, in a particular fashion, for some period of time without paying too much and without significant transaction costs. Given the variety of factors involved in addressing these and related concerns, music publishers and others have launched and continue to develop licensing platforms and technology that can roughly be divided into three categories:

Category 1: Web-based applications through which individuals seeking licenses or quotes through a guided process.

Category 2: Bulk licensing platforms that facilitate the exchange of large amounts of data to license large catalogs of music, track usage and distributed royalties.

Category 3: Industry-wide standards for electronic data exchange that can be used to manage musical work and sound recording assets.

One of the greatest challenges for music publishers is properly defining and pricing a particular use requested by a potential licensee. Many variables affect the rate charged by publishers for particular licenses. Fees for music licenses can vary greatly depending on the popularity or importance of the song, the type of use (mechanical, user generated synchronization, commercial synchronization), the media outlet of the use (film, television,

webpage, advertising etc.); predominance of the music (background, foreground etc.), the length of time the licensee wishes to make the use available (term); and many other factors. Music publishers and songwriters, therefore, must balance the need to vary pricing based on these factors with their desire to license as many legitimate uses as possible while allocating licensing resources efficiently. As a result, many music publishers and their common administrators have developed, or are developing, online licensing platforms that correspond with Category 1 described above.

These licensing applications permit individual licensees to search publisher's catalogs and obtain licenses via an online process. Music publishers often include pre-priced options for certain types of licenses offered through these platforms. Music publishers have also worked with record labels, independent artists and developing artists to offer pre-priced licenses that include both artist masters and publishing rights for certain uses. They even offer licenses for the use of both their compositions and pre-recorded covers of songs in their catalogs. Where pre-priced options are not available, these licensing platforms are used to generate quotes that can be accepted by a party requesting a license.

Third party administrators operate similar licensing platforms for their affiliates and others. HFA offers online licensing applications such as Songfile and, for higher volume users, e-Mechanical, through which mechanical licenses for physical and digital uses may be obtained for songs represented by HFA. HFA has also partnered with Ricall to offer an e-Synch platform through which pre-priced licenses for the synchronization of both the composition and master are made available. Many innovative companies are competing in the synch market, such as Greenlight Music, Dashbox, Songfreedom, CueSongs, SynchTank, Rumblefish, AudioSocket, Fieldhouse Music, YouLicense, Jingle Punks, Triple Scoop Music and MusicSynk.

Within Category 2 described above, a variety of companies compete to provide information management and technology solutions designed for music distributors. These solutions simplify the administration of musical works rights, streamline the licensing and royalty process, accelerate market entry and reduce costs. The solutions are generally used by digital music services that provide consumers access to massive catalogs of recordings or audiovisual works.

HFA's Slingshot service offering is a good example. Broadly speaking, Slingshot services include catalog management, licensing, royalty tracking, distribution and reporting, and inquiry management. At a more granular level, these services include issuing licenses, administering direct agreements between publishers and licensees, serving Notices of Intent, soliciting publisher participation in direct licensing agreements, data mapping and matching, copyright research, royalty calculation, advance payment administration, royalty administration and distribution, and statement generation. Many companies compete in to provide some or all of these services. They include Music Report, Inc., Medianet, RoyaltyShare, RightsFlow, Backlash Solutions, ClearThis Entertainment, SACEM, COMPASS and Crunch Digital.

A significant example of a hybrid of Category 1 and Category 2 services, of course, is YouTube's Content ID system. Music publishers and record labels partnered with and licensed YouTube in order to access the new source of revenue offered by its distribution platform. YouTube invested significant resources in developing the platform and works both directly with music publishers and other administrators of copyrighted works to make copyrighted works available to its users and partners for inclusion in user generated videos. 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.”<sup>58</sup>

Lastly, the music industry continues to develop a variety of data exchange standards and platforms that fit into Category 3 above. Most well known are the 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 addition, music publishers rely on the exchange of Common Works Registration or CWR files to provide catalog information to common administrators and others.

Although the applications, systems and platforms discussed above may not be perfect, all involved are working diligently to make sure that licenses can be obtained by those seeking liability coverage and revenue flows to the owners and creators of works included, distributed and performed via the Internet.

*17. Would the music marketplace benefit from modifying the scope of the existing statutory licenses?*

As discussed previously, songwriters and music publishers believe that the licensing of musical works should take place in the free market. As a result, the scope of compulsory licenses should not be expanded in any way. In particular and as set forth above, the music marketplace would benefit adopting uniform rate standards as proposed in the Songwriter Equity Act, and by modifying the Section 114 to allow rate courts to consider all information relevant to their decisions. We have also noted previously some area in which the operation of Section 115 could be improved.

## V. Revenues and Investment

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<sup>58</sup> 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](http://www.uspto.gov/ip/global/copyrights/comments/Google_Comments.pdf)

18. *How have developments in the music marketplace affected the income of songwriters, composers, and recording artists?*

Digital distribution of music has resulted in a huge decline in the income of songwriters and recording artists.<sup>59</sup> The availability of digital distribution channels has made it easy to distribute music on a mass scale without obtaining a license. DMCA takedown procedures are ineffective in combating illegal distribution. Although the physical marketplace continues to be displaced by the digital marketplace, the digital marketplace has not reached a level of economic maturity sufficient to provide songwriters and recording artists with an income comparable to that earned when physical distribution was the norm.<sup>60</sup> Moreover, as users shift from a download model to a streaming model, the income received from public performances will become more and more significant, and mechanical income will become less significant (which makes all the more important a favorable resolution of the rate court and consent decree issues discussed above).

This downturn in economic reward has led to a decrease in the music industry's middle class.<sup>61</sup> Those making money as songwriters for mid-level artists, those producing such artists, and those working on behalf of those artists, have felt the brunt of piracy and the inadequacies of enforcement more than those top level artists or those working for the top level artists.<sup>62</sup> A recent study focusing on this dynamic concludes that the top 1% of all artists and songwriters account for 77% of all recorded music income.<sup>63</sup> This is an untenable situation, and has led to not only

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<sup>59</sup> See LUIS AGUIAR & BERTIN MARTENS, INST. FOR PROSPECTIVE TECHNOLOGICAL STUDIES, MUSIC CONSUMPTION ON THE INTERNET: EVIDENCE FROM CLICKSTREAM DATA 16-17 (2013), available at <ftp://ftp.jrc.es/pub/EURdoc/JRC79605.pdf>.

<sup>60</sup> See IFPI DIGITAL MUSIC REPORT 2013, ENGINE OF A DIGITAL WORLD 9 (2013), available at [http://www.ifpi.org/downloads/dmr2013-full-report\\_english.pdf](http://www.ifpi.org/downloads/dmr2013-full-report_english.pdf).

<sup>61</sup> See Paul Resnikoff, *The Top 1% of Artists Earn 77% of Recorded Music Income, Study Finds...*, DIGITAL MUSIC NEWS (Mar. 5, 2014), available at <http://www.digitalmusicnews.com/permalink/2014/03/05/toponepercent>.

<sup>62</sup> See *id.*

<sup>63</sup> *Id.*

artists feeling the brunt of the economic downturn, but the impoverishment of a generation of stand-alone songwriters. There is less investment money, greater risk, and more uncertainty.

Fixing this is the challenge for us all.

*19. Are revenues attributable to the performance and sale of music fairly divided between creators and distributors of musical works and sound recordings?*

Please see our response to Question 12 above.

*20. In what ways are investment decisions by creators, music publishers, and record labels, including the investment in the development of new projects and talent, impacted by music licensing issues?*

Songwriters and music publishers make the vast majority of their living from licensing derivative works, not from the sale of copies of the original, underlying composition. Their expectation is to license their songs for numerous uses in a variety of markets. Songwriters and those who invest in their work have a longstanding expectation that derivative works can be monetized. However, the legal regime governing music licensing and copyright enforcement redistributes income from the original songwriters and publishers to secondary users and businesses that make money from secondary users.

The existence of compulsory licenses and the ASCAP and BMI consent decrees necessarily means that songwriters and music publishers are not receiving fair market value for their songs with respect to two-thirds of the music publishing market. Compounding this characteristic of the marketplace is the difficulty of enforcing rights under the DMCA regime and the vast size of the internet itself. Placing the burden of policing this content on copyright owners creates an unwieldy responsibility for many copyright owners, large and small, that simply do not have the means to scour content made available by online services. Their income suffers as a result. This decrease in revenue derived from music licensing directly impacts the investment decisions of music publishers.

Below market royalty rates and the prevalence of unlicensed uses mean music publishers have less capital to invest in new songwriters and songwriters have less incentive to invest the time necessary to create great music. In addition, music publishers and songwriters are conditioned by the fear of decreased revenue streams and the constant threat that ever great portions of their music catalog and business will be subject to governmental price controls making it impossible to obtain fair market value for their works. If a creator does not believe they will recoup their financial and time resource investment, they will not be incentivized to create new works.

*21. How do licensing concerns impact the ability to invest in new distribution models?*

Songwriters and music publishers understand that uncertainty in the music licensing ecosystem might dampen incentive to invest in new music distributions systems and platforms for those who fear the liability associated with unlicensed uses of copyrighted works. Recent history suggests, however, that such a fear is overblown. Although we have worked with several good digital music service partners, copyright owners repeatedly have to chase new online music retailers who use, distribute or perform music. And only after the copyright owners catch them is there any recognition that they should buy or build the processes necessary to pay for the rights they use. We believe the interpretation of the DMCA by lower courts have only encouraged this behavior.

Notwithstanding this state of affairs, the music publishing community is dedicated to development of a music licensing regime that allows for easier more streamlined music licensing practices and takes into account the interests of both the songwriting and music publishing community, as well as the music distribution community. It is when either side's interests are minimized or ignored, that dysfunction and uncertainty become the rule rather than the

exception. There is common ground, but those developing new distribution models must adopt a view recognizing and supporting the copyright interests at the core of the experience they sell. Copyrights must not be ignored, belittled, or diminished – but rather embraced at the development stage of new technologies. When money is being earned from distributing and performing copyrights, the owners of those copyrights should share in the proceeds.

## VI. Other Issues

22. *Please supply or identify data or economic studies that measure or quantify the effect of technological or other developments on the music licensing marketplace, including the revenues attributable to the consumption of music in different formats and through different distribution channels, and the income earned by copyright owners.*

From time to time, the International Intellectual Property Alliance (“IIPA”), a coalition of trade organizations representing creators, publishes a study on copyright economics and the United States economy.<sup>64</sup> In the most recent study, IIPA noted that the core copyright industries, which includes music, added more than \$1 trillion to the U.S. economy, positing that “[n]ew technologies leading to the development of new distribution methods for legitimate copyrighted products, supported by good laws and enforcement, will allow the U.S. copyright-based industries to enjoy economic growth in the future.”<sup>65</sup>

Studies also suggest that the music industry is taking note of the importance of licensing new digital services, which were responsible for \$5.6 billion in global revenues in 2012.<sup>66</sup> Download sales continue to increase while subscription services have become an integral part of the music industry, “with 20 million paying subscribers globally in 2012- an increase of 44 per

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<sup>64</sup> Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2013 Report 6*, available at [http://www.iipa.com/pdf/2013\\_Copyright\\_Industries\\_Full\\_Report.PDF](http://www.iipa.com/pdf/2013_Copyright_Industries_Full_Report.PDF).

<sup>65</sup> *Id.* at 17.

<sup>66</sup> *IFPI Digital Music Report 2013: Engine of a digital world 5*, available at [http://www.ifpi.org/downloads/dmr2013-full-report\\_english.pdf](http://www.ifpi.org/downloads/dmr2013-full-report_english.pdf) (“Record companies’ strategies of proactively licensing across different revenue channels are paying dividends, too. Most revenue streams- downloads, subscription, advertising-supported, video, performance rights, synch- are growing.”)

cent on 2011.”<sup>67</sup> In fact, a recent report published by the International Federation of the Phonographic Industry (“IFPI”) reports roughly 500 licensed digital music services available in over 100 territories around the world.<sup>68</sup>

*23. Please identify any pertinent issues not referenced above that the Copyright Office should consider in conducting its study.*

Education represents another pertinent issue. Oftentimes, users of music complain they do not understand music publishing law and practice, both substantively and procedurally. This is an impediment to properly dealing with songwriters and music publishers on a small or grand scale. To help alleviate this problem, and to facilitate the education of all music users, we have included an Appendix A containing a bibliography of music publishing books and resources that will be made a part of the record, and will serve as a starting point for any user of music works to fully understand the topic of music publishing – and to promote the concept that new technology creators or services must incorporate within their creations from inception systems respecting copyright that identify and pay all songwriters and music publishers.

NMPA and HFA appreciate the opportunity to provide comments on these issues and we look forward to the opportunity to continue our involvement in the Copyright Office’s Music Licensing Study, and to promote a general conversation within the music community of how a more free market approach, developed gradually and thoughtfully, will benefit the entire music community, including the creators, the distributors, and the consumers of music.

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<sup>67</sup> *Id* at 7.

<sup>68</sup> *Id* at 32.

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Respectfully submitted,



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## Appendix A

### Music Publishing Bibliography

**The Plain and Simple Guide to Music Publishing: What you need to know about protecting and profiting from, music copyrights**

By Randall D. Wixen

Hal Leonard Corporation, 2005

**Music Publishing- The Complete Guide**

By Steve Winogradsky

Alfred Music, 2013

**Music & Copyright in America: Toward the Celestial Jukebox**

By Kevin Parks

American Bar Association, 2012

**An Introduction to Popular Music Publishing in America**

By Leonard Feist

National Music Publishers' Association, 1980

**Music, Money and Success: The Insider's Guide to Making Money in the Music Business**

By Jeffrey Brabec and Todd Brabec

Schirmer Trade Books; A Part of The Music Sales Group, 2006

**Music Publishing: The Real Road to Music Business Success**

By Tim Whitsett

MixBooks, 2004

**Pennies from Heaven: The American Popular Music Business in the Twentieth Century**

By Russell Sanjek

Decapo Press, 1996

**Legal Aspects of the Music Industry: An Insider's View of the Legal and Practical Aspects of the Music Business**

By Richard Schulenberg

Watson-Guptill Publications, 2005

**Kohn on Music Licensing**

By Al Kohn and Bob Kohn

Aspen Law & Business, A Division of Aspen Publishers, Inc., 1996.

**All You Need to Know About the Music Business**

By Don Passman

Free Press, a Division of Simon & Schuster, 2003

**The Musicians Business & Legal Guide**

Edited by Mark Halloran

Beverly Hills Bar Association, 2005

**Music Law in the Digital Age**

By Allen Bargfrede and Cecily Mak

Berklee Press, 2009