UNITED STATES COPYRIGHT OFFICE

Federal Copyright Protection for Pre-1972 Sound Recordings

A REPORT OF THE REGISTER OF COPYRIGHTS

DECEMBER 2011

House Appropriations Committee Print, Omnibus Appropriations Act, 2009
(H.R. 1105; Public Law 111–8)
DIVISION G—LEGISLATIVE BRANCH APPROPRIATIONS ACT, 2009, at 1769

Pre-1972 Sound Recordings.--The Register of Copyrights is directed to conduct a study on the desirability of and means for bringing sound recordings fixed before February 15, 1972, under federal jurisdiction. The study is to cover the effect of federal coverage on the preservation of such sound recordings, the effect on public access to those recordings, and the economic impact of federal coverage on rights holders. The study is also to examine the means for accomplishing such coverage. As part of this effort, the Register of Copyrights should publish notice of the study and provide a period during which interested persons may submit comments. The Register of Copyrights is to submit a report on the results of this study to the Committees on Appropriations of the House and Senate no later than two years after the enactment of this Act. The report should include any recommendations that the Register considers appropriate.

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The Register of Copyrights of the United States of America
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8359

December 28, 2011

Dear Mr. President:

On behalf of the United States Copyright Office, I am pleased to deliver this Report to Congress, as required in the Explanatory Statement to the Omnibus Appropriations Act of 2009. See Public Law No. 111-8, 123 Stat. 524 (2010), at p. 1769.

As directed by Congress, the Report considers the desirability of and means for bringing sound recordings fixed before February 15, 1972, under federal jurisdiction, with consideration given to the effect of federal coverage on the preservation of such sound recordings, the effect on public access to those recordings, and the economic impact of federal coverage on rights holders. It also examines the means for accomplishing such coverage. Under current law, sound recordings fixed on or after February 15, 1972 are protected under federal copyright law, but recordings fixed before that date are protected by a patchwork of state statutory and common law.

The Report recommends that federal copyright protection should apply to sound recordings fixed before February 15, 1972. It proposes special provisions to address issues such as copyright ownership, term of protection, termination of transfers and copyright registration.

In reaching the recommendations contained in the Report, the Copyright Office engaged with many stakeholders, including representatives of libraries and archives, the recording industry, performers and musicians, the broadcast, cable and satellite industries, and other interested parties.

The Report is also available on the Copyright Office website at http://www.copyright.gov/docs/sound/.

Respectfully,

Maria A. Pallante

Maria A. Pallante
Register of Copyrights

Enclosure

The Honorable Joseph Biden
President
United States Senate
Washington, DC 20510

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Enclosure

The Honorable John Boehner
Speaker of the House
of Representatives
Washington, DC 20515

ACKNOWLEDGMENTS

This Report was prepared under the auspices of the Office of General Counsel, U.S. Copyright Office, with support from the Office of Policy and International Affairs. It is the result of the sustained commitment and professional expertise of several people in these departments, especially David Carson, General Counsel, Chris Weston, Attorney-Advisor, and Steve Ruwe, Attorney-Advisor.

Special thanks go to June Besek, Executive Director of the Kernochan Center for Law, Media and the Arts at Columbia University School of Law. June, who has done extensive work on copyright and pre-1972 sound recordings in the past, played a leading role on our team, providing valuable insights and background information at the outset of the study and actively participating in the Office's work throughout the study, including at the roundtable conducted in June 2011. She drafted significant sections of the Report and reviewed numerous drafts of the final Report.

June, Chris and Steve were the principal authors of the Report. David oversaw the entire process and the preparation of the Report, actively assisted by Chris. Associate Register for Policy and International Affairs Michele Woods and Deputy General Counsel Tanya Sandros played invaluable roles in providing substantive and editorial comments on the Report. Senior Counsel for Policy and International Affairs Karyn Temple Claggett also offered editorial input and was an active participant at the roundtable. Attorney-Advisor Erik Bertin reviewed and proofread the final draft. Christopher Reed, Senior Advisor to the Register, provided both policy and production assistance. Many thanks to legal interns Jenni Wiser and Emily Zandy for their research efforts in reviewing and updating the survey of state criminal antipiracy statutes.

Finally, I would like to recognize David Christopher and his staff in the Information and Records Division of the Copyright Office, including George Thuronyi, Helen Hester-Ossa, Teresa McCall and Cecelia Rogers, for their assistance in producing the Report.

Maria A. Pallante
Register of Copyrights

TABLE OF CONTENTS

ABBREVIATIONS

A2IM	**American Association of Independent Music**
ALA	**American Library Association**
ARL	**Association of Research Libraries**
ARSC	**Association of Recorded Sound Collections**
CDA	**Communications Decency Act**
EFF	**Electronic Frontier Foundation**
FMC	**Future of Music Coalition**
LOC	**Library of Congress**
MLA	**Music Library Association**
NAB	**National Association of Broadcasters**
NMPA	**National Music Publishers Association**
NRPB	**National Recording Preservation Board**
RIAA	**Recording Industry Association of America**
SAM	**Society of American Music**
SAA	**Society of American Archivists**
TRIPS	**Trade-Related Aspects of Intellectual Property Rights**
URAA	**Uruguay Round Agreements Act**
WTO	**World Trade Organization**

Wax cylinder

EXECUTIVE SUMMARY

In the Omnibus Appropriations Act of 2009, Congress instructed the Register of Copyrights (hereinafter "Copyright Office" or "Office") to conduct a study on the "desirability and means" of extending federal copyright protection to sound recordings fixed before February 15, 1972 ("pre-1972 sound recordings"). Congress directed the Office to discuss several major points in the study, including: (1) the effect that federal protection would have with respect to the preservation of pre-1972 sound recordings; (2) the effect that federal protection would have with respect to providing public access to the recordings; and (3) the impact that federal protection would have on the economic interests of right holders of the recordings. Congress also requested "any recommendations that the Register considers appropriate."

Although sound recordings were brought within the scope of federal copyright protection beginning in 1972, protection of pre-1972 sound recordings remains governed by a patchwork of state statutory and common law. States are permitted to continue protection for pre-1972 sound recordings until 2067, at which time all state protection will be preempted by federal law and pre-1972 sound recordings will enter the public domain.

The Copyright Office enjoyed significant input from stakeholders in the course of preparing this report. The Office solicited written comments and reply comments on a panoply of questions, including the current state of preservation and public availability, value in the marketplace, the Constitutional implications of federal protection, and the best methods to avoid harming the legitimate interests of right holders. The Office also held a two-day public roundtable for representatives of libraries and archives, the recording industry, performers, broadcasters and satellite radio, and other interested parties.

Among the conclusions of the Copyright Office is that the goals served by federalizing common law copyright for other types of works in 1976 would be served by bringing pre-1972 sound recordings into the federal statutory scheme as well. Indeed, Congress did not articulate grounds for leaving pre-1972 sound recordings outside the federal scheme and there is very little information as to why it did so. The Copyright Office also concludes that federalization would best serve the interest of libraries, archives and others in preserving old sound recordings and in increasing the availability to the public of old sound recordings. While many librarians and archivists are dissatisfied with the scope of the federal statutory privileges enjoyed by libraries and archives, these exceptions and limitations (sections 107 and 108 in particular) provide more certainty and, in general, more opportunity than state laws to preserve and make available sound recordings from many decades past. Moreover, pre-1972 sound recordings would enjoy the benefit of any future statutory amendments to exceptions and limitations in the Copyright Act, including updates to section 108 or orphan works legislation.

The principal objection offered by record companies – that federalizing protection for pre-1972 sound recordings would cast a cloud over existing ownership of rights in those recordings – is not insurmountable. Congress can address it by expressly providing that the ownership of copyright in the sound recording shall vest in the person who owned the rights under state law just prior to the enactment of the federal statute. Other concerns can also be resolved.

Here are the key points and legislative recommendations in the Report:

- The Copyright Office recommends that federal copyright protection should apply to sound recordings fixed before February 15, 1972, with special provisions to address ownership issues, term of protection, and registration. This will improve the certainty and consistency of copyright law, will likely encourage more preservation and access activities, and should not result in any appreciable harm to the economic interests of right holders.

- Federal copyright protection for pre-1972 sound recordings means that all of the rights and limitations of Title 17 of the U.S. Code applicable to post-1972 sound recordings would apply, including section 106(6) (public performance right for digital audio transmissions), section 107 (fair use), section 108 (certain reproduction and distribution by libraries and archives), section 110 (exemption for certain performances and displays), section 111 (statutory license for cable retransmissions of primary transmissions), section 112 (ephemeral recordings by broadcasters and transmitting organizations), section 114 (statutory license for certain transmissions and exemptions for certain other transmissions), section 512 (safe harbor for Internet service providers), Chapter 10 (digital audio recording devices), and Chapter 12 (copyright protection and management systems), as well as any future applicable rights and limitations (*e.g.*, orphan works) that Congress may choose to enact.

- The initial owner(s) of the federal copyright in a pre-1972 sound recording should be the person(s) who own(s) the copyright under applicable state law at the moment before the legislation federalizing protection goes into effect.

- Section 203 of the Copyright Act should be amended to provide that authors of pre-1972 sound recordings are entitled to terminate grants of transfers or licenses of copyright that are made on or after the date federal protection commences. However, termination of pre-federalization grants made under state law prior to federalization presents serious issues with respect to retroactivity and takings, so the Office does not recommend providing termination rights for grants made prior to federalization of protection.

- The term of protection for sound recordings fixed prior to February 15, 1972, should be 95 years from publication (with "publication" as defined in section 101) or, if the work had not been published prior to the effective date of legislation federalizing protection, 120 years from fixation. However,

    - In no case would protection continue past February 15, 2067, and

    - In cases where the foregoing terms would expire before 2067, a right holder may take the action described below to obtain a longer term.

- For pre-1972 sound recordings other than those published before 1923, a transition period lasting between six and ten years from enactment of federal protection should be established, during which a right holder may make a pre-1972 sound recording available to the public and file a notice with the Copyright Office confirming availability at a reasonable price and stating the owner's intent to secure protection until 2067. If a right holder does this, the term of protection of the sound recording will not expire until 2067, provided that the recording remains publicly available at a reasonable price during its extended term of protection.

- For sound recordings published before 1923, a transition period lasting three years from enactment of federal protection should be established, during which a right holder may make a pre-1923 sound recording available to the public and file a notice with the Copyright Office confirming availability at a reasonable price and stating the owner's intent to secure protection for 25 years after the date of enactment the legislation that federalizes protection. If a right holder does this, the term of protection of the sound recording will not expire until the end of the 25-year period, provided that the recording remains publicly available at a reasonable price during its extended term of protection.

- Regardless of a right holder's actions, all pre-1972 sound recordings should enjoy federal protection at least until the end of the relevant transition period described above.

- Regarding the requirement of timely registration in order to recover statutory damages or attorney's fees in an infringement suit, a transitional period of between three and five years should be established, during which right holders in pre-1972 sound recordings can seek statutory damages and attorney's fees notwithstanding the lack of registration prior to filing suit.

- Adjustments should be made or at least considered with respect to certain other provisions of the Copyright Act to take into account difficulties that owners of rights in pre-1972 sound recordings may encounter. Among those provisions are: section 405 (notice of copyright: omission of notice on certain copies and phonorecords), section 406 (notice of copyright: error in name or date on certain copies and phonorecords), section 407 (deposit of copies or phonorecords for Library of Congress), section 410 (*prima facie* weight of certificate of registration), and section 205 (regarding priority between conflicting transfers recorded in the Copyright Office).

78 rpm shellac disc

I. INTRODUCTION AND BACKGROUND

A. The Pre-1972 Sound Recordings Report

In 2009, Congress directed the Register of Copyrights to conduct a study on the desirability of and means for bringing sound recordings fixed before February 15, 1972 under federal jurisdiction. Specifically,

> The study is to cover the effect of federal coverage on the preservation of such sound recordings, the effect on public access to those recordings, and the economic impact of federal coverage on rights holders. The study is also to examine the means for accomplishing such coverage. As part of this effort, the Register of Copyrights should publish notice of the study and provide a period during which interested persons may submit comments. The Register of Copyrights is to submit a report on the results of this study to the Committees on Appropriations of the House and Senate no later than two years after the enactment of this Act. The report should include any recommendations that the Register considers appropriate.[1]

[1] *See* 155 CONG. REC. H2397 (daily ed. Feb. 23, 2009) (statement of Rep. Obey, Chairman of the House Committee on Appropriations, regarding H.R. 1105, Omnibus Appropriations Act of 2009). The deadline was extended from March 11, 2011 to December 31, 2011 at the request of the Copyright Office.

After internal study of the issue, in 2010 the Copyright Office issued a Notice of Inquiry[2] describing the issues to be addressed in the study and inviting the public to submit written comments on relevant questions such as (1) whether libraries currently treat pre-1972[3] sound recordings differently from federally copyrighted sound recordings for purposes of preservation and access; (2) whether federalizing protection would improve their ability to preserve and provide access to such recordings; and (3) the likely effects on the commercial value of those recordings, including on the scope of rights, the certainty and enforceability of protection, ownership of rights, and the term of protection The deadline for initial comments was originally set for December 20, 2010, but was subsequently extended at the request of interested parties until January 31, 2011.[4] Reply comments were due on April 13, 2011.[5]

The Office received 59 initial comments[6] and 17 reply comments.[7] The comments represented organizations and individuals with diverse perspectives and experiences, including:

- **Sound recording libraries and organizations** (*e.g.*, Association of Recorded Sound Collections, Music Library Association, Society for American Music)
- **Other libraries, archives and library and archives associations** (*e.g.,* Library of Congress, American Library Association, Association of Research Libraries, Society of American Archivists)

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[2] 75 Fed. Reg. 67,777 (Nov. 3, 2010). Federal Register notices published by the Copyright Office during this study are included as Appendices A-C.

[3] As used in this report, "pre-1972" means before February 15, 1972, when sound recordings first became eligible for federal copyright protection.

[4] 75 Fed. Reg. 74,749 (Dec. 1, 2010).

[5] Originally the period for reply comments was set at 30 days, but that deadline too was extended at the request of the parties. See Appendix B; 76 Fed. Reg. 10,405 (Feb. 24, 2011).

[6] One of the comments, #57, groups together 231 copies of a form letter originated by Grooveshark. The form letter is available on Grooveshark's website at http://blog.grooveshark.com/post/2519052858/help-grooveshark-stay-alive (last checked Dec. 1, 2011).

[7] Both the initial comments and the reply comments have been posted to the Copyright Office's website and are available at http://www.copyright.gov/docs/sound/. Lists of commenters are attached as Appendices D and E.

- **Recording industry associations** (*e.g.*, American Association of Independent Music, Recording Industry Association of America)

- **Broadcasters and satellite radio** (*e.g.,* National Association of Broadcasters, Sirius XM)

- **Music publishers** (*e.g.,* National Music Publishers Association)

- **Songwriters and musicians organizations (***e.g.,* Songwriters Guild of America, Future of Music Coalition)

- **Universities and academic institutions** (*e.g.,* University of Louisville, Syracuse University, Tulane University Law School, University of Utah Library)

- **Other organizations concerned about the legal treatment of pre-1972 sound recordings** (*e.g*., Electronic Frontier Foundation, Starr-Gennett Foundation, Sound Exchange, Inc.)

- **Numerous individuals**

The Copyright Office also organized a two-day public meeting in Washington, D.C. on June 2 and 3, 2011, attended by 19 representatives of 13 organizations, as well as two individuals. These participants included representatives of all of the categories of commenters, and most of the organizations, listed above. (See Appendix F.) The Office subsequently met with several organizations and individuals to further explore some of the issues raised in the comments and in the meetings.

In the course of its research, the Office consulted a number of reports commissioned or sponsored by the National Recording Preservation Board, all published between 2005 and 2010.[8]

[8] Rob Bamberger and Sam Brylawski, Nat'l Recording Preservation Board of the Library of Congress, THE STATE OF RECORDED SOUND PRESERVATION IN THE UNITED STATES: A NATIONAL LEGACY AT RISK IN THE DIGITAL AGE 1 (2010) [hereinafter NRPB REPORT]; June M. Besek, COPYRIGHT ISSUES RELEVANT TO DIGITAL PRESERVATION AND DISSEMINATION OF PRE-1972 COMMERCIAL SOUND RECORDINGS BY LIBRARIES AND ARCHIVES (CLIR & Library of Congress 2005) [hereinafter, BESEK COMMERCIAL SOUND RECORDINGS STUDY]; June M. Besek, COPYRIGHT AND RELATED ISSUES RELEVANT TO DIGITAL PRESERVATION AND DISSEMINATION OF UNPUBLISHED PRE-1972 SOUND RECORDINGS BY LIBRARIES AND ARCHIVES (CLIR & Library of Congress 2009) [hereinafter, BESEK UNPUBLISHED SOUND RECORDINGS STUDY]; Tim Brooks, SURVEY OF REISSUES OF U.S. RECORDINGS (CLIR & Library of Congress 2005) [hereinafter, BROOKS STUDY]; Program on Information Justice and Intellectual Property, Washington College of Law, American University (under the supervision of Peter Jaszi with the assistance of Nick Lewis), PROTECTION FOR PRE-1972 SOUND RECORDINGS UNDER STATE LAW AND ITS IMPACT ON USE BY

This Report is the result of the Copyright Office's research and public outreach concerning the legal treatment of pre-1972 sound recordings. The Report (1) explains the process by which the Office undertook its research; (2) describes the comments received as well as the views expressed at the public meetings; and (3) explain the Office's recommendations and the reasons for them.[9]

B. The Pre-1972 Sound Recordings Issue

The body of pre-1972 sound recordings is vast. Commercially released "popular" recordings come most readily to mind – from Frank Sinatra and Ella Fitzgerald to the Beatles and the Rolling Stones. But pre-1972 commercial recordings encompass a wide range of genres: ragtime and jazz, rhythm and blues, gospel, country and folk music, classical recordings, spoken word recordings and many others.[10] Some remain popular; others have long since faded from memory and are of interest only to scholars. There are, in addition, many unpublished recordings such as journalists' tapes, oral histories, and ethnographic and folklore recordings. There are also recordings of old radio broadcasts, which were publicly disseminated by virtue of the broadcast, but in many cases are technically unpublished under the standards of the U.S. Copyright Act. These recordings are a rich aspect of this country's cultural heritage, and it is important to ensure that they will be preserved and accessible for researchers and scholars, as well as to future generations.

NONPROFIT INSTITUTIONS: A 10-STATE ANALYSIS (CLIR & Library of Congress 2009) [hereinafter, JASZI STUDY].

[9] In citing to the comments and the transcript of the public meeting, this Report follows the following conventions: For an initial comment, the institutional or individual author followed by the page number (*e.g*., Society of American Archivists (SAA) at 10); for a reply comment, the same structure but with the word "Reply" (*e.g*., SAA Reply at 6); for a citation to the public meeting transcript, the speaker, the letter T, a number indicating the first or second day, and the page number (*e.g*., Schwartz T1 at 78).

[10] *See generally* BROOKS STUDY.

Congress brought sound recordings within the scope of federal copyright law for the first time on February 15, 1972. It provided protection on a prospective basis, leaving recordings first fixed before that date under the protection of state law. The issue was revisited during enactment of the 1976 Copyright Act, when Congress federalized protection for works that had been protected by state rather than federal copyright law but preserved the state law regime for pre-1972 sound recordings.[11] But Congress did provide some limitations on state law protection for sound recordings: the Copyright Act provides that states are entitled to protect pre-1972 sound recordings until February 15, 2067.[12] At that point, all pre-1972 sound recordings, no matter how old, will enter the public domain in one fell swoop and the dual regimes of protection for sound recordings will disappear.

As a consequence of this legal construct, there is virtually no public domain in the United States for sound recordings and a 55 year wait before this will change.[13] To put this in perspective, one need only compare the rules of copyright term for other works. For example, a musical composition published in 1922 would have entered the public domain at the end of 1997, but a sound recording of that same musical composition that was fixed the same year will remain protected for another 70 years, until 2067. In fact, sound recordings first fixed in 1922 will enter the public domain the same year as those first fixed between February 15 and December 31, 1972

[11] Until the effective date of the 1976 Copyright Act, unpublished works were protected by state common law copyright, which lasted until a work was published. As discussed below, state law (including common law copyright as well as other common law doctrines and statutes) also protected sound recordings, whether or not they were published. *See infra* Chapter II.E.

[12] *See* 17 U.S.C. § 301(c); *see also Capitol Records, Inc. v. Naxos of America, Inc.*, 830 N.E.2d 250 (N.Y. 2005), discussed below.

[13] A few individual states have explicitly set shorter terms of protection (*see infra* Chapter II.E.2), but no pre-1972 sound recordings are in the public domain throughout the United States unless they were published between February 15, 1972 and March 1, 1989 without notice and without mitigating circumstances, or unless their right holders have dedicated them to the public domain.

(the first year they were eligible for federal protection). In each case, they will not enter the public domain until the end of 2067.[14]

To be clear, it is misleading to speak of state law as a single regime of protection. More accurately, it consists of multiple regimes of protection, sometimes vague and inconsistent, with the scope of rights and of permissible activities often difficult to discern. This patchwork of state protection has frustrated many libraries, archives and educational institutions, which are unclear at best whether they are legally permitted to preserve pre-1972 sound recordings, or provide access to them for researchers and scholars – at least to the same degree as later recordings.[15]

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[14] To make matters more complicated, it is not always clear which of the two regimes of protection for sound recordings, state or federal (or both), is applicable because, due to copyright restoration in certain circumstances, there are some recordings fixed prior to February 15, 1972 that have federal law protection as well. Foreign sound recordings whose copyrights were "restored" under the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4973 (1994) may begin to enter the public domain only at the end of 2041. *See infra* Chapter II.D.

[15] *See* NRPB REPORT at 131.

Lacquer recorder

II. LEGAL AND LEGISLATIVE HISTORY

A. Federal Copyright Law and Sound Recordings until 1972

Sound recordings as defined under federal copyright law are "works that result from the fixation of a series of musical, spoken, or other sounds, . . . regardless of the nature of the material objects, such as disks, tapes or other phonorecords, in which they are embodied."[16] Although sound recordings have existed since the mid-nineteenth century,[17] no federal copyright protection was available to them until 1972.[18]

As early as 1906, during the revision process that led to the 1909 Copyright Act, representatives of the then-leading record company, Victor Talking Machine Co., urged Congress

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[16] 17 U.S.C. § 101. The full definition of sound recordings is: "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes or other phonorecords, in which they are embodied." *Id.*

[17] According to the NRPB Report, the earliest identifiable sound recording was made in 1860, and the phonograph was invented in 1877. NRPB REPORT at 1, 133.

[18] For a thorough and insightful analysis of the legal status of sound recordings in the United States until 1957, *see* Barbara A. Ringer, COPYRIGHT LAW REVISION, STUDY NO. 26: THE UNAUTHORIZED DUPLICATION OF SOUND RECORDINGS, at 21-37 (Feb. 1957) [hereinafter, Ringer], *available at* http://www.copyright.gov/history/studies/study26.pdf.

to grant federal copyright protection to sound recordings.[19] They were unsuccessful in getting such a provision into any of the revision bills introduced from 1906 to 1908. But in 1908, the Supreme Court decided *White-Smith v. Apollo*,[20] holding that a piano roll was not a "copy" of the musical composition embodied in it because the composition could not be "read" from the roll with the naked eye. Therefore, according to the Court, the defendant did not infringe the musical composition in creating and reproducing the roll. Record companies apparently realized the inconsistency between the holding in *White-Smith* and their proposal to grant copyright protection for sound recordings (for which mechanical reproductions were the only means of fixation), and they abandoned that proposal.[21]

The 1909 Copyright Act, passed the following year, granted copyright owners of musical compositions rights with respect to mechanical reproductions of their compositions, for example, in records or piano rolls. Congress was concerned, however, that if musical composition owners had exclusive rights, record companies might be able to buy up the rights and monopolize the market with respect to particular musical compositions, so the mechanical right was made subject to a compulsory license. Once a music copyright owner authorized a mechanical reproduction of his composition, others could take advantage of the license to make their own mechanical reproductions, provided that they met the statutory requirements and paid the statutory rate.[22]

While the 1909 Act provided protection for copyright holders of musical compositions whose works were reproduced in sound recordings, it included no explicit protection for sound recordings *per se*. As a result, over the subsequent decades the courts and the Copyright Office

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[19] *See* Ringer at 3.

[20] *White-Smith Publ'g. Co. v. Apollo Co.,* 209 U.S. 1 (1908), *superseded by statute*, Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

[21] Ringer at 4.

[22] An Act to Amend and Consolidate the Acts Respecting Copyright, Pub. L. No. 60-349, 35 Stat. 1075, § 1(e) (1909).

consistently refused to recognize copyright in sound recordings.[23] By the 1940s and 1950s, respected commentators, including Professor Zechariah Chafee[24] and Judge Learned Hand,[25] had expressed the opinion that there was no constitutional obstacle to protecting a sound recording as the writing of an author, even though its fixation may be unintelligible to the naked eye. They were in agreement, however, that the current law did not provide such protection.

In the absence of federal protection, states provided protection against duplication of sound recordings under common law theories, usually unfair competition or common law copyright, as discussed below.

The first bill to explicitly provide federal copyright protection for sound recordings was introduced in Congress in 1925,[26] and copyright revision bills that would have extended copyright protection to sound recordings (with varying restrictions) were introduced regularly thereafter through 1951.[27] In all, more than thirty bills to provide sound recordings with some form of copyright protection were introduced during this period, but none passed.[28] In a Copyright Office study published in 1957, Barbara Ringer (who later became Register of Copyrights) observed that the opposition to these bills was based on technical deficiencies and concerns about their constitutionality (both as to whether sound recordings were creative, and whether they were

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23 *See, e.g.*, *Aeolian Co. v. Royal Music Roll Co.*, 196 F. 926, 927 (W.D.N.Y. 1912) ("music rolls or records are not strictly matters of copyright"). The Court's holding in *White-Smith Publ'g. Co. v. Apollo* – that a piano roll did not qualify as a copy of the musical composition embodied in it – was adopted in the 1909 Act not only with respect to whether a reproduction was an infringement, but also with respect to whether a reproduction met the fixation requirement. Melville B & David Nimmer, NIMMER ON COPYRIGHT, § 2.03[B][1] (2011) at 2-32 to -33 [hereinafter NIMMER ON COPYRIGHT].

24 Zechariah Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 719, 735 (1945).

25 *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 664 (2d Cir. 1955) (Hand, J. dissenting). The panel agreed that the Constitution permitted Congress to protect sound recordings and that it had chosen not to provide such protection, but Judge Hand dissented on preemption grounds.

26 H.R. 11258, 68th Cong. (2d Sess. 1925).

27 *See* Ringer at 21-37 for a detailed discussion of efforts to provide copyright protection for sound recordings from 1925-1951.

28 *See id.; see also* Melvin L. Halpern, *The Sound Recording Act of 1971: An End to Piracy on the High ©'s?*, 40 GEO. WASH. L. REV. 964, 975 (1971-1972).

writings). She characterized the arguments on both sides as "dictated by economic self-interest, and revolv[ing] around the problem of radio broadcasting."[29] She observed that there was "practically no direct opposition" to the principle that sound recordings should be protected against unauthorized duplication.[30]

As work began in earnest on a comprehensive revision of the 1909 Copyright Act, the possibility of protecting sound recordings received renewed attention. Barbara Ringer's study, "The Unauthorized Duplication of Sound Recordings" was one of several studies commissioned by Congress to lay the groundwork for what became the 1976 Copyright Act. The contemplation was that sound recordings would be included in the copyright revision law that was then under development,[31] and copyright revision bills in the 1960s and early 1970s included protection for sound recordings, although the scope of that protection varied in the different bills.[32]

B. 1971 Sound Recording Amendment

The general copyright revision process became stalled in the late 1960s and early 1970s. Congress, persuaded that the situation concerning sound recordings was becoming urgent, decided to bring sound recordings under the federal copyright law without waiting for the overall revision. On November 15, 1971 it passed the Sound Recording Amendment, which for the first time made sound recordings eligible for federal copyright.[33]

There were three principal reasons that Congress moved ahead on sound recordings without waiting for the general revision. First, record and tape piracy had climbed to alarming

[29] Ringer at 37.

[30] *Id.*

[31] *See Report of the Register of Copyrights on the General Revision of the Copyright Law* at 18 (1961).

[32] *See, e.g.*, *Copyright Law Revision,* Part 3, Preliminary Draft for Revised U.S. Copyright Law § 10 (Sept. 1964); S. 543, 91st Cong. (1st Sess. 1969); H.R. 2512, 90th Cong. (1st Sess. 1967); S. 597, 90th Cong. (1st Sess. 1967).

[33] Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (1971).

proportions as the use of audiotapes and audiotape recorders became increasingly popular and made it easier to make and distribute unauthorized recordings on a commercial scale. The House Report accompanying the 1971 Act estimated the annual volume from pirated sales "in excess of $100 million" as compared with $300 million annually from legitimate sales of prerecorded tapes.[34]

Second, although states had begun to pass criminal laws prohibiting the unauthorized commercial duplication and distribution of sound recordings,[35] in most states record producers still relied on unfair competition, "where the remedies available are limited."[36] Moreover, the Supreme Court's decisions in *Sears, Roebuck & Co. v. Stiffel*[37] and *Compco v. Day-Brite Lighting, Inc*.[38] had cast doubt on the validity of state protection.[39] Defendants in record piracy cases were arguing that state laws were preempted by the federal copyright scheme, even though Congress had chosen not to protect sound recordings.[40]

Third, a diplomatic conference to complete a treaty to combat record piracy was scheduled for late 1971, and Congress believed progress on the domestic front would be helpful to U.S. interests.[41]

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[34] H.R. REP. NO. 92-487, 92nd Cong. at 2 (1971).

[35] *See infra* Chapter II.E.

[36] H.R. REP. NO. 92-487 at 2. For example, state law was far from uniform, and states could not enjoin activities beyond their borders. *See* Halpern, *The Sound Recording Act of 1971: An End to Piracy on the High ©'s?*, 40 GEO. WASH. L. REV. at 975.

[37] 376 U.S. 225, 230 (1964).

[38] 376 U.S. 234, 238 (1964).

[39] *See* H.R. REP. No. 92-487 at 2-3, 12-13; *see also Int'l Tape Mfrs. Assn v. Gerstein*, 344 F. Supp. 38, 49 (S.D. Fla. 1972), *vacated and remanded*, 494 F.2d 25 (5th Cir. 1974); *Tape Indus. Assn. v. Younger*, 316 F. Supp. 340, 346 (C.D. Cal. 1970), *appeal dismissed*, 401 U.S. 902 (1971).

[40] The preemption issue was not conclusively resolved until after the Sound Recording Amendment was passed, when the Supreme Court decided *Goldstein v. California,* 412 U.S. 546 (1973), discussed below.

[41] *See* H.R. REP. NO. 92-487 at 3, 11. The diplomatic conference led to the Geneva Convention for the Protection of Producers of Phonograms, Oct. 28, 1971, 25 U.S.T. 309.

The effective date of the Sound Recording Amendment was February 15, 1972,[42] four months after it was passed. It applied to sound recordings first fixed on or after that date. The law provided only a limited right with respect to sound recordings. Its principal provision was to grant sound recordings a reproduction right analogous to that provided for other works of authorship, thus giving record producers a new tool with which to combat outright duplication. However, the right to reproduce was "limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording."[43] Thus, the new law provided no protection against imitations of the performance. Moreover, it contained a significant temporal restriction: it had a "sunset provision" and protected only sound recordings first fixed on or after February 15, 1972 and before January 1, 1975.[44] It is apparent that Congress envisioned that protection for sound recordings would be folded into the copyright revision act then under consideration, making any extension of the sound recording amendment unnecessary.

The bill omitted any performance right for sound recordings, which had been a controversial issue in the revision process. At the same time, Congress refused to impose a compulsory license on sound recordings analogous to the one contained in the law for musical compositions, something that the bill's opponents had sought. In both cases, Congress observed that those issues could be revisited in the general revision of the copyright law.[45] There was no discussion of Congress's decision to protect sound recordings only on a prospective basis.

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[42] Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (1971).

[43] *Id.* § 1(a).

[44] *See id*. § 3.

[45] *See* H.R. REP. NO. 92-487 at 5; S. REP. NO. 92-72 at 3 (1971).

Shortly after the 1971 Sound Recording Amendment was enacted, its constitutionality was challenged in *Shaab v. Kleindienst*.[46] A three-judge district court rejected the plaintiff's main argument that sound recordings do not qualify as the "writings" of "authors."

The following year, the Supreme Court put to rest the question whether states could regulate pre-1972 sound recordings. In *Goldstein v. California*,[47] the Supreme Court held that California's record piracy law as it applied to pre-1972 sound recordings was not preempted by federal copyright law or the Constitution under its decision in *Sears* and *Compco*. The Court concluded that Congress had left the area of sound recordings "unattended," and states were free to act with respect to the regulation of pre-1972 sound recordings.[48] The *Goldstein* case led to the passage of many more state anti-piracy laws with respect to pre-1972 recordings,[49] and its rationale extended as well to state civil protection.

By the end of 1974 the copyright revision bill still had not become law, so Congress removed the January 1, 1975 sunset date for federal copyright protection of sound recordings.[50]

C. 1976 Copyright Revision Act

The Copyright Revision Act was passed on October 19, 1976. It included sound recordings among the categories of protectable subject matter, although the scope of protection for sound recordings continued to be more limited than that for other works. The reproduction right was (and continues to be) limited to duplication of the actual sounds in the recording.[51]

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[46] 345 F. Supp. 589 (D.D.C. 1972).

[47] 412 U.S. 546 (1973).

[48] *Id*. at 569-70.

[49] *See* Sidney A. Diamond, *Sound Recordings and Phonorecords: History and Current Law*, 1979 U. ILL. L. F. 337, 349 (1979).

[50] Pub. L. No. 93-573, 88 Stat. 1873 (Dec. 31, 1974).

[51] *See* 17 U.S.C. § 114(b). There is a similar limitation with respect to the derivative work right in sound recordings. *See id.*

Sound recordings were granted no public performance right in the 1976 Copyright Act, although later enactments provided them with a performance right with respect to certain digital transmissions.[52]

Thus sound recordings fixed on or after February 15, 1972 were secure in their eligibility for federal copyright protection. The fate of pre-1972 sound recordings, however, was addressed separately in the law.

To create a unitary system of copyright, Congress in the 1976 Act preempted state law that provided rights equivalent to copyright. Specifically, section 301(a) of the Copyright Act provides:

> On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

Congress exempted pre-1972 sound recordings from this general preemption provision and treated them separately under section 301(c) of the Copyright Act, which currently provides:

> With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.

Why Congress decided to maintain two separate systems of protection for sound recordings is unclear.[53] There are at least two theories as to why Congress did not bring pre-1972

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[52] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995), as amended by the Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860, 2905 (1998) (codified at 17 U.S.C. § 114).

recordings under federal law in 1976. The first is that Congress did not fully understand the implications of amending the bill as it then existed to add section 301(c) – in short, it was simply a mistake. Section 301 in S. 22, the general revision bill introduced in 1975, provided for preemption of state laws equivalent to copyright, but did not specifically exclude state laws concerning pre-1972 sound recordings.[54] The Justice Department, in the course of the 1975 hearings, had expressed concern that unless Congress excluded pre-1972 sound recordings from the general preemption provision, state anti-piracy laws related to those recordings would be abrogated, and the likely result would be "the immediate resurgence of piracy of pre-February 15, 1972 sound recordings."[55] It suggested adding a provision to exclude from the sweep of federal preemption the state laws that protected pre-1972 sound recordings. Apparently in response to this concern, the Senate added such a provision to the pending bill.[56] Nimmer suggests that both the Justice Department and the Senate "overlooked" the fact that a resurgence of piracy would not

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[53] Commentary on the early revision bills reflected some uncertainty as to whether any preexisting sound recordings would qualify for federal copyright protection. Against the possibility that at least some might be eligible, Congress included a provision in the revision bill (§ 402(d)) that copyright notice would be required only once the federal law became applicable, so that an otherwise eligible recording would not be barred from protection for failure to use a notice in the past. *See, e.g.*, H.R. REP. NO. 89-2237 at 20, 39 (1966). The sound recording industry urged that preexisting recordings affirmatively be included in the revision bill. *See, e.g.*, *Hearings on S. 597 Before the Subcomm. on Patents, Trademarks and Copyrights of the S. Comm. on the Judiciary*, 90th Cong. at 519 (1967) (Testimony of Clive Davis, CBS Records); *see id.* at 531-32 (Testimony of Henry Brief, RIAA). In 1969, Senator Harrison Williams offered an amendment to S. 543, the revision bill under consideration by the Senate in the 91st Congress. 115 CONG. REC. 8613, 8617 (Apr. 3, 1969). The amendment was principally designed to add a performance right in sound recordings, but it also included an amendment to section 303 of the draft bill to explicitly protect preexisting sound recordings. The performance rights amendment was accepted and became part of the revision bill in the Senate until 1974. Neither the portion of the amendment designed to include preexisting sound recordings under federal law nor section 402(d) survived the subcommittee vote, but the report provides no explanation. *See* S. REP No. 91-1219 at 7 (1970).

[54] S. 22, 94th Cong., § 301 (1st Sess. 1975).

[55] *Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the H. Comm. on the Judiciary,* Ser. No. 36, Part I at 137-38 (1975) [hereinafter, 1975 House Hearings].

[56] S. 22, 94th Cong. § 301(b)(4) (2d Sess. 1976).

otherwise have resulted because the revision bill in its then-current form conferred statutory protection on *all* sound recordings.[57]

However, it appears that the Recording Industry Association of America ("RIAA") and the Copyright Office shared the Justice Department's view that without the amendment to the preemption provision, pre-1972 sound recordings would be left without protection when the Copyright Revision Act went into effect. RIAA "strongly supported" the Justice Department's proposed amendment.[58] The Register of Copyrights agreed that pre-1972 sound recordings "should not all be thrown into the public domain instantly upon the coming into effect of the new law."[59] However, she expressed concern that under the Justice Department's proposed amendment, sound recordings would have perpetual protection under state law, and suggested a revision to provide a future date of February 15, 2047 for preemption to take place.[60]

Subsequently, the House added an end date of February 15, 2047 for state law protection for pre-1972 recordings, together with a provision specifically excluding pre-1972 sound recordings from federal copyright protection.[61]

The second theory for why Congress did not bring pre-1972 sound recordings into federal copyright in 1976 is that Congress was simply following a long tradition of including new works

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[57] 1 NIMMER ON COPYRIGHT, § 2.10[B] at 2-178.4.

[58] 1975 House Hearings at 1397 (1975) (Addendum to Statement of Stanley M. Gortikov, Sept. 11, 1975).

[59] *Id.* at 1911 (testimony of Barbara Ringer, Register of Copyrights).

[60] *Id.* Concerning the 2047 end date, the Register stated: "This might seem like a long time, but I would point out that it is in comparison to eternity. . . ." *Id.*

[61] This date of February 15, 2047 allowed state law works created the last day before federal copyright protection went into effect – February 14, 1972 – to enjoy a full 75 years of protection. Seventy-five years was the maximum duration of protection for works copyrighted under the 1909 Act, as provided by the terms of the 1976 Act. Of course, under most state laws there is no expiration date for protection of pre-1972 sound recordings, so a sound recording created in either 1941or 1971would remain protected until 2047. When the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) was passed, the date for preemption of state laws protecting sound recordings was extended by 20 years, to February 15, 2067.

under copyright only on a prospective basis.[62] This was the case, for example, with musical compositions in 1831[63] and photographs[64] in 1865.[65]

It is apparent from the legislative reports concerning the Sound Recording Amendment and the 1976 Copyright Act that Congress well understood it was leaving in place the state law regime for pre-1972 sound recordings, rather than bringing them under federal law. However, nowhere does Congress explain the considerations that, in its view, supported this result. This omission is particularly curious in light of Congress's articulated goal of a unitary system of copyright and its decision to implement that goal by bringing essentially all other works protected by state law copyright regimes into the federal system.

D. 1994 Uruguay Round Agreements Act

Despite this history, there are now some pre-1972 sound recordings that do enjoy federal copyright protection. When Congress implemented the TRIPS Agreement in the Uruguay Round Agreements Act (URAA),[66] passed in 1994, it "restored" copyright protection to certain works of foreign origin that were in the public domain in the United States on the effective date (which for most works was January 1, 1996).[67] This was done to comply with U.S. treaty obligations. Many

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62 *See* Henry Lee Mann, *As Our Heritage Crumbles Into Dust: The Threat of State Law Protection for Pre-1972 Sound Recordings*, 6 WAKE FOREST INTELL. PROP. L. REV. 45, 51-54 (2006).

63 Act of Feb. 3, 1831, Ch. 16, 4 Stat. 436.

64 Act of Mar. 3, 1865, Ch. 126, 13 Stat. 540.

65 In 1912 Congress amended the 1909 Copyright Act to include motion pictures, but the law was silent on the question of its applicability to earlier works. Act of Aug. 24, 1912, Ch. 356, 37 Stat. 488.

66 The Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994), implemented U.S. obligations under the Trade-Related Aspects of Intellectual Property Rights Agreement, April 15, 1994, 33 I.L.M. 1199, Annex 1C of the Agreement Establishing the World Trade Organization ("TRIPS Agreement"), 33 I.L.M. 1143 (1994).

67 This was the date of restoration for works whose source countries were members of the Berne Convention or the WTO on that date; for other countries, it is the date of adherence. *See* 17 U.S.C. § 104A(h)(2).

of those works had fallen into the public domain for failure to comply with U.S. formalities that used to be conditions for copyright protection, such as renewal registration or affixation of a valid copyright notice. However, among the works for which protection was "restored" were qualifying pre-1972 sound recordings of foreign origin, which had never before been eligible for federal copyright protection.

In order to be eligible for restoration, works had to meet several conditions, including (1) they could not, on the date of restoration, be in the public domain in their home country through expiration of the term of protection; (2) they had to be in the public domain in the United States due to noncompliance with formalities, lack of subject matter protection (as was the case for sound recordings),[68] or lack of national eligibility; and (3) they had to meet national eligibility standards, *i.e.*, the work had to be of foreign origin.[69] Specifically, to be restored a work had to have "at least one author or rightholder who was, at the time the work was created, a national or domiciliary of an eligible country, and if published, must have been first published in an eligible country and not published in the United States during the 30-day period following publication in such eligible country."[70]

Restoration occurred automatically on the effective date.[71] As explained above, one of the conditions was that the sound recording in question could not be in the public domain in its home country on the effective date due to expiration of copyright term. Most foreign sound recordings are protected in other countries not by copyright, but under a "neighboring rights" regime which provides a 50-year term of protection.[72] As a result, most foreign sound recordings

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[68] *See* 17 U.S.C. § 104A(h)(6)(C)(ii).

[69] *See* 17 U.S.C. § 104A(h)(6).

[70] 17 U.S.C. §104A(h)(6)(D).

[71] 17 U.S.C. §104A(a)(1).

[72] Some countries offer a longer term of protection for sound recordings, and the number of countries that offer a longer term is about to increase dramatically. Earlier this year, the Council of the European Union issued a directive extending the term of protection for phonograms (sound recordings) to 70 years.

first fixed prior to 1946 were not eligible for restoration. Those that were protected in their home countries on January 1, 1996 got the term they would have received had they been copyrighted in the United States: 75 years from publication, later extended to 95 years.[73] This means, for example, that a foreign recording made in 1945 probably would have gone into the public domain in its home country by the end of 1995 and therefore was not eligible for U.S. federal copyright protection.[74] On the other hand, a foreign recording made in 1947 probalby would have have gone into the public domain in its home country by the end of 1997, but because its copyright was restored in the United States on January 1, 1996, it received a 75 year term (later extended to 95 years), so it will be protected by U.S. copyright law until the end of 2042.

It is theoretically possible that foreign sound recordings restored to federal copyright protection enjoy concurrent state law protection. Section 301(c) – which saves state laws concerning sound recordings from federal preemption until 2067 – was never amended to exclude foreign recordings.[75] However, the rationale underlying *Goldstein v. California* was that Congress "has left the area [legal protection of sound recordings] unattended, and no reason exists why the State should not be free to act."[76] One might reasonably argue that Congress has not left the legal status of these restored foreign recordings "unattended," so that state law is preempted by the URAA at least with respect to those recordings. This issue has not been

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Directive 2011/77/EU of The European Parliament and of The Council, 2011 O.J. (L. 265) (Sept. 27, 2011). All 27 member states of the European Union are required to implement the new extended term in their domestic laws no later than November 1, 2013. The extension is not retroactive, *i.e.*, it does not apply to sound recordings that are already in the public domain. Thus, a phonorecord first published on September 1, 1961 would not enjoy the newly-extended 70-year term of protection in the EU.

[73] *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. REP. NO. 103-316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4290.

[74] However, such a recording may be eligible for state protection. *See Capitol Records, Inc. v. Naxos of America, Inc.*, 830 N.E.2d 250 (N.Y. 2005), discussed below.

[75] *See* 3 NIMMER ON COPYRIGHT, § 8C.03[E] at 8C-10.2 to 8C-10.3.

[76] 412 U.S. 546, 570 (1973) (footnote omitted).

addressed by the courts, and merely illustrates the potential complications, and inconsistencies, of dual systems of protection.

E. State Law Protection for Pre-1972 Sound Recordings

State law protection for pre-1972 sound recordings is a complicated subject, and this Report provides only a brief overview.[77] The states provide protection for pre-1972 sound recordings through a patchwork of criminal laws, civil statutes and common law. Early cases relied on common law, principally the tort of unfair competition, to protect sound recordings from unauthorized duplication and sale.[78] By the 1950s, record piracy had become a serious problem, with pirates openly competing with record companies.[79] For that reason, attention shifted to legislation imposing criminal sanctions starting in the 1960s.

1. Criminal Record Piracy Statutes

In the 1960s, states began to pass laws making it a criminal offense to duplicate and distribute sound recordings, without authorization, for commercial purposes. New York was the first such state in 1967; California was the second, in 1968.[80] Several other states followed, and

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[77] For a more extensive overview of state law protection for pre-1972 sound recordings, see JASZI STUDY, BESEK UNPUBLISHED SOUND RECORDINGS STUDY, and BESEK COMMERCIAL SOUND RECORDINGS STUDY. A chart of state criminal laws, prepared initially by ARL and revised and updated by Copyright Office interns, as well as the texts of those laws, are available at www.copyright.gov/docs/sound.

[78] *See, e.g., Victor Talking Mach. Co. v. Armstrong*, 132 F. 711 (S.D.N.Y. 1904).

[79] Glenn M. Reisman, *The War Against Record Piracy: An Uneasy Rivalry Between the Federal and State Governments*, 39 ALB. L. REV. 87, 89 (1974).

[80] *See* 1968 Cal. Stat. ch. 585, p. 1256, codified as amended in CAL. PENAL CODE § 653h (West 2011); New York Law, L. 1967, ch. 680 § 59, initially codified in N.Y. GEN. BUS. LAW art. 29-D. That section was repealed in 1978 when the law became part of New York's Penal Code, L. 1978, ch. 445, codified in N.Y. PENAL LAW §§ 275.00–275.45 (McKinney 2011).

after the Supreme Court ruled in *Goldstein v. California*[81] in 1973 that state law protection of sound recordings was constitutional, many additional states passed such laws.

a. *Examples of state criminal statutes*

Currently, nearly all states have criminal record piracy laws applicable to pre-1972 sound recordings.[82] Most state criminal laws prohibit, at a minimum, duplication and sale of recordings done knowingly and willfully with the intent to sell or profit commercially from the copies.[83] Many have express exceptions for activities such as broadcasting, archiving, and personal use. It is unclear how many cases are brought under these statutes, but they inform the protection for sound recordings under state law and provide a backdrop for commercial transactions.

Examples from four states – California, Michigan, New York and Tennessee – illustrate some of the different forms of criminal record piracy statutes.

California. California's criminal record piracy statute provides:

(a) Every person is guilty of a public offense . . . who:

> (1) Knowingly and willfully transfers or causes to be transferred any sounds that have been recorded on a phonograph record, disc, wire, tape, film or other article on which sounds are recorded, with intent to sell or cause to be sold, or to use or cause to be used for commercial advantage or private financial gain through public performance, the article on which the sounds are so transferred, without the consent of the owner.
>
> (2) Transports for monetary or like consideration within [California] or causes to be transported within [California] any such article with the knowledge that the sounds thereon have been so transferred without the consent of the owner.[84]

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[81] 412 U.S. 546.

[82] 2 NIMMER ON COPYRIGHT, § 8C.03[C] at 8C-8 to -9; JASZI STUDY at 8. According to a survey prepared by the Association of Research Libraries and supplemented and revised by the Copyright Office, only Indiana and Vermont do not have some form of statute criminalizing piracy of sound recordings. *See* http://www.copyright.gov/docs/sound/.

[83] State laws generally also protect against creation and distribution of bootleg recordings – sometimes in the same statute that prohibits unauthorized duplication and distribution of existing sound recordings, and sometimes in a separate provision. *See, e.g.*, BESEK UNPUBLISHED SOUND RECORDINGS STUDY, App. A. However, those laws, which relate to the recording of live performances without authorization, are not the focus of this Report.

[84] CAL. PENAL CODE § 653h(a) (West 2011).

In addition the law provides that

> Every person who offers for sale or resale, or sells or resells, or causes the sale or resale, or rents, or possesses for [the purposes specified above], any article described in subdivision (a) with knowledge that the sounds thereon have been so transferred without the consent of the owner is guilty of a public offense.[85]

The statute provides an exemption for persons engaged in radio or television broadcasting who transfer sounds (other than from the sound track of a motion picture) in connection with "broadcast transmission or related uses, or for archival purposes."[86]

The California law contains an "orphan works" exception for not-for-profit educational institutions or federal or state governmental entities that have as their primary purpose "the advancement of the public's knowledge and the dissemination of information regarding America's musical cultural heritage."[87] It requires that the educational institution or government entity make "a good faith effort to identify and locate the owner or owners of the sound recordings to be transferred" and "the owner or owners could not be and have not been located."[88] It provides that specific efforts must be taken to find the right holder.[89] Also, it provides that the

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[85] *Id.* § 653h(d). It is also an offense if, for commercial advantage or private financial gain, one knowingly advertises, offers for sale, etc. a recording whose cover or label does not accurately disclose the true name of the manufacturer and artist(s). *Id.* § 653w.

[86] *Id.* § 653h(g).

[87] That purpose must be "clearly set forth in the institution's or entity's charter, bylaws," or similar document. *Id.* § 653h(h).

[88] *Id.*

[89] "In order to continue the exemption permitted by this subdivision, the institution or entity shall make continuing efforts to locate such owners and shall make an annual public notice of the fact of the transfers in newspapers of general circulation serving the jurisdictions where the owners were incorporated or doing business at the time of initial affixations. The institution or entity shall keep on file a record of the efforts made to locate such owners for inspection by appropriate governmental agencies." *Id.*

exemption does not relieve an institution or entity of its contractual or other obligation to compensate the owners of sound recordings to be transferred.[90]

Michigan. Michigan's record piracy statute provides:

> [A] person, without the consent of the owner, shall not transfer or cause to be transferred sound recorded on a phonograph record, disc, wire, tape, film, or other article on which sound is recorded, with the intent to sell or cause to be sold for profit or used to promote the sale of a product, the article on which the sound is so transferred.[91]
> …
> A person, knowing or having reasonable grounds to know that the sound thereon has been transferred without the consent of the owner, shall not advertise, sell, resell, offer for sale or resale, or possess for the purpose of sale or resale, an article that has been produced in violation of [the provision above].[92]

The Michigan law contains an exception for persons who transfer sound or cause it to be transferred when:

> (a) Intended for or in connection with radio or television broadcast transmission or related uses.
> (b) For archival, library, or educational purposes.
> (c) Solely for the personal use of the person transferring or causing the transfer and without any compensation being derived by the person from the transfer.[93]

New York. New York Penal Law provides criminal liability for a person who

> 1. knowingly, and without the consent of the owner, transfers or causes to be transferred any sound recording, with the intent to rent or sell, or cause to be rented or sold for profit, or used to promote the sale of any product, such article to which such recording was transferred, or
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> 2. transports within this state, for commercial advantage or private financial gain, a recording, knowing that the sounds have been reproduced or transferred without the consent of the owner. . . .[94]

In addition, it is an offense if someone

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[90] *Id.*

[91] MICH. COMP. LAWS ANN. § 752.782 (West 2011).

[92] *Id*. at §752.783.

[93] *Id*. §752.785.

[94] N.Y. PENAL LAW § 275.05 (McKinney 2011). This offense is entitled "Manufacture of unauthorized recordings in the second degree." If done by someone who has been convicted of the same crime in the past five years, or who manufactures one thousand unauthorized recordings, it may qualify as a first degree offense with enhanced penalties. *Id*. § 275.10.

> knowingly advertises, offers for sale, resale, or rental, or sells, resells, rents, distributes or possesses for any such purposes, any recording that has been produced or transferred without the consent of the owner. . . .[95]

The term "recording" is broadly defined to include any medium on which sound, images, or both can be recorded.[96] There are exceptions in the law for (1) any broadcaster who transfers recorded sounds or images in connection with or as part of a radio, TV or cable broadcast, or for the purposes of archival preservation, and (2) for "any person who transfers such sounds or images for personal use, and without profit for such transfer."[97] The statute does not define the terms "broadcaster" or "archival preservation," and there is no case law on this subsection that clarifies those terms.

Tennessee. Under Tennessee law, it is unlawful for any person to:

> (A) Knowingly reproduce for sale or cause to be transferred any recording with intent to sell it or cause it to be sold or use it or cause it to be used for commercial advantage or private financial gain through public performance without the consent of the owner;
>
> (B) Transport within this state, for commercial advantage or private financial gain, a recording with the knowledge that the sounds on the recording have been reproduced or transferred without the consent of the owner; or
>
> (C) Advertise, offer for sale, sell or rent, cause the sale, resale or rental of, or possess for one (1) or more of these purposes any recording that the person

[95] *Id.* § 275.25. If done by someone who has been convicted of the same crime in the past five years, or the commission of that crime involved at least one thousand unauthorized sound recordings or at least one hundred unauthorized audiovisual recordings, it may qualify as a first degree offense with enhanced penalties. *Id*. § 275.30. Failure to disclose the origin of a recording is also an offense. *Id*. § 275.35.

[96] The definition in full provides:

> "Recording" means an original phonograph record, disc, tape, audio or video cassette, wire, film, hard drive, flash drive, memory card or other data storage device or any other medium on which such sounds, images, or both sounds and images are or can be recorded or otherwise stored, or a copy or reproduction that duplicates in whole or in part the original.

Id. § 275.00(6).

[97] *Id*. § 275.45.

> knows has been reproduced or transferred without the consent of the owner.[98]

"Recording" for purposes of the statute includes sound recordings in any medium.[99]

Tennessee law provides no statutory exceptions.

b. *Summary of state criminal record piracy provisions*

Commercial/For profit activity: All of the statutes cited above require sales or commercial or "for profit" use or intent as a predicate to liability, and that appears to be true for the great majority of criminal statutes.[100] There are a small number of states, however, that do not explicitly require commercial activity for at least some offenses related to unauthorized use of pre-1972 sound recordings. For example, Alabama's law makes it a felony to knowingly reproduce sound recordings (*i.e.*, to "transfer or cause to be transferred . . . any sounds recorded") without the consent of the owner onto any medium "now known or later developed" for recording sounds, with the intent to sell or rent the recordings "for commercial advantage or private financial gain" or "to be used for profit through public performance."[101] On the other hand Alabama also provides, without specific reference to commercial gain, that it is an offense "to manufacture, distribute, transport or wholesale" any recording with knowledge that the sounds or

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98 TENN. CODE. ANN. § 39-14-139(b)(1)(A–C) (2011).

99 The Tennessee statute provides:

> "Recording" means a tangible medium on which sounds, images, or both are recorded or otherwise stored, including an original phonograph record, disc, tape, audio or video cassette, wire, film, memory card, flash drive, hard-drive, data storage device, or other medium now existing or developed later on which sounds, images, or both are or can be recorded or otherwise stored, or a copy or reproduction that duplicates, in whole or in part, the original.

TENN. CODE. ANN. § 39-14-139(a)(6) (2011).

100 *See* JASZI STUDY at 12 (regarding the meaning of "commercial").

101 ALA. CODE § 13A-8-81(a)(1) (2011).

performances thereon were transferred without the owner's consent.[102] Georgia law provides that it is unlawful to "transfer or cause to be transferred any sounds or visual images recorded on a phonograph record, disc, wire, tape, videotape, film, or other article on which sounds or visual images are recorded onto any other phonograph record, disc, wire, tape, videotape, film, or article" without the consent of the owner of the master recording.[103] There is no explicit requirement of commercial gain or intent to profit. However, the law does exclude copies made solely for the personal use of the copier, provided no profit is derived from the copying.[104]

Prohibited Activities. The formulation of prohibited activities varies from state to state. Almost all states prohibit the act of duplicating without authorization (often referred to as "transferring the sounds"). Most states also prohibit advertising or offering for sale, and selling or otherwise distributing the unauthorized recordings. Some states also criminalize activities such as transporting sound recordings within the state (or possessing them) with knowledge that they are unauthorized, with intent to sell them.

Exceptions. The nature and number of exceptions available under criminal statutes vary from state to state. Most states have at least a few exceptions, the most common being exceptions for broadcasters to facilitate broadcast transmissions and/or for archival purposes, such as those found in the laws of California, Michigan and New York, discussed above.[105] But "broadcaster" is often undefined and the exception is usually limited to radio and television broadcasting, although in some states cable transmissions are also included.[106]

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[102] ALA. CODE § 13A-8-81(a)(3) (2011); *see also* JASZI STUDY at 24, 29.

[103] GA. CODE ANN. § 16-8-60(a)(1) (2011); *see also* IOWA CODE ANN. § 714.15 (West 2011); NEB. REV. STAT. ANN. § 28-1323 (West 2011).

[104] GA. CODE ANN. § 16-8-60(c)(3) (2011).

[105] All ten states surveyed in the Jaszi Study had an exception for broadcasters. *See* JASZI STUDY at 10.

[106] *See, e.g.*, DEL. CODE ANN. tit. 11, § 923(1) (West 2011); FLA. STAT. ANN. § 540.11(6)(a) (West 2011). North Carolina has extended its exception to webcasters. *See* N.C. GEN. STAT. § 14-433(c) (2010); JASZI STUDY at 10.

Many states (such as Michigan, whose statute is described above) also have an exemption for personal nonprofit or noncommercial use, sometimes limited to "in home" use.[107] Several states (such as California and Michigan, cited above) have exceptions for educational or library uses,[108] or for archival preservation that is not limited to broadcasters.[109] And then there are exceptions provided by only one or a very few states, such as for judicial proceedings,[110] law enforcement purposes,[111] and even, in one case, for sound recordings of bird and wild animal calls.[112]

Even without a specific exception, in almost all cases activities that are not undertaken for commercial advantage or private financial gain will not be within the scope of potential criminal liability. However, as the Jaszi Study points out, "[t]he word 'commercial' . . . is subject to a multitude of interpretations" and it is possible for a nonprofit institution to receive commercial benefits in any number of ways.[113]

Nevertheless, there are two important considerations about the criminal laws that provide considerable comfort to users with respect to activities that would be permitted if federal law were applicable. First, criminal laws are strictly construed.[114] So, where there is ambiguity, the law is likely to be construed in the user's favor. Second, criminal laws are enforced by public

[107] *See, e.g.*, COLO. REV. STAT. § 18-4-605(1)(b) (2011); MO. ANN. STAT. § 570.245(2) (West 2011).

[108] *See, e.g.*, NEB. REV. STAT. ANN. § 28-1325(4) (West 2011); W. VA. CODE § 61-3-50 (2011).

[109] *See, e.g.*, NEV. REV. STAT. ANN. § 205.217(3) (West 2010); R.I. GEN. LAWS ANN. § 42-8.1-7 (West 2011).

[110] *See, e.g.*, ALASKA STAT. § 45.50.900(b)(2) (2011); S.D. CODIFIED LAWS § 43-43A-4(3) (2011).

[111] *See* MASS. GEN. LAWS ch. 266, § 143D (2010).

[112] *See* S.C. CODE ANN. § 16-11-950 (2010).

[113] JASZI STUDY at 12.

[114] *See, e.g.*, 73 Am. Jur. 2d Statutes § 194 (2011) ("Statutes imposing a penalty, or penal statutes, are generally subject to a strict construction").

officials, who are unlikely to bring an action in circumstances that do not amount to commercial piracy.

2. Civil Statutes

A number of states have civil laws that address protection for pre-1972 sound recordings, directly or indirectly. Section 980(a)(2) of the California statute provides civil protection of pre-1972 sound recordings and is a good example:

> The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior sound recording, but consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording.[115]

The few cases decided under § 980(a)(2) have viewed the section as conferring an intangible property interest in the sound recordings that can be protected in a misappropriation, conversion or unfair competition claim. They have distinguished the property interest protected by this statute from copyright protection which, under California law, terminates upon publication.[116]

Other states may provide civil protection under common law, but have statutory limitations on those actions. For example, federal law permits states to protect pre-1972 sound recordings until 2067, but Colorado's law provides that "no common law copyright shall exist for a period longer than fifty-six years after an original copyright accrues to an owner."[117] California's civil statute, cited above, provides protection only until 2047.[118]

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[115] CAL. CIV. CODE § 980(a)(2) (West 2011).

[116] *See, e.g., Lone Ranger Television, Inc. v. Program Radio Corp.,* 740 F.2d 718, 725 (9th Cir. 1984); *A&M Records, Inc. v. Heilman,* 75 Cal. App. 3d 554, 570 (Ct. App. 1977); *see also* JASZI STUDY at 34.

[117] COLO. REV. STAT. § 18-4-601(1.5) (2011).

[118] CAL. CIV. CODE § 980(a)(2) (West 2011). Delaware's criminal piracy law provides protection only for a period of 50 years from the original fixation of a sound recording, but the law provides that it "shall neither enlarge nor diminish the rights of parties in civil litigation." DEL. CODE ANN. tit. 11, §§ 923(3), 924 (West 2011).

Those limitations may also address the relationship between private actions and the provisions of state criminal law. Some states specifically provide that there is a private right of action for violation of the state criminal piracy provision.[119] A number of state laws specifically preserve civil actions by stating affirmatively that their criminal piracy law is not an exclusive remedy or that it does not abrogate civil actions.[120] Other states simply provide that the criminal piracy law does not enlarge or diminish civil remedies.[121]

A few states specifically prohibit certain types of claims in connection with pre-1972 sound recordings. For example, North Carolina has a statute that abrogates any common law rights to obtain royalties on the commercial use of sound recordings embodying musical performances once copies of the sound recordings are sold.[122] Essentially, this statute denies any common law performance right in sound recordings.[123] South Carolina has a similar law.[124]

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[119] *See, e.g.*, ALA. CODE § 13A-8-85 (2011); N.C. GEN. STAT. § 14-436 (2010).

[120] *See, e.g.*, IDAHO CODE ANN. § 18-7607 (2011); LA. REV. STAT. ANN. § 14:223.4 (2011); OR. REV. STAT. ANN. § 164.866 (West 2011).

[121] *See, e.g.,* ARK. CODE. ANN. § 5-37-510(f) (2011); TENN. CODE ANN. § 39-14-139(h) (2011); WASH. REV. STAT. ANN. § 19.25.020(3) (West 2011).

[122] North Carolina's statute provides in full:

> When any phonograph record or electrical transcription, upon which musical performances are embodied, is sold in commerce for use within this State, all asserted common-law rights to further restrict or to collect royalties on the commercial use made of such recorded performances by any person is hereby abrogated and expressly repealed. When such article or chattel has been sold in commerce, any asserted intangible rights shall be deemed to have passed to the purchaser upon the purchase of the chattel itself, and the right to further restrict the use made of phonograph records or electrical transcriptions, whose sole value is in their use, is hereby forbidden and abrogated. Nothing in this section shall be deemed to deny the rights granted any person by the United States copyright laws. The sole intendment of this enactment is to abolish any common-law rights attaching to phonograph records and electrical transcriptions, whose sole value is in their use, and to forbid further restrictions of the collection of subsequent fees and royalties on phonograph records and electrical transcriptions by performers who were paid for the initial performance at the recording thereof.

N.C. GEN. STAT. § 66-28 (2010).

[123] This statute was apparently passed in response to *Waring v. Dunlea*, 26 F. Supp. 338 (E.D.N.C. 1939). *See* JASZI STUDY at 85-86. Despite this broad language, the North Carolina Court of Appeals in *Liberty/UA, Inc. v. Eastern Tape Corp.*, 180 S.E. 2d 414, 418 (N.C. Ct. App. 1971) held that the effect of

Finally, a number of states also have statutory unfair competition laws that may reach acts of record piracy if there is a likelihood of consumer confusion.[125]

3. Non-Statutory Causes of Action

Most states also have some form of non-statutory civil protection, although the precise nature of that protection varies from state to state. The two most prevalent theories for providing protection are common law copyright and misappropriation/unfair competition,[126] but courts have also protected sound recordings under other legal theories, such as conversion.[127] Sometimes people mistakenly refer to all forms of protection collectively as "common law copyright" or "common law protection." But not all civil protection for sound recordings is common law – see the discussion of civil statutes, above – and a "common law copyright" claim differs from one grounded in unfair competition or conversion, as discussed below.

a. *Common law copyright*

The Nature of Common Law Copyright. Common law copyright refers to the protection historically provided by state law to unpublished works of authorship. It is not statutory, but is

the statute was to eliminate "any common law right to restrict the use of a recording sold for use in this State" and interpreted "use" to mean "the use for which a recording is intended; *i.e*. the playing of the recording." The court ruled that playing the recording publicly or privately was permitted, but rerecording it for sale was not.

124 *See* S.C. CODE ANN. § 39-3-510 (2010).

125 *See, e.g.*, 815 ILL. COMP. STAT. 510/2 (2011); OHIO REV. CODE ANN. § 4165.02 (West 2011); *see also* JASZI STUDY at 14.

126 "Unfair competition" embraces two principal torts: "passing off" and misappropriation. "Passing off" occurs when someone tries to market goods or services as those of another, to take advantage of the goodwill that the other person has developed in the marketplace. The misappropriation prong is more often applicable to unauthorized use of sound recordings, since generally the seller has no desire to mislead as to the source of the recordings, but rather wants to benefit from – *i.e*., misappropriate the value of – another's investment of time, talent and money. Most misappropriation claims are now preempted under section 301 of the Copyright Act, but those with respect to pre-1972 sound recordings survive because of section 301(c).

127 *See* JASZI STUDY at 4, 19.

judge-made law, developed through judicial decisions. For most works, common law copyright protection disappeared in 1978 when the unitary, federal system of copyright took effect and unpublished works were brought under the federal scheme. For pre-1972 sound recordings, however, common law copyright remains relevant.

Traditionally, a work was protected by common law copyright only for as long as it was unpublished.[128] Upon publication, if a work met the requirements of federal law (*i.e.*, if it was published with a proper notice of copyright), it gained federal copyright protection. Otherwise, it went into the public domain. Sound recordings, however, were ineligible for federal protection until 1972. Rather than allow sound recordings to be thrust into the public domain when copies were distributed, states began amending their laws to ensure continued state protection, even though the recordings were published as defined by federal law. Some states, like New York, have done this by adapting their definition of "publication" so that sound recordings, regardless of how widely distributed copies may have been, would be deemed unpublished and therefore entitled to protection under the principles of common law copyright.[129] Other states, such as California, simply protected sound recordings that were published or otherwise made widely available under a different legal doctrine, such as unfair competition.[130]

Because common law copyright has long protected unpublished works, one might have reasonably expected states to confirm the application of common law copyright principles to the

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[128] For clarity, the terms "published" and "publication" will be used as defined in federal copyright law unless otherwise specified: "'Publication' is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease or lending." 17 U.S.C. § 101.

[129] The Supreme Court in *Goldstein* held that federal law concerning publication had no application to state law, indicating that states were free to define publication as they wished for state law purposes. 412 U.S. at 570 n.28.

[130] *See, e.g., Lone Ranger Television,* 740 F.2d at 726 (copies of radio broadcasts are not eligible for common law copyright protection but may still be protected pursuant to a conversion or unfair competition claim, which "lies outside copyright").

pre-1972 sound recordings that remain unpublished.[131] The reality is that there is little state law directed to unpublished sound recordings and nearly all of the state law cases involving pre-1972 sound recordings involve commercially published sound recordings.[132]

Recent Common Law Copyright Cases. The most notable case in recent years involving pre-1972 sound recordings was *Capitol Records, Inc. v. Naxos of America, Inc*.[133] At issue were recordings of classical music performances by Pablo Casals, Edwin Fischer and Yehudi Menuhin, originally made in the 1930s. Capitol, with a license from EMI, the successor of the original recording company, remastered the recordings, and was distributing them in the United States. Naxos obtained and restored the recordings in the UK, where they were in the public domain, and began marketing them in the United States in competition with Capitol. Capitol sued in federal court for unfair competition, misappropriation and common law copyright infringement. The district court granted summary judgment to Naxos because the recordings were in the public domain in the UK, where they were originally recorded.

When that decision was appealed, the U.S. Court of Appeals for the Second Circuit concluded that New York law was unclear in some important respects and certified three questions of state law to the New York Court of Appeals (the highest court of the state):

> (1) whether expiration of the term of protection in the country of origin precluded common law copyright protection in New York;
>
> (2) whether a cause of action for common law copyright infringement includes some or all of the elements of a claim for unfair competition; and
>
> (3) whether a claim for common law copyright infringement is defeated by a demonstration that plaintiff's work has little market value, and defendant's work

[131] This is, of course, provided that any statute of limitations a state has provided with respect to such works has not lapsed. *See, e.g.*, COLO. REV. STAT. § 18-4-601(1.5) (2011).

[132] Note, however, that the Jaszi Study examined cases addressing common law copyright, not only with respect to pre-1972 sound recordings, but also as they had developed with respect to unpublished works prior to 1978.

[133] 4 N.Y.3d 540, 830 N.E.2d 250, 797 N.Y.S.2d 352 (N.Y. 2005).

> can fairly be regarded as a new product, even though it uses components of plaintiff's work.[134]

The New York Court of Appeals accepted the case, and held that foreign sound recordings remain protected under "common law copyright" in New York until 2067, even though they may be in the public domain in their home country. Concerning the second question, the court explained that a common law copyright claim in New York "consists of two elements: (1) the existence of a valid copyright; and (2) unauthorized reproduction of the work protected by copyright."[135] It went on to state that "[c]opyright infringement is distinguishable from unfair competition, which in addition to unauthorized copying and distribution requires competition in the marketplace or similar actions designed for commercial benefit."[136]

Concerning the final certified question, the court concluded that even if the original recordings had "slight if any current market" and Naxos's work, because of the remastering, could fairly be regarded as a new product, it would not affect plaintiff's ability to enforce a state law copyright claim.[137] It ruled that Naxos's remastered recording could still infringe Capitol's copyright "to the extent that it utilizes the original elements of the protected performances."[138] It also observed in passing, with reference to federal copyright law, that Naxos's recordings were not independent creations and that under the fair use doctrine, reproduction of an entire work is generally infringing.[139]

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[134] *Capitol Records, Inc. v. Naxos of Am., Inc.*, 372 F.3d 471, 484-85 (2d Cir. 2004), *certified question accepted,* 3 N.Y.3d 666, 817 N.E.2d 820, 784 N.Y.S.2d 3 (N.Y. 2004), *and certified question answered*, 4 N.Y.3d 540, 830 N.E.2d 250, 797 N.Y.S.2d 352 (N.Y. 2005).

[135] 830 N.E.2d at 266.

[136] *Id*.

[137] *Id*. at 266-67.

[138] *Id*. at 267.

[139] *Id*.

In *EMI Records Ltd. v. Premise Media Corp.*,[140] a New York trial court, ruling on a motion for a preliminary injunction, considered the applicability of the fair use defense to a claim for infringement of common law copyright in a sound recording. Defendants had used an excerpt of John Lennon's "Imagine," a pre-1972 sound recording, in a documentary film entitled "Expelled." The film attempts to counter criticism of the theory of intelligent design. The 99-minute documentary used a 15-second excerpt from Lennon's 3-minute sound recording.

Plaintiffs argued that under common law copyright, any unauthorized use of a sound recording is actionable. Defendants argued that only a reproduction of the complete recording was an infringement. The court rejected both claims, but ultimately concluded that plaintiffs had established a *prima facie* claim of common law copyright infringement.[141] The court observed that New York cases have acknowledged the existence of a fair use defense to common law infringement claims but that no case had actually applied fair use in that context.[142] The court recognized that fair use was generally unavailable as a defense with respect to unpublished works, principally to protect the copyright owner's right of first publication.[143] In the case of sound recordings, however, common law copyright protection exists regardless of publication, reasoned the court. "Thus, the erosion of the publication distinction in the context of sound recordings vitiates the underlying rationale preventing application of pre-publication fair use."[144] Accordingly, the court held that fair use was available as a defense to plaintiffs' copyright infringement claim.

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[140] 2008 N.Y. Misc. Lexis 7485 (N.Y. Sup. Ct. Aug. 8, 2008).

[141] *Id*. at *9.

[142] *Id.* at *10.

[143] *Id*. at *13 (citing *Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539, 551 (1985)).

[144] *Id.* at *14.

The court turned for guidance to the federal law of fair use and specifically to the fair use factors in 17 U.S.C. § 107 and the cases interpreting them.[145] The court ruled that defendants were likely to prevail on their fair use defense, primarily because the use of the sound recording excerpt in the film could be seen as transformative, conveying a critical message about the song and the viewpoint it represents, and because there was little likely market effect from defendants' use. Accordingly, the court denied the preliminary injunction.[146]

Although just a trial court decision on a preliminary injunction motion, the *EMI* case illustrates a judicial willingness to recognize a fair use defense in a common law copyright infringement action, at least when recordings have been made available to the public.[147]

b. *Unfair competition/misappropriation*

Many states have protected published pre-1972 sound recordings under common law unfair competition principles. The tort of unfair competition has evolved over time. Traditionally, three elements were required to establish the tort: (1) the plaintiff and defendant had to be in competition with one another; (2) the defendant must have "appropriated a business asset that plaintiff had acquired by the investment of skill, money, time and effort";[148] and (3) the

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145 *Id.* at *18. The statutory factors, set out in 17 U.S.C. § 107, are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

146 The court also denied defendants' motion to dismiss, holding that plaintiffs had adequately pleaded both common law copyright infringement and unfair competition because they argued, *inter alia*, that defendants used the recording in a manner that falsely suggested to the public that the use was authorized by the right holder. *Id.* at **38, 40.

147 Fair use developed as a common law doctrine, and only became part of the federal copyright statute in the 1976 Copyright Act. *See, e.g., Folsom v. Marsh*, 9 F. Cas. 342 (D. Mass. 1841).

148 Ringer at 17.

defendant must have fraudulently "passed off" or "palmed off" the appropriated assets as those of plaintiff, causing the public to be confused as to the source of the goods.[149]

Over time the courts in many (but not all) states dispensed with the requirement of "passing off" in cases involving misappropriation in general (and sound recordings in particular), in part because it is difficult to establish: "there is rarely any incentive for the appropriator to represent the recording as anything except exactly what it is."[150] In order to achieve equitable results, some courts also dispensed with the requirement of competition, because it is difficult for performers to establish that they are in competition with the appropriator. So the core of the tort as it applies to sound recordings is the misappropriation of plaintiff's business asset.[151] Some courts still refer to this tort as unfair competition, others as misappropriation.

The following cases – from California, Illinois, Michigan, New Jersey and North Carolina – illustrate the application of unfair competition principles to sound recordings.[152]

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[149] *Id.*; *see, e.g., Victor Talking Mach. Co. v. Armstrong*, 132 F. 711 (S.D.N.Y. 1904).

[150] Ringer at 17. In many cases defendants tried to escape liability by affixing distinctive labels to avoid the charge of passing off, but those efforts were generally unavailing, as courts held that a claim for unfair competition could still lie. *Compare Columbia Broadcasting System, Inc. v. Melody Recordings, Inc.*, 341 A.2d 345 (N.J. App. Div. 1975) *and Capitol Records v. Erickson*, 2 Cal. App. 3d 526 (Ct. App. 1969) *with ABKCO Music, Inc. v. Washington*, 2011 U.S. Dist. LEXIS 120081 (E.D. Mich. Oct. 18, 2011) (discussed below).

[151] *Id*. "Passing off" remains a viable cause of action. Common law unfair competition in effect evolved into two principal torts: passing off, which requires a showing of consumer confusion, and misappropriation, which does not.

[152] Prior to *Capitol Records v. Naxos*, New York courts also protected pre-1972 sound recordings on common law unfair competition grounds. *See, e.g., Arista Records, Inc. v. MP3Board, Inc.*, 2002 U.S. Dist. Lexis 16165, at **36-37, 2002 WL 1997918 (S.D.N.Y. Aug. 29, 2002) (plaintiff stated a claim for unfair competition under New York law against operator of an internet site that provided users with pirated copies of plaintiff's pre-1972 musical recordings); *Capitol Records, Inc. v. Greatest Records, Inc.*, 252 N.Y.S.2d 553 (Sup. Ct. 1964) (entering temporary injunction against manufacture and distribution of unauthorized reproductions of Beatles albums and holding, *inter alia*, that the application of state unfair competition law to this field remains intact after the Supreme Court's decisions in *Sears, Roebuck & Co. v. Stiffel Co.* and *Compco Corp. v. Day-Brite Lighting, Inc.*). In several of the cases discussed above, the courts struggled with the question whether *Sears* and *Compco* precluded a state law unfair competition claim with respect to sound recordings, and ultimately concluded that they did not. The Supreme Court in *Goldstein* concluded that those cases did not pose a bar to state protection of sound recordings. 412 U.S. at 569-70.

In *Capitol Records, Inc. v. Erickson*,[153] the court held that relief on the grounds of unfair competition could be granted in circumstances where someone "unfairly appropriates to his profit the valuable efforts of his competitor" even where the defendant did not "palm off" his products as those of his competitor.[154] The defendant had purchased tapes and recordings sold by the plaintiff, remastered them, and then sold tapes made from the new masters in competition with the plaintiff. The California trial court granted the plaintiff's motion for a preliminary injunction, and the appellate court affirmed. The plaintiff had argued that labels on the tapes it sold, disclaiming any relationship with the plaintiff or the recording artists, protected it from a claim of unfair competition, a contention rejected by the court. Although there was a question of fact as to whether the labels were effective, the court found that the rights involved were not merely those of the public not to be misled but also rights as between plaintiff and defendant. The court concluded that defendant "unfairly appropriate[d] artistic performances produced by Capitol's efforts" and "profit[ed] thereby to the disadvantage of Capitol."[155]

In *Capitol Records, Inc. v. Spies,*[156] an Illinois appellate court held that the unauthorized recording and resale of commercial sound recordings constituted wrongful appropriation and unfair competition. The defendant had purchased plaintiff's records and tapes in retail stores, then made and sold 1500 unauthorized copies. The court cited several cases, including *Capitol Records v. Erickson*, discussed above, in support of its conclusion that defendants had engaged in unfair competition. In the court's view, the unfairness inhered in the fact that the defendants waited until the recordings, created by the plaintiff at great expense, became popular, and then appropriated the plaintiffs' products to take advantage of the existing market.

[153] 2 Cal. App. 3d 526 (Ct. App. 1969).

[154] *Id.* at 537-38.

[155] *Id.* at 537.

[156] 264 N.E.2d 874 (Ill. App. Ct. 1970). For further discussion of this case, *see* BESEK COMMERCIAL SOUND RECORDINGS STUDY App. n.13 and accompanying text.

In *A&M Records, Inc. v. M.V.C. Distributing Corp.*,[157] the U.S. Court of Appeals for the Sixth Circuit upheld the district court's ruling that defendant's alleged conduct constituted unfair competition under the common law of Michigan, rejecting defendant's claim that plaintiffs lost their common law property rights when they distributed their recording.[158] The defendants had engaged in unauthorized duplication of the plaintiff's sound recordings, which the defendants distributed under a different label. On the other hand, in *ABKCO Music v. Washington*,[159] decided in October 2011, a Michigan district court concluded that the gist of an unfair competition claim is "that the public is so misled that plaintiff loses some trade by reason of the deception."[160] The court denied summary judgment to plaintiffs on their claim of unfair competition based on defendants' use of plaintiffs' pre-1972 sound recordings in an online audiovisual advertisement for a play. The plaintiffs claimed that the ad led the public to believe that the plaintiffs sponsored or supported the advertisement and the play. But in the court's view, they provided no evidence to back up their allegations, nor did they cite case law to support a finding that defendants can be liable under a common law unfair competition theory for such conduct.

In *Columbia Broadcasting System Inc. v. Melody Recordings, Inc.*,[161] a record piracy case that arose in New Jersey, the court affirmed the trial court's grant of summary judgment to CBS on common law unfair competition grounds, rejecting the defendants' claim that because their

[157] 574 F.2d 312 (6th Cir. 1978).

[158] *Id*. at 314.

[159] 2011 U.S. Dist. LEXIS 120081 (E.D. Mich. Oct. 18, 2011).

[160] *Id*. at *30 (citing *Revlon, Inc. v. Regal Pharmacy, Inc.*, 29 F.R.D. 169, 174 (E.D. Mich. 1961)).

[161] 341 A.2d 348 (N.J. Super. Ct. App. Div. 1975).

recordings were clearly labeled, there was no palming off and therefore no unfair competition.[162] The court observed that:

> The actionable unfairness of this practice inheres in a combination of factors—the substantial investment of time, labor, money and creative resources in the product by plaintiff, the utilization of the actual product by defendant, the misappropriation or use of the appropriated product by defendant in competition with plaintiff, and commercial damage to plaintiff.[163]

In *Liberty/UA, Inc. v. Eastern Tape Corp.*,[164] a North Carolina appellate court held that record piracy constitutes unfair competition in that state. Defendants had copied plaintiff's records onto tapes and sold the tapes in competition with plaintiff. According to the court, defendants' appropriation of the fruits of plaintiff's initiative, skill, and investment provided them with a significant competitive advantage over plaintiff and damaged plaintiff's business.[165] The court found that "[t]his conduct . . . amounts to unfair competition and is subject to restraint."[166] Defendants also argued that the North Carolina statute mentioned above (which abrogates any common law rights to obtain royalties on the commercial use of sound recordings embodying musical performances once copies of the sound recordings are sold)[167] precluded the court from holding that defendants' conduct constituted unfair competition. The court held that the statute was designed to eliminate any common law right that would restrict playing a recording sold for use in the state. But to hold that the statute permitted duplicating a recording and selling it in

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162 CBS had sued the defendants, who were copying CBS recordings and selling them – with defendants' own distinctive label – to distributors.

163 *Id.* at 354. The court also rejected defendants' contention that the Supreme Court's decision in *Goldstein* permitted the states to regulate only through statutes, and not by common law. *Id.* at 351.

164 180 S.E.2d 414 (N.C. Ct. App. 1971).

165 *Id.* at 415-16.

166 *Id.* at 416.

167 *See* N.C. GEN. STAT. § 66-28 (2010). *See supra* note 122 for the full text of the statute.

competition with the original "would, in our opinion, give a construction to the statute that was never intended."[168]

Not all states have civil statutes or reported cases dealing specifically with the unauthorized use of sound recordings, but states generally recognize unfair competition torts, so presumably a cause of action could lie in appropriate circumstances.

c. *Conversion*

The tort of conversion generally applies to the unauthorized and wrongful assumption of control of another's personal property in a way that seriously interferes with or effectively repudiates the owner's rights.[169] While in most states conversion applies only to tangible property and not to intellectual property,[170] a few states have recognized conversion claims with respect to the unauthorized duplication and distribution of pre-1972 sound recordings.

For example, in *A & M Records, Inc. v. Heilman*[171] defendant duplicated plaintiff's records and tapes and distributed them without authorization. The California appellate court affirmed judgment for plaintiff, stating defendant's conduct constituted unfair competition even though there was no "palming off."[172] The court further concluded that the "misappropriation and sale of the intangible property of another without authority from the owner is conversion."[173] Accordingly, the court held that there was a valid basis for placing a constructive trust on the money defendant made from selling copies of plaintiff's recordings.

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[168] *Liberty/UA*, 180 S.E.2d at 418.

[169] 18 Am. Jur. 2d Conversion § 1 (2004).

[170] JASZI STUDY at 19 (citing 1 NIMMER ON COPYRIGHT § 1.01[B][1][i]).

[171] 75 Cal. App. 3d 554 (1977).

[172] *Id.* at 564.

[173] *Id.* at 570.

In *CBS, Inc. v. Garrod*,[174] another record piracy case, the court granted plaintiff's motion for partial summary judgment on its conversion claim, holding that "[i]n Florida, an action for conversion will lie for a 'wrongful taking of intangible interests in a business venture.'"[175]

4. Right of Publicity

The right of publicity protects against unauthorized use of someone's identity, which in some cases has been held to include duplication of a voice – at least where the voice is distinctive and recognizable. Many states protect an individual's right of publicity though statutes, common law, or both, although such protection may flow from privacy laws rather than laws specifically denominated "right of publicity." For example, New York protects the right of publicity by means of section 51 of its Civil Rights Law, which prohibits, *inter alia*, use of a person's "name, portrait, picture or voice . . . within [New York] for advertising purposes or for the purposes of trade" without that person's consent.[176] New York does not, however, recognize any common law right of publicity claims. Michigan has no statutory right of publicity, but does recognize common law right of publicity.[177] California provides both statutory protection for the right of publicity (which extends to name, voice, signature, photograph or likeness)[178] and common law protection, which may extend to aspects of an individual's persona that its statute does not reach.[179]

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[174] 622 F. Supp. 532 (M.D. Fla. 1985), *aff'd*, 803 F.2d 1183 (11th Cir. 1986).

[175] *Id*. at 536 (citing *In re Estate of Corbin*, 391 So.2d 731, 732-33 (Fla. Dist. Ct. App. 1980)). The court also granted summary judgment on plaintiff's other claims, including common law copyright, unfair competition and statutory theft.

[176] N.Y. CIV. RIGHTS LAW § 51 (McKinney 2011). Section 50 of New York's Civil Rights Law is an accompanying criminal provision. *Id.* § 50.

[177] *See, e.g.*, *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 n.1 (6th Cir. 1983).

[178] CAL. CIV. CODE § 3344 (West 2011).

[179] *See, e.g.*, *White v. Samsung Electronics America*, 971 F.2d 1395, 1398 (9th Cir. 1992) (reversing summary judgment against game show hostess Vanna White in connection with an ad showing a blond

Although a few states, such as New York and California, explicitly include "voice" among the attributes of identity entitled to protection, most do not.[180] Some state laws do not list specific protectable attributes, but extend generally to, for example, "aspect[s] of an individual's persona."[181] In such cases, a distinctive voice might be entitled to protection even though "voice" is not specifically mentioned in the law. In certain circumstances, state courts have extended protection to forbid sound-alike recordings, thus providing broader protection than federal law provides for copyright-protected sound recordings.[182]

In general the right of publicity protects against use of someone's identity for advertising or commercial purposes.[183] Record piracy clearly qualifies as use for commercial purposes, and therefore in some states a right of publicity claim might be asserted based on use of the performer's voice. Nevertheless, plaintiffs in state law record piracy cases have generally relied instead on common law copyright and unfair competition claims.[184] Presumably this is in part because the right of publicity concerns not the use of a particular sound recording *per se*, but rather the use or imitation of a particular performer's voice, sometimes in connection with the imitation of a particular recording. The owner of the right of publicity – the performer – will not

robot in conjunction with a game board, and holding that the common law right of publicity "does not require that appropriations of identity be accomplished through particular means to be actionable").

[180] *See, e.g.,* FLA. STAT. § 540.08 (2011) (protecting name, portrait, photograph, or other likeness); VA. CODE ANN. § 8.01-40(A) (2011) (protecting name, portrait, picture).

[181] OHIO REV. CODE ANN. § 2741.02 (West 2011); *see also* 765 ILL. COMP. STAT. 1075/30 (2011) (protecting a person's "identity").

[182] *Compare Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (applying common law right of publicity to protect widely known professional singer from deliberate imitation of her distinctive voice in television advertisement) *with* 17 U.S.C. § 114(b) (exclusive right of the owner of a sound recording is limited to the right to duplicate in a manner that recaptures the actual sounds fixed in the recording).

[183] *See, e.g.*, FLA. STAT. § 540.08 (2011) (providing protection against use of a person's name, portrait, photograph or other likeness "for any commercial or advertising purpose"); 765 ILL. COMP. STAT. § 1075/10 (2011) (providing protection against use of an individual's identity "for commercial purposes"); N.Y. CIV. RIGHTS LAW § 51 (McKinney 2011) (providing protection against use of someone's name, portrait, picture or voice "for advertising purposes or for purposes of trade").

[184] For a further discussion of state law rights of publicity in the context of pre-1972 sound recordings, *see* JASZI STUDY at 20-22.

necessarily be the owner of the common law rights in the recording or have standing to assert an unfair competition claim based on unauthorized use of the recording.

5. Variations among States with Respect to Civil Claims: Rights and Exceptions

There are significant variations among states (and ambiguities in the law within states) concerning (1) the nature of the activities that might be deemed to unfairly compete with another or violate a common law copyright – *i.e.*, whether the "bundle of rights" is similar under state and federal law; and (2) whether exceptions exist under state civil law for certain uses, as they do under federal copyright law.

Concerning the former point, most of the reported cases deal with reproduction and distribution of copies of sound recordings, and it is clear that state law rights extend to such activities. But because most cases involve reproduction and distribution of entire recordings, there is no developed body of law addressing whether a "derivative work right" can be said to exist. A few cases suggest that copying less than an entire recording can be infringing. For example, in *EMI Records, Ltc. v. Premise Media Corp.*,[185] discussed above, the court rejected defendant's argument that common law copyright protected only against reproduction of an entire sound recording, although it ultimately concluded that defendants' copying of 15 seconds of plaintiffs' recording was fair use. In *Bridgeport Music, Inc. v. Justin Combs Publishing*,[186] the court upheld a jury verdict against a defendant that sampled a portion of a pre-1972 sound recording in a new work. And in *Capitol Records v. Naxos*, discussed above, one of the questions certified to the New York Court of Appeals was whether a claim of common law copyright infringement was defeated by showing that plaintiff's work has little market value and

[185] 2008 N.Y. Misc. LEXIS 7485 (Sup. Ct. Aug. 8, 2008). See discussion *supra* in text accompanying notes 140-146.

[186] 507 F.3d 470 (6th Cir. 2007).

"defendant's work, although using components of plaintiff's work, is fairly to be regarded as a 'new product.'"[187] The court concluded, in the context of common law copyright, that "even assuming that Naxos has created a 'new product' due to its remastering efforts that enhance sound quality, that product can be deemed to infringe on Capitol's copyright to the extent that it utilizes the original elements of the protected performances."[188]

A different result might prevail, however, if the claim were based in unfair competition rather than common law copyright. The federal district court that first heard the *Capitol Records v. Naxos* case dismissed plaintiff's unfair competition claim for several reasons, among them that Naxos was not merely duplicating the recordings and capitalizing on plaintiff's efforts, as was the situation in most record piracy cases.[189] Instead, the court concluded that Naxos had invested significant time, effort and money to produce high-quality restorations, of plaintiff's recordings, which could not have been marketed in their pre-existing state.[190] While the New York Court of Appeals effectively reversed this case, the federal district court decision suggests that a derivative work right is on less certain ground where the asserted claim is unfair competition rather than common law copyright.

In general, state law does not appear to recognize a performance right in sound recordings. The Pennsylvania Supreme Court in *Waring v. WDAS Broad. Station*[191] suggested that one could obtain indirect public performance rights in sound recordings through the use of a restrictive legend on the sound recording prohibiting radio broadcast. Yet other states rejected

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[187] 830 N.E.2d at 254.

[188] *Id*. at 267.

[189] *Capitol Records, Inc. v. Naxos of America*, 262 F. Supp. 2d 204 (S.D.N.Y. 2003), *summary judgment granted*, 274 F. Supp. 2d 472 (S.D.N.Y. 2003), *question certified*, 372 F.3d 471 (2d Cir.), *certified question accepted,* 3 N.Y.3d 666, 817 N.E.2d 820, 784 N.Y.S.2d 3 (N.Y. 2004), *and certified question answered*, 4 N.Y.3d 540, 830 N.E.2d 250, 797 N.Y.S.2d 352 (N.Y. 2005).

[190] 262 F. Supp. 2d at 214-15.

[191] 194 A. 631 (Pa. 1937).

this conclusion. For example, in *RCA Mfg. Co. v. Whiteman*,[192] the Second Circuit declined to follow *Waring v. WDAS* and held that a record company had no power to impose such a restriction on use of the sound recordings because the common law property right in the performances ended with the sale of the records.

In *Waring v. Dunlea*, a federal district court in North Carolina did enforce a restrictive legend on sound recordings.[193] However, shortly after the case was decided, North Carolina enacted a statute that effectively overruled it.[194] South Carolina also enacted a statute to deny a public performance right in sound recordings.[195]

Until 1995 there was no public performance right in sound recordings under federal law, and it does not appear that, in practice, pre-1972 sound recordings had such protection. The current right provided by federal law applies only to digital audio transmissions (not to broadcasts) of copyrighted sound recordings. It is possible that a state court would entertain a claim for unfair competition or common law copyright infringement if, for example, it were faced with a claim that pre-1972 sound recordings were being made available through internet streaming, particularly if it were persuaded that the use was substituting for purchases of the plaintiff's recording. But no such case has yet arisen.[196]

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[192] 114 F.2d 86, 89-90 (2d Cir. 1940).

[193] *Waring v. Dunlea*, 26 F. Supp. 338, 339 (E.D.N.C. 1939).

[194] N.C. GEN. STAT. § 66-28 (2010), passed in 1939 and discussed in *Liberty/UA,* 180 S.E. 2d at 418. The court interpreted the statute to deny only public performance rights, but not reproduction rights. *See id.*

[195] S.C. CODE ANN. § 39-3-510 (2011). This law, originally passed in 1942, remains on the books. *See* Ringer at 9; Michael Erlinger, Jr., *An Analog Solution in A Digital World: Providing Federal Copyright Protection for Pre-1972 Sound Recordings*, 16 UCLA ENT. L. REV. 45, 55 (2009).

[196] It appears that at least some webcasters are making royalty payments for the use of pre-1972 sound recordings as part of the statutory royalties they pay to SoundExchange in connection with the digital performance of sound recordings pursuant to sections 112 and 114. SoundExchange at 4. Presumably this is done to diminish the risk that their webcasting of pre-1972 sound recordings might be considered actionable under state law.

As for exceptions, where state law is statutory there may be explicit exceptions, but not of the nature and scope of those provided in federal copyright law, as illustrated above in the discussion of state criminal and civil statutes. Where protection derives from common law, it is difficult to draw any conclusions about available exceptions, since most of the cases involve commercial, for-profit duplication and sale of complete sound recordings that substitute for sales by the right holders. So the courts have had little opportunity to define exceptions. *EMI v. Premise Media* indicates that common law courts are willing to apply the fair use doctrine in appropriate circumstances, but it is a single trial court decision.

6. Availability of Punitive Damages for State Law Claims

In those states that allow punitive damages in tort cases, a plaintiff who is successful on a claim for unfair competition may recover punitive damages.[197] *Nimmer on Copyright* states that punitive damages may also be available for common law copyright claims: "Even though punitive damages are not available for statutory copyright infringement, in the residual domain of common law copyright, exemplary damages may be recovered."[198] In some cases, punitive damages have been awarded in connection with unauthorized uses of pre-1972 sound recordings. For example, in *Bridgeport Music v. Justin Combs Publishing*,[199] the court affirmed a jury verdict in which defendants were held liable for sampling plaintiff's pre-1972 sound recording in defendant's recording. Applying New York law, the Sixth Circuit held that "punitive damages for common law copyright infringement and unfair competition are available 'where a wrong is

[197] Restatement (3d) of Unfair Competition, § 36, comment (n); Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 30:96 (4th ed. 2009).

[198] 4-14 NIMMER ON COPYRIGHT § 14.02[C][2]. *See, e.g., Roy Export Co. Establishment v. Columbia Broadcasting System, Inc.*, 503 F. Supp. 1137 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir.); *Williams v. Weisser*, 273 Cal. App. 2d 726, 743 (1969). In addition, "Under the law of most states, punitive or exemplary damages may be obtained in privacy and publicity suits." 2 Thomas McCarthy, RIGHTS OF PUBLICITY AND PRIVACY § 11:36 (2d ed).

[199] 507 F.3d 470 (6th Cir. 2007).

aggravated by recklessness or willfulness.'"[200] However, it vacated the damages award as grossly excessive.[201] In *GAI Audio of New York, Inc. v. Columbia Broadcasting System, Inc.*, a Maryland appellate court affirmed the jury's award of punitive damages in a record piracy case where the "acts of unfair competition were practiced intentionally, wantonly and without legal justification or excuse."[202]

7. Summary: Use of Pre-1972 Sound Recordings under State Law

There are several important points to be drawn from this brief discussion. First, state laws that relate to sound recordings are inconsistent. The variations in state criminal laws are discussed above. Concerning civil law, some states have statutes that address the unauthorized use of pre-1972 sound recordings. In most states, common law torts provide protection. Where the basis is unfair competition or misappropriation, the claims that can be brought under state law may be more limited than those that could be brought under federal copyright law, particularly in a state that still requires competition or passing off as part of the tort. The requirement in unfair competition cases that commercial harm to the right holder (and/or commercial benefit to the user) be established also limits possible claims. As a practical matter, many sound recordings will lose protection over time as their commercial value diminishes, even though state law can theoretically protect sound recordings until 2067. A few states terminate protection for sound recordings before 2067, but that may be of little value to users whose uses go beyond the state's border.

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200 *Id.* at 479-80 (quoting *Roy Export Co. v. CBS, Inc.*, 672 F.2d 1095, 1106 (2d Cir. 1982)).

201 *See id.* at 486-90. On remand the district court remitted the amount of punitive damages to $688,500 (twice the amount of compensatory damages) instead of the $3.5 million the jury had awarded. *Westbound Records, Inc. v. Justin Combs Publishing, Inc.*, 2009 U.S. Dist. LEXIS 29507, **5-8, 2009 WL 943516 (M.D. Tenn. Apr. 3, 2009).

202 340 A.2d 736, 755 (Md. App. 1975); *see also A&M Records v. Heilman*, 75 Cal. App. 3d 554, 571 (1977) (affirming award of punitive damages in a record piracy case where there was an "intentional pattern of misappropriation of property owned by others" as well as contempt of court).

Common law copyright provides greater protection for right holders, and correspondingly, greater challenges for users. For example, New York has chosen to provide common law protection for pre-1972 sound recordings, whether or not the recordings have been published.

Many other states simply have no civil law directly on point, so it is difficult to know how they might protect pre-1972 sound recordings. Even states that protect published recordings through unfair competition and similar torts may protect unpublished recordings under common law copyright.

One complicating factor is that common law protection is amorphous, and courts often perceive themselves to have broad discretion. So it is sometimes hard to know whether new uses might be problematic. As the Supreme Court of Wisconsin stated in permitting plaintiffs to proceed with an unfair competition claim for record piracy in the face of defendants' argument that the state could act in this area only through the legislature: "We conclude that it is the duty of this court to act in circumstances where it is apparent that a wrong has been committed. . . ."[203] The court observed that "'unfair competition has evolved as a broad and flexible doctrine with a capacity for further growth to meet changing conditions.'"[204]

In short, the protections that state law provides for pre-1972 sound recordings are inconsistent and sometimes vague and difficult to discern. The laws lack clearly delineated exceptions, making it hard for users to predict with assurance the range of activities that are permissible and those that are likely to result in liability. In many states, activities concerning sound recordings that are not conducted for profit and have no commercial impact on the right holder are unlikely to result in liability. But the differences and ambiguities in state laws make it

[203] *Mercury Record Productions, Inc. v. Economic Consultants, Inc.*, 64 Wis.2d 163, 218 N.W.2d 705, 715-16 (Wis. 1974).

[204] *Id.* at 716 (quoting *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483, 488 (Sup. Ct. 1950), *aff'd*, 107 N.Y.S.2d 795 (App. Div. 1951).

difficult to undertake multistate or nationwide activities, particularly for individuals and entities that are risk-averse or that lack the ability to conduct detailed legal analyses for each proposed new use.

Lacquer disc

III. APPRECIATING THE CHALLENGES OF PRESERVATION AND ACCESS

A. The Nature of Pre-1972 Sound Recordings

The recordings addressed in this Report encompass every conceivable sound, from one person talking, to music played by orchestras of over 100 pieces; from a primitive wax cylinder field recording to the detailed sound-picture of a multitrack analog studio recording; from the music of small ethnic enclaves to million-selling pop hits; from improvisation to composition, and so on. Notably, unlike other works of authorship protected by federal copyright law, virtually no pre-1972 sound recordings have entered the public domain throughout the United States. State criminal and civil law appear to protect almost everything back to the very first sound recordings known to exist.

1. Commercial and Noncommercial Recordings

While the first sound recording is now known to have been fixed in 1860 by Frenchman Edourd-Leon Scott de Martinville,[205] sound recording in the United States famously began in

[205] NRPB REPORT at 1.

1877 with Thomas Edison's invention of the phonograph.[206] However, the sale of recorded sound did not get underway until 1889 when the North American Phonograph Co. first offered recorded music for public sale. It was joined later that year in the marketplace by the new Columbia Phonograph Co.[207] Sound recordings in the early years of the industry were manufactured on wax cylinders. Cylinders in the 1890s contained a single selection and sold – like single MP3s do today – for between $1 and $2.[208] However, most early-1890s cylinders were not heard in private homes but on public phonographs – the predecessors to jukeboxes – for a nickel.[209] In the early years of the 20th century, cylinders gave way to discs, which were easier to mass-produce, cheaper, more durable, and could hold twice as much music as an Edison cylinder, and a new breed of celebrity – the recording artist – emerged.[210] The disc – in varying sizes and durability – remained the primary consumer medium for sound recordings through 1972,[211] although the media upon which the recordings were made went through myriad changes over time before settling on multitrack magnetic tape.

Commercial music recordings tend to dominate discussions of copyright in sound recordings because of their popularity, their tendency to create emotional attachments, and their existence as the basis for a multi-billion dollar international industry, but they account for only a

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[206] *See, e.g.*, WALTER L. WELCH & LEAH BRODBECK STENZEL BURT, FROM TINFOIL TO STEREO 8-18 (1994).

[207] *See* Tim Brooks, *Columbia Records in the 1890s: Founding the Record Industry*, 10 ASS'N FOR RECORDED SOUND COLLECTIONS JOURNAL, No. 1, 3, 5-6 (1978).

[208] *See id.* at 9.

[209] *See id.*

[210] *See, e.g.,* DAVID SUISMAN, SELLING SOUNDS: THE COMMERCIAL REVOLUTION IN AMERICAN MUSIC 125-49 (2009).

[211] Of course, discs, either vinyl or compact, continued to be the primary medium well after 1972, but this report is only concerned with pre-1972 works.

small percentage of all pre-1972 works.[212] Noncommercial recordings, such as ethnographic field recordings, oral histories, private home recordings, and scientific audio experiments, while not as evident to the general public, are an enormous source of cultural and historical information, and come with their own unique copyright issues.

The first ethnographic recordings were made one year after the first commercial recordings, in 1890. Anthropologist Jesse Walter Fewkes recorded songs and speech from the Passamaquoddy, Zuni, and Hopi tribes with a wind-up Edison cylinder recorder.[213] Field recordings from 1890 into the 1930s exist mainly on wax cylinders. With the advent of the portable disc cutter, ethnomusicologists made their transcriptions on discs of varying quality, and once audiotape was made available commercially, it soon became the recording medium of choice – first in reel-to-reel and then in cassette form.[214] The development of tape recording, and in particular the portable cassette recorder, spurred ethnographic audio collecting to such a large degree that by 2000 approximately 90% of all sound recordings held in folkloric collections were on cassette.[215]

2. Published and Unpublished Works

Not only can pre-1972 sound recordings be either commercial or noncommercial, but they also can be either published or unpublished.[216] Most commercial recordings are, as one

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[212] *See, e.g.*, Society of American Archivists (SAA) at 1.

[213] NRPB REPORT at 16-17.

[214] *See id.* at 17.

[215] *See id.* at 18 (citing COUNCIL ON LIBRARY AND INFORMATION RESOURCES, FOLK HERITAGE COLLECTIONS IN CRISIS 59-63 (2001)).

[216] In this discussion "publication" is used as defined in the federal copyright law:

> the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public

would expect, considered to be published works, and most noncommercial recordings are considered to be unpublished. According to the Society for American Archivists, of the 46 million sound recordings housed in American cultural institutions, the majority are unpublished.[217] Furthermore, such unpublished recordings "far surpass the number of commercially published sound recordings that have ever been released."[218] The unpublished nature of most pre-1972 sound recordings raises special concerns. It often makes identification of a sound recording's right holders difficult. Unpublished works also tend to exist in only one copy and to reside with a single individual or institution, making their preservation and the provision of public access much more important. In addition to "typical" unpublished works – field recordings, oral histories, and other single-copy recordings – there are also what might be called "pre-publication" works, such as those elements of commercial recordings that did not end up becoming part of the distributed version of a work.[219]

In addition, there are some commercial works that are considered unpublished, such as radio broadcasts. Despite their broad reach and significant popularity throughout the 20th and 21st centuries, radio programs have been, and still are, considered "unpublished" under copyright law because, with rare exceptions, they were not distributed in copies. Such works constitute a broad and important source of historical information, from first-hand reports of notable news events, to radio dramas, to one-of-a-kind transcriptions of performances by notable musicians.

> performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

This is important to note because, as will be shown below, states often assign different meanings to "publication." In some states, commercial sound recordings are considered to be technically unpublished even when distributed to the public.

[217] SAA at 1.

[218] *See id.*

[219] *See, e.g.*, NRPB REPORT at 33 (quoting Paul West, vice president, studios and vault operations, digital logistics and business services, Universal Music Group: "Only 65 to 75 percent of what is in our library has ever been released").

Unfortunately, because they were not distributed in copies, radio broadcasts are comparatively ill-represented in the nation's libraries and archives.[220]

3. Availability and Location

Some pre-1972 sound recordings are widely available to consumers through digital downloads, record stores, and new endeavors such as the Sony-Library of Congress "National Jukebox," where recordings made on thousands of pre-1925 cylinders and discs are posted online for free streaming.[221] However, in part due to corporate consolidation and lack of concern over the value of preserving recordings, many current record companies do not own physical copies of those sound recordings to which they own the rights.[222] Thus, these recordings must be sought out in libraries and archives. Other recordings, including many noncommercial and/or unpublished works, are also available to hear in person at archives or music libraries. These institutions hold an estimated 46 million recordings.[223] For commercial pre-1972 sound recordings, there is much duplication among institutions. But those works residing in institutional collections generally cannot, without permission from their copyright owners, be made widely available through the internet or other channels, since the various state laws do not generally include exceptions permitting such dissemination.[224]

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220 *See id.* at 4 ("Many recordings believed to have been made of radio broadcasts are untraceable, and numerous transcription discs of national and local broadcasts have been destroyed.").

221 The National Jukebox (www.loc.gov/jukebox) is a project that makes thousands of early U.S. sound recordings available to the public for free streaming access. It consists of recordings made by labels now owned by Sony Music Entertainment, which provided the Library of Congress a *gratis* license. The actual recordings are from the collections of the Library's Packard Campus for Audio Visual Conservation, the University of California Santa Barbara, and other partners. The Jukebox was launched on May 10, 2011 with 10,000 recordings from the Victor Talking Machine Company, which date from the 1890-1925 "acoustical" era, and include the classical, popular, religious, spoken word, and "ethnic characterization" genres. More recordings are expected to be added in the coming years.

222 *See, e.g.*, Library of Congress (LOC) at 6-7.

223 NRPB REPORT at 10.

224 For the application of state sound recording protection to public availability, *see supra* Chapter II.E.

Many pre-1972 commercial sound recordings are in the hands of individual collectors, who hold what is estimated to be the majority of commercially issued sound recordings, including "some of the most significant, as well as rarest" items.[225] While at least one major collector has in the past taped items in his collection for interested listeners,[226] it is unknown how common such a practice is. Certainly private collectors are the sources of many record company reissues, as they have the cleanest or only copies of some titles.[227]

Finally, while there are a few significant collections of commercial radio broadcasts residing in libraries and archives in the United States, they are far from complete.[228] Availability of these collections is generally restricted to on-premises listening.[229] As for public radio and local radio stations, they retain thousands of hours of programming in their vaults, although the digitization of these programs has just begun.[230] One additional source for copies of radio broadcasts is private collectors, who are estimated to hold tens of thousands of recordings, many of which are not represented in institutional collections.[231]

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225 NRPB REPORT at 35-36. The relationship between private collectors and institutions is described below. *See infra* Chapter III.C.1.c.

226 Eddie Dean, *Desperate Man Blues: Record Collector Joe Bussard Parties Like It's 1929,* WASHINGTON CITY PAPER, Feb. 12, 1999, *available at* http://www.washingtoncitypaper.com/articles/16690/desperate-man-blues.

227 *See id.*

228 For example, a significant portion of NBC broadcasts from the 1930s through the 1970s is held at the Library of Congress, and smaller collections of ABC and Mutual Network transcriptions have been saved, but no extensive archive of CBS transcriptions is known to exist. NRPB REPORT at 21-22.

229 *See id.* at 23, noting that dissemination of the NBC collection at the Library of Congress is "tightly restricted."

230 *See id.* at 26-29, describing the holdings of WNYC, WGBH, Pacifica, and WWOZ.

231 *See id.* at 30.

4. Recording Media and Deterioration Rates for Pre-1972 Sound Recordings

All sound recording media, from the earliest to the most recent, are at risk of deterioration or breakage that may render them unplayable. The chart below, prepared by the staff of the Library of Congress Packard Campus for Audio Visual Conservation, outlines the major media that were used to record sound prior to 1972, the major components of each medium's composition, and the chemical and/or physical processes that place them at risk.

Essential to the long-term survival of all audio media, but not listed below, are proper housing – shelving and packaging – of audio media, and appropriate temperature and humidity that do not fluctuate greatly. Improper storage conditions, such as excessive heat or exposure to water, are the most serious threats to long-term survival of all types of sound recordings.[232]

Medium	Period of Primary Use[233]	Content	Composition	Risks and Challenges
Wax cylinders	1890-1925	Commercial recordings of music and spoken word; ethnographic field recordings; dictation	Wax compound, metallic soap composite	Fungal growth can deteriorate and obstruct grooves. The organic plasticizer can experience exudation, causing crazing,[234] and shrinkage of playback surface is possible as plasticizer is lost. Wax cylinders are also fragile and susceptible to damage from improper

[232] Dietrich Schüller, Audio and Video Carriers Recording Principles, Storage and Handling, Maintenance of Equipment, Format and Equipment Obsolescence, http://www.tape-online.net/docs/audio_and_video_carriers.pdf (2008); Indiana University Digital Library Program, FACET Formats Document: Format Characteristics and Preservation Problems, http://www.dlib.indiana.edu/projects/sounddirections/facet/downloads.shtml (2007); Bill Klinger, Cylinder records: Significance, production, and survival, http://www.loc.gov/rr/record/nrpb/pdf/klinger.pdf/ (2007); AMERICAN FOLKLIFE CENTER, 1 THE FEDERAL CYLINDER PROJECT: A GUIDE TO FIELD CYLINDER COLLECTIONS IN FEDERAL AGENCIES (1984).

[233] Please note that the date ranges here reference approximate years of *primary* use. For instance, wax cylinders were used for dictation into the 1960s, shellac 78-rpm discs were still being manufactured in the early 1960s, and lacquer discs were used to record broadcasts by the NBC radio network until 1970.

[234] Crazing is the making of small cracks on a surface. *See* THE AMERICAN COLLEGE DICTIONARY 283 (1968) (definition of "craze").

Medium	Period of Primary Use[233]	Content	Composition	Risks and Challenges
				handling. Extremely fragile.
Celluloid cylinders (including Edison "Blue Amberol" cylinders)	1900-1929	Commercial recordings of music, spoken word, etc.	Nitrocellulose celluloid with plaster, cardboard, and other cores	The plaster core can expand through hydrolysis, making it difficult to mount the cylinder on the playback mandrel and can, in severe cases, cause the celluloid to break or split. The celluloid becomes more brittle with age. Catastrophic failure, such as found in nitrocellulose film, is uncommon.
Shellac discs, 78-rpm discs	1896-1950	Commercial recordings of music, spoken word, etc.	Shellac-bonded mineral powders; other resins also used	Until recently, believed to be chemically stable, though fragile.[235] Signal can be significantly affected by scratches, surface deformities, and groove wear. Mold or other fungal growth, heat, and water can damage and obscure grooves.
Aluminum discs	1925-1935	"Live" events; radio broadcast transcriptions	Aluminum	Oxidation; scarcity of playback hardware (styluses).
Lacquer and acetate discs	1936-1960	Radio broadcast transcriptions; studio master recordings	Aluminum, glass, or cardboard with a lacquer coating	Lacquer layer susceptible to plasticizer exudation and/or information layer delamination. Aluminum base susceptible to oxidation. Glass based discs, the predominant instantaneous audio medium during World War II, are extremely fragile. Cardboard base susceptible to water damage. Discs susceptible to crazing of lacquer layer regardless of base material.

[235] Discovering some degradation of shellac discs in its collection, the Bibliotheque nationale de France is researching the composition of 78-rpm records. Among the challenges to the project are the great disparity of compositions of recordings of different pressing companies, countries, and time periods. *See* Nguyen, et al, *Determining the composition of 78-rpm records: Challenge or fantasy?* 42 ASS'N FOR RECORDED SOUND COLLECTIONS JOURNAL, No. 1 (2011).

Medium	Period of Primary Use[233]	Content	Composition	Risks and Challenges
Wire recordings	1935-1945	Remote recordings of "live events"; oral histories; radio broadcast transcriptions	Steel or stainless steel	Technological obsolescence; mechanical damage to wire (tangling); rusting in rare cases. Early, pre-standardized sizes not compatible with common playback equipment. Playback equipment difficult to obtain and maintain in working order.
Vinyl and polystyrene discs (33-1/3- and 45-rpm)	1948-1990	Commercial recordings of music, spoken word, etc.	Vinyl (co-polymer of polyvinyl chloride and polyvinyl acetate) or polystyrene[236]	Chemically stable, though material is relatively soft. Susceptible to mechanical damage such as scratching and deformation due to improper storage and handling. Polystyrene becomes brittle with age.
Acetate tape	1950s-1960s	Restricted to use in Germany until late 1940s; radio broadcasting and recording industry until mid-1950s; also used in moving image industry and home recording.	Cellulose acetate (e.g., cellulose diacetate, cellulose triacetate)	Becomes brittle with age. Degrades in high humidity; both the tape base and the binders used are highly susceptible to hydrolysis, in extreme cases this is referred to as "vinegar syndrome," as cellulose acetate is broken down to release acetic acid. Vinegar syndrome causes the tape base to shrink and deform; "cupping" is a common outcome of deformation. The information layer can also separate from the base. Both processes can severely inhibit playback.
Polyester tape, open reel and cartridge (including audio cassettes)	1965-2005	Commercial recordings of music, spoken word, etc.	Polyester tape within plastic shells	Binder hydrolysis and delamination of magnetic layer possible, especially in improper environmental conditions; mechanical failure of cassette shell; technological obsolescence, access to quality playback equipment becoming limited in the US. Stretching and deformation of base film layer possible, though not frequently reported.

[236] The great majority of "LP" discs are vinyl, while most 45-rpm discs are made from polystyrene.

The above chart provides some basis for understanding the urgency of users' preservation concerns, particularly regarding wax cylinders, lacquer and acetate discs, and acetate tape. It is interesting to note that more recently developed media are not necessarily more robust than older media, a point vividly illustrated by a comparison of the risks and challenges of shellac discs with polyester tape. Subsequent chapters will show how the various stakeholders perceive that federalization may (or may not) assist with the preservation and provision of access to pre-1972 sound recordings embodied on the media described above.

B. Preservation of Pre-1972 Sound Recordings

In the 21st Century, the preservation of sound recordings means, for all practical purposes, *digital* preservation – specifically, copying a work from its native format to a digital medium. Preservation is extremely important because sound recordings represent a key component of our cultural heritage, and one that will be lost to posterity if efforts are not undertaken to preserve old recordings and migrate them from what are often volatile and obsolete media to more stable forms of fixation. It is this initial reproduction, and the related downstream potential of distributing multiple perfect copies via the Internet, that invites copyright law into the discussion. If preservation were nothing more than carefully cleaning and storing the original media, copyright would be irrelevant to preservation. But because reproduction onto digital media is becoming the most common means of preserving sound recordings (among other media), copyright issues cannot be avoided.

The nuts-and-bolts of digital preservation are quite complex. As a report by the National Recording Preservation Board describes it:

> After capture of the source audio and creation of digital files, systems must protect the files and assure their integrity, which requires periodic migration of the files to new media, validations to assure that copies of the digital files are faithful to the previous generations, and further steps to assure that these files are

> accessible in perpetuity. In other words, recorded sound preservation is a chain and process without end.[237]

The RIAA and A2IM agree that preservation is complex, noting that preparing a digital reissue includes:

> the costs of storage, review in realtime (of analog recording media) for missing or incomplete metadata, data entry, cataloging, conversion/digitization using carefully preserved obsolete equipment and storage media (*i.e.*, preservation), and, related overhead costs including legal fees (for the recordings and/or for clearing underlying rights, such as compositions).[238]

Regardless of who is doing it, digital preservation is clearly a difficult endeavor requiring significant resources and technical skill.

1. Current Preservation Activities

For preservation of pre-1972 sound recordings, there are four important entities to survey: record companies, libraries and archives, private collectors, and radio stations.

a. *Libraries and archives*

Preservation of sound recordings by libraries and archives is a primary focus of this Report. These institutions and other stakeholders shared with the Copyright Office a great deal of information about practices, technology, costs, and frustrations with legal analysis. However, it is unclear in the context of "pure" preservation activities[239] whether the date a sound recording was first fixed and its corresponding legal status actually matter to libraries and archives. Some commenters report that the pre- or post-1972 status of a recording does not factor into a decision

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[237] NRPB REPORT at 9-10.

[238] RIAA/A2IM at 8.

[239] *I.e.,* activities focusing solely on preservation, without regard to access.

whether to digitize, and some report that it does.[240] There are also additional factors bearing upon preservation of sound recordings by libraries and archives, such as the availability of technology and money, specifically grant funding.[241] And such funding, as will be seen, is in part dependent upon the access that the institution can provide to its preserved works. In addition, librarians and archivists who deal with ethnographic materials must abide by the cultural and religious norms of those whose voices and stories are on the recordings.[242]

Much like a record company, a library or archive must have several sound recording preservation specialists in order to create and maintain durable and high quality digital copies. Only a few libraries – notably the Library of Congress and the University of California, Santa Barbara – have sufficient resources to preserve the multiple media types on which pre-1972 sound recordings reside, such as wax cylinders and lacquer discs. In one notable partnership between record companies and the Library of Congress – the National Jukebox – libraries are providing the original recordings and undertaking the digitization, while Sony is providing the permission to use the recordings that it owns. Because Sony now controls the catalogs of the

[240] For assertions that the pre-1972 status of a recording does not affect its preservation, *see, e.g.*, Music Library Ass'n (MLA) at 6 ("[W]hile some libraries may consider the date of fixation when considering preservation activities under §108(c), in most cases this would not be an important consideration for preservation activities beyond isolated, single-item duplication.") and SAA at 2 ("We have no data that would suggest that archives differentiate between pre-1972 and post-1972 recordings for preservation purposes, even when they may so differentiate for access purposes. Because of the complexity of laws governing sound recordings, few archivists are even cognizant of the difference in the legal status of pre-1972 and post-1972 recordings."). For assertions that preservation decisions are affected by pre-1972 status, *see, e.g.*, Kenneth Crews at 5, n.12 ("I can affirm that some libraries do in fact treat early sound recordings differently because of the lack of federal protection, particularly for the purposes of preserving unique or scarce works.") and Stephanie Roach at 2 ("the complexity of the inconsistent body of state laws that govern these recordings introduces needless delays – sometimes indefinitely – and hampers decision making regarding preservation and access for collections of pre-1972 sound recordings within archives, libraries, and other cultural heritage institutions in the United States.").

[241] NRPB REPORT at 14.

[242] NRPB REPORT at 19.

large record companies of the acoustical era – pre-1925 – including that of Columbia, it effectively owns the rights in the majority of commercial recordings of that era.[243]

b. *Record Companies*

According to several comments submitted for this Report, record companies historically have not been concerned with preserving their sound recordings for future use.[244] One public meeting participant suggested that preservation is not properly the domain of record companies, who are established to manufacture and sell recordings.[245] Nonetheless, in recent years (perhaps spurred by the CD reissue boom in the 1990s), U.S. and foreign record companies have been taking a greater interest in their back catalogs and either reissuing titles themselves or licensing their works to other companies who serve more specialized markets. The decision as to what titles to reissue is driven in large part by what kind of a return on investment can be expected.[246] The question of whether a recording was fixed pre- or post-1972 is irrelevant for a record company reissuing its own works.

In their initial comment, RIAA and A2IM detailed the preservation work of some of the larger foreign and domestic record companies. Some of the highlights of the survey include EMI's plans to digitize tens of thousands of recordings released between 1923 and 1940, with approximately 5,500 remastered for commercial purposes; Warner Brothers' goal of digitizing every recording it released since the time of its founding in the late 1940s;[247] Sony's partnership

243 *See supra* note 220; *see also* Association of Recorded Sound Collections (ARSC) at 6 and http://www.loc.gov/jukebox/about.

244 *See, e.g.*, Brooks T1 at 108-09.

245 Loughney T1 at 118 ("the commercial industry, they live within the strictures of the marketplace, and they can only invest in things that they believe will be commercially available, and they are not in the archive business in the sense of doing what libraries do.").

246 RIAA/A2IM at 8.

247 *See id.* at 8-14; *but see* ARSC Reply at 7.

with the Library of Congress to digitize and make available for streaming to the public thousands of pre-1925 sound recordings;[248] and Universal Music Group's decision to give its master recordings from 1929 to 1948 to the Library of Congress.[249]

RIAA and A2IM stressed in their initial comment that the time, effort, and resources required to do a quality reissue "can be prohibitive," citing "storage, review of analog media for metadata, data entry, cataloging, conversion/digitization using obsolete equipment and storage media, and legal fees."[250] Thus, its members focus on earning a return on their investment in deciding whether and what to preserve.

c. *Private Collectors*

Private collectors were the first sound recording preservationists, in that they collected, cataloged, and maintained in good condition thousands of pre-1972 titles that otherwise would have been discarded or forgotten.[251] As a general rule, private collections often form the basis of public collections or collections that reside in larger institutional settings. Many private collections, however, are stored in less-than archival-quality conditions, vulnerable to poor handling and environmental damage.[252] And, while some private collectors of commercial sound recordings may make digital copies of titles in their collections, this practice is not "true" preservation of the sort practiced under generally accepted norms by librarians who have the professional duty of insuring continued playability and accessibility of the digitized copy.

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[248] http://www.loc.gov/jukebox/about.

[249] *Library of Congress Gets a Mile of Music*, N.Y. TIMES, Jan. 9, 2011, http://www.nytimes.com/2011/01/10/arts/music/10masters.html.

[250] RIAA/A2IM at 8.

[251] NRPB REPORT at 35-37. The NRPB Report divides private collectors into two groups: "record collectors," who hold mainly rare, but not unique copies of commercial recordings, and "recorded sound collectors," who hold both commercial recordings and unique items such as interviews, private recordings, and studio out-takes. *See id.* at 37-38.

[252] *See id.* at 38-39.

d. *Radio Stations*

There has been no systematic documentation of radio broadcasts, and few institutions work actively to support radio broadcast preservation. During the most popular years of radio (early 1930s through early 1950s), nobody envisioned an aftermarket for recordings of radio programs. And because most of these broadcasts were done live, there was little financial incentive to record them. In terms of history, the first 15 years of radio – roughly 1920-1935 – have left relatively few sound recordings, and those recordings that were saved were recorded on lacquer-coated discs until the advent of magnetic tape.[253] In later years more recordings were made and retained. For example, the Library of Congress and the University of Wisconsin have significant holdings of NBC radio programs that were recorded on what were called "transcription discs."

Radio transcriptions were not only made by broadcast networks, but by third party transcription services, which used wire recorders that produced very fragile recordings. The largest resource for radio broadcasts from 1942 to the present is the Armed Forces Radio and Television Service transcriptions collection at the Library of Congress.[254] Other sources of radio broadcast recordings are National Public Radio stations, local radio stations, and individual enthusiasts, who hold tens of thousands of tape recordings.[255]

2. Preservation and the Law

To what extent does the law – both state and federal – permit preservation activities? All digital preservation activities require making copies. Thus, unless a library or archive has

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[253] *See id.* at 20-21.

[254] *See id.* at 24. AFRTS provided programming for US military forces overseas.

[255] *See id*. at 30.

permission from the right holder, copyright law (or related state law doctrines) will determine whether and to what extent the library or archive may lawfully make preservation copies. A discussion of those provisions follows.

a. *Federal Law*

Although federal copyright law is inapplicable to most pre-1972 sound recordings, it provides an important backdrop for understanding the legal status of pre-1972 sound recordings.

Congress has recognized that the ability of certain research libraries and archives to preserve cultural and historical works for posterity is in the public interest and has included provisions in the Copyright Act that, at the time of enactment, were appropriately tailored for this purpose. The primary provision is section 108, which was first enacted in 1976 and is in need of updating for the digital age. Section 108 was the subject of a major independent report co-sponsored by the Copyright Office and the Library of Congress's National Digital Information Infrastructure and Preservation Program in 2008, and updating it is a current priority of the U.S. Copyright Office.[256]

Section 108 provides explicit exceptions to and limitations on a right holder's exclusive rights for the benefit of libraries and archives. These exceptions are available only when they are "without any purpose of direct or indirect commercial advantage,"[257] and only by institutions open to the public or at least to researchers in a specialized field.

The part of section 108 pertaining specifically to preservation is subsection 108(b). It applies only to *unpublished* copyrighted works and allows libraries or archives to make up to three copies "solely for purposes of preservation and security or for deposit for research use in

[256] *Priorities and Special Projects of the United States Copyright Office, October 2011 – October 2013*, at 8 (2011), *available at* http://www.copyright.gov/docs/priorities.pdf.

[257] 17 U.S.C. § 108(a)(1). In addition, any copy must include a notice of copyright, or if no copyright notice is found, a legend indicating that the work may be protected by copyright. *Id*.

another library or archives."[258] The work must be currently in the collections of the library or archives, and any copy made in a digital format may not be made available to the public in that format outside the premises of the library or archives. Subsection 108(c) allows libraries and archives to make *replacement* copies of *published* works in their collection that are damaged, deteriorating, lost, or stolen, or the format of which has become obsolete.[259] Before a replacement copy is made, however, the library or archives must first make a reasonable effort to determine whether an unused copy is available on the market at a fair price. While subsection 108(c) is explicitly for replacement copying, in practice libraries and archives use it for preservation in the sense that it allows them to keep in circulation copies of works that otherwise would be inaccessible.[260] Digital copies made under subsection 108(c), like those made under subsection 108(b), may not be made available outside the premises of the library or archives.

An additional exception applying to published works is section 108(h), which allows libraries, archives, and nonprofit educational institutions under certain conditions to "reproduce, distribute, display, or perform in facsimile or digital form … for purposes of preservation, scholarship, or research" copies of any published work in its last 20 years of federal copyright protection. This exception is not available if the work is subject to normal commercial exploitation or a copy or phonorecord can be obtained at a reasonable price.

It should be noted here that there is widespread agreement among libraries, archives, and right holders that section 108 is inadequate to address preservation and access issues in the digital realm, although there is a wide variety of views as to how it should be amended.[261]

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[258] 17 U.S.C. § 108(b).

[259] A format is considered obsolete "if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace." 17 U.S.C. § 108(c).

[260] Section 108 Study Group, *Section 108 Study Group Report* at 53 (2008). For a discussion of why section 108 treats published and unpublished works differently *see id*. at 18-19.

[261] *See id.* at i-xiv.

Apart from section 108, libraries and archives may also, in appropriate cases, use the fair use doctrine (section 107 of the Copyright Act) in order to make preservation copies.[262] Fair use provides an exception to the Copyright Act's exclusive rights (reproduction, preparation of derivative works, distribution, public performance, public display, and digital public performance for sound recordings[263]) for certain purposes. [264] Whether or not a use is fair is a fact-specific inquiry, including consideration of:

> (1) the purpose and character of the use including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[265]

Determining fair use is not a mechanical process, and whether or not a particular preservation activity is a fair use depends upon the nature of that activity. Some libraries and archives may rely on the flexibility of fair use in evaluating their digitization plans. However, what some see as flexibility others may experience as uncertainty, and this difference in perception is frequently attributable to one's level of risk aversion. An institution with little appetite for stretching the boundaries of fair use, for example, may appreciate the relative certainty of section 108, despite its restrictions.

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[262] 17 U.S.C. § 108(f)(4) ("nothing in this section in any way affects the right of fair use as provided by section 107.")

[263] 17 U.S.C. § 106.

[264] Section 107 lists examples of uses that may be fair – criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. However, these uses are not automatically considered fair uses; indeed, the statute clearly states that courts must consider the statutory factors "[i]n determining whether the use made of a work in any particular case is a fair use." 17 U.S.C. § 107. And other non-enumerated uses may also qualify as fair use.

[265] 17 U.S.C. § 107.

b. *State Law*

In the absence of permission, the various state laws that protect pre-1972 sound recordings generally lack specific provisions allowing libraries and archives to make preservation copies.[266] Indeed, the structure of statutory state law protection is fundamentally different than federal law, partaking of many different criminal and civil approaches, with some commonalities among the states and some differences. The two largest differences between state and federal protection of sound recordings are (a) the use in the states of "common law copyright," meaning law based entirely upon judicial decisions, and not codes enacted by the legislature, and (b) the states' use of misappropriation/unfair competition laws.

The one facet of state protection of pre-1972 sound recordings that has a modicum of similarity from state to state is found in criminal anti-piracy statutes. A 10-state survey conducted in 2009 found that states tended to follow language pioneered by the California and New York legislatures, namely:

> Each of the 10 states has similar requirements of knowledge [that the distribution is taking place] and lack of consent of the owner. Even more important, the statutes in all 10 states contain explicit language stating that the unauthorized use must be made with "intent to sell," for "commercial profit," or some other language indicating a commercial nature to the unlawful activity."[267]

State law regarding what qualifies as "commercial" is either unknown or unclear.[268] However, it would seem that library and archives digitization (divorced from access) is an archetypal example of noncommercial activity. There have been no criminal piracy charges brought against a library or archive in any state, so the exact application of the law as pertaining to pre-1972 sound recordings in a cultural repository remains undeveloped.

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[266] For a full discussion of the state law landscape, *see supra* Chapter II.E.

[267] JASZI REPORT at 9 (internal citations omitted).

[268] *See id.* at 12 ("Overall, there seems to be a dearth of case law relating directly to the scope of permitted noncommercial use.").

Comments by the stakeholders overwhelmingly indicate that it is not any specific provision of any state's law that affects preservation decisions, but simply the multitude of different laws and the lack of interpretation and analysis that deters preservation activities.[269] Some states provide more guidance than others. For example, in 2008 the Supreme Court of New York (a trial court) recognized the federal fair use exception as a defense to a common law claim of infringement of a sound recording.[270] It is also useful to note that, to the degree that common law copyright and associated state laws hinder preservation, it appears that technological barriers and lack of funding hinder it significantly as well.[271]

c. *Risk Analysis*

A substantial amount of digital preservation activity occurs regardless of the apparent ambiguity of, and confusion over, state law pertaining to pre-1972 sound recordings. The University of Utah Library commented that it feels more able to digitize under its state's law than it would under federal law – an example of an entity looking at its state's legal landscape and determining that, while it is not crystal clear, it is clear enough to justify the risk of forging ahead with digitization.[272] In addition, many entities are likely forging ahead without concern one way or the other about state law.[273]

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[269] *See, e.g*. LOC at 4; Syracuse Univ. Library at 4-5; Roach at 2; *but see* J. Willard Marriott Library, University of Utah at 2 ("According to Utah's Unauthorized Recording Practices Act, libraries and other collecting institutions in the State of Utah are permitted to copy and distribute pre-1972 recordings.").

[270] *EMI Records Ltd. v. Premise Media Corp.*, 2008 N.Y. Misc. LEXIS 7485, at **14-15 (Sup. Ct. Aug. 8, 2008).

[271] *See, e.g.*, NRPB REPORT, at 11-14 (discussing barriers to preservation of sound recordings revealed by surveys).

[272] *See* University of Utah at 2-3*; see also* Association of Research Libraries/American Library Association ("ARL/ALA") Reply (discouraging federal protection for pre-1972 sound recordings, and asserting that, so long as fair use applies, the lack of explicit exceptions and their attendant restrictions in state law is better for preservation).

[273] *See* SAA at 2 ("Because of the complexity of laws governing sound recordings, few archivists are even cognizant of the difference in the legal status of pre-1972 and post-1972 recordings. Almost all archivists

Certainly, in the general context of copyright law, there are users of copyrighted materials who are risk-averse and those who are not. Libraries and archives tend to be risk-averse,[274] a fact which has not been lost on the Copyright Office or the right holders themselves.[275] Note, for example, the observations of the RIAA and A2IM, commenting that state protection of pre-1972 sound recordings should not inhibit and is not inhibiting preservation activities, even in cases where libraries and archives may be in technical violation of the law.

When these right holder groups also claimed that "to our knowledge, no public or private institution has been sued (or threatened with a lawsuit) by an RIAA or A2IM member for undertaking preservation activity; nor should any reputable archive be so threatened,"[276] that assertion received a mixed response. While the ARL and ALA did not object to the record companies' assertion,[277] SAA and MLA took great exception. They stated that such an attitude fostered disrespect for copyright law,[278] and would be little more than cold comfort to libraries and archives who were interested in providing access as well as undertaking preservation.[279]

C. Public Access to Pre-1972 Sound Recordings

The degree of public access to pre-1972 sound recordings varies widely depending upon the age of the recording, whether it is published or of a commercial nature, its popularity, who is

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assume that their ability to 'format shift' material for purposes of preservation is a given in existing law, both Federal and state, and act accordingly. If a sound recording is in the collection and it needs to be preserved, archivists will try to preserve it.").

274 *See, e.g.*, *id.* at 2 ("Congress and the Copyright Office should remove any legal impediments that may discourage libraries and archives from preserving sound recordings.").

275 *See* Pallante T1 at 72-73 ("I think part of what you are saying is that librarians and archivists and museum curators shouldn't be so risk adverse, but I have to tell you that as a former museum attorney myself, you are not going to change that…[T]hey are very risk averse and conservative.").

276 RIAA/A2IM at 19.

277 ARL/ALA at 3, note 9.

278 SAA Reply at 4.

279 MLA Reply at 4.

providing the access, and how one defines "public access" in the first place. For older recordings, access does not necessarily utilize digital technology. For example, a library may allow listeners to privately study an LP in its listening room, or an individual may purchase a used 45 rpm single at a yard sale. By contrast, when dealing with works preserved through digitization, the question of public access will draw on the digital copy and therefore raise issues about the application of copyright law to the work. Examples of access derived from digital technology include the distribution of copies of a CD by the right holder in the sound recording, to listening to a digital copy transmitted to a library reading room from the library's network server, to the performance via streaming of an MP3 by a web site.

How broadly one defines the question of public access plays a significant role in determining how much of the pre-1972 recorded patrimony is "available." For example, in his 2005 Survey of Reissues of U.S. Recordings, Tim Brooks distinguished "availability" of pre-1972 sound recordings (which he defined as meaning one can locate but not necessarily be able to play a copy) from "accessibility" (meaning the recording is available on CD or for purchase or download through the Internet).[280] On this basis he determined that, for recordings within the scope of his study released between 1890 and 1964, an average of 14% are made publicly accessible (*i.e.*, reissued) by their right holders.[281] Apparently not considered by Mr. Brooks are recordings that can be heard solely on-site at a library or archives.[282] Under this view, almost all field recordings and other scholarly recordings would be considered inaccessible to the public, as would the vast majority of commercial recordings housed in libraries and archives. Clearly,

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[280] BROOKS STUDY at 1-2.

[281] *See id.* at 7. The scope of the Brooks study was "recordings for which there is documented historic interest," which encompassed "seven major fields of study," but not, for example, pop vocals. Brylawski T1 at 113-14. All recordings within the scope number about 400,000; the random sample size was 1,500. BROOKS STUDY at 3-4.

[282] BROOKS STUDY at 14; Brooks T1 at 197.

however, such recordings enjoy the same level of accessibility that many other works of authorship receive, to those who live near or travel to the libraries and archives housing them.

Another example illustrates the tensions involved in addressing accessibility. One attempt at making early commercial recordings more accessible is the Sony-Library of Congress "National Jukebox" partnership described above.[283] This endeavor allows users to stream at will thousands of acoustical-era recordings to their home computers. Were these recordings protected under federal law, such distribution would certainly qualify as a public performance, which the Copyright Act defines in part as

> to transmit or otherwise communicate a performance or display . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.[284]

However, for certain scholars such a public performance would not qualify as sufficient public access, because they may need to "get your hands on the file and hold the file and use and study the audio file" in order to analyze it.[285] "Streaming," one public roundtable participant maintained, "simply doesn't cut it."[286]

1. Current Activities Providing Public Access

a. *Libraries and Archives*

The 2005 survey of U.S. reissues quotes an expert as saying that of all recordings issued commercially in the United States, probably over 90% exist in some form today.[287] That same

[283] *See supra* note 220.

[284] 17 U.S.C. § 101.

[285] Brooks T1at 110-12.

[286] *Id.* at 110.

[287] BROOKS STUDY at 11 (citing Brylawski).

study indicates that right holding record companies are responsible for reissuing 14% of a sub-set of these works, while non-right holders have reissued 22%.[288] (Although, by the time this Report is read, these numbers will be more than seven years old, the author of the 2005 report asserts that he has seen no evidence that the percentage of physical reissues has risen.[289]) Where might the rest of these extant recordings be? One answer is libraries and archives.

To date, many libraries and archives appear to have been fairly conservative in providing public access to the pre-1972 sound recordings (and, for that matter, other works of authorship) in their care. However, if the comments and roundtable remarks from the Office's proceedings are instructive, what libraries and archives appear to mean by public accessibility seems to be Internet access – from streaming to downloading – and not merely in-person listening. Streaming and downloading may be done with permission,[290] without permission (either out of ignorance of the law[291] or out of disregard for the law), or refrained from altogether.[292] This observation from the Library of Congress is representative of views expressed by scholars, librarians, and archivists:

> Within the community of librarians and archivists having custody of sound recording collections, when faced with complex or unclear information on the copyright status or ownership of a pre-1972 sound recording relating to a public access request, the "safe" response is "No."[293]

[288] *See id.* at 7. Note that the titles reissued by right holders and by non-right holders likely duplicate one another to a certain extent.

[289] Brooks T1 at 110. Brooks also stated that online availability to pre-1972 sound recordings has changed, and that were the survey performed today online availability would have to be addressed. However, Brooks averred that "it is the belief of our members in our organization [ARSC] that limited or restricted – we would say heavily restricted – access is not the same thing as availability, certainly not for the purposes that scholars need it or even preservationists, perhaps." *Id.* Hence, at least in the eyes of archivists, it is doubtful that the recordings being streamed through the National Jukebox would be considered "available."

[290] The National Jukebox is one example of permission-based public access by means of streaming provided by a library, in this case with the cooperation and permission of the right holder.

[291] SAA at 4.

[292] MLA at 6.

[293] LOC at 5.

b. *Record Companies*

Record companies provide public access to pre-1972 sound recordings through reissuing these recordings on compact disc and as downloads.[294] Sometimes an entire album will be reissued intact, and sometimes, particularly for artists popular before the advent of the 33⅓ rpm LP, the reissue will consist of a series of individual songs. As indicated in the previous section, record companies tend to reissue a recording only when they can be relatively sure of a return on their investment, given the costs of preparing a reissue. As the RIAA stated, cost "coupled with uncertainty about the commercial value of the vast majority of the recording, is the principal reason many recordings are not widely available."[295]

Still, to the degree that providing public access to a pre-1972 sound recording means issuing a consumer-ready product, record companies appear to reissue *fewer* of their own works than do foreign labels and smaller U.S. ventures who apparently act without authorization.[296] Such other labels have, according to Tim Brooks's survey, reissued 22% of the pre-1972 recordings surveyed, compared to 14% by right holders.[297]

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[294] As noted elsewhere, record companies have also cooperated in making very old sound recordings available for streaming through services such as the Library of Congress's National Jukebox. *See supra* note 220.

[295] RIAA/A2IM at 8.

[296] BROOKS STUDY at 7-8.

[297] *See id.* It is important to note that the Brooks Report does not encompass all commercial sound recordings for the 1890-1964 time period, but instead is restricted to titles with "documented historic interest," as represented in seven major genres: ragtime and jazz; blues and gospel; country and folk; ethnic; pop, rock, and R&B; classical; and other (including show music and spoken word). *See id.* at 3. This left "large bodies of recordings" outside the survey such as "every pop vocal that was made before 1965." Brylawski T1 at 113-14. It was also noted at the public meeting that, had the total number of recordings issued in the U.S. been included in the study, the percentage of right-holder reissues would be "significantly less" than 14%. *Id.*

c. *Private Collectors*

Librarians and scholars report that many private collectors are loath to put their collections in the hands of preserving institutions for fear that their lovingly curated 78s will fall into a "black hole" of inaccessibility.[298] Since such collections are not particularly accessible in their present locations, the main public access service provided by private collectors is that of lending titles from their collections to record labels to use as masters for digital reissue.[299]

d. *Radio Stations*

To the degree that radio stations make publicly available their digitally preserved archives, it is likely through private appointments with researchers, or through libraries that have assumed stewardship of their recordings. In making radio broadcasts more accessible to more than just on-site researchers, libraries and archives must address not only copyright concerns but also performer and union contracts that may govern use beyond the initial airing of a program.[300]

2. Provision of Public Access and the Law

A point of interest among the librarians and archivists who submitted comments and spoke at the roundtable is that preservation activities are inextricable from the goal of providing public access. To some degree this is about the desire to provide access, and the degree to which access is part of the mission of many research or collecting institutions. On a related point, they stressed that access is often a condition of grant money for preservation projects. Such money becomes scarce when there is no potential for public access.[301]

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[298] *See, e.g.*, NRPB REPORT at 40; Brooks T1 at 83.

[299] *See* Dean, *Desperate Man Blues*, *supra* note 225.

[300] NRPB REPORT at 22.

[301] *See, e.g.*, Cockrell at 1; Roach at 3.

This section of the Report briefly describes the aspects of federal and state law pertaining to the provision of access, specifically access to a preservation copy or other digital copy. Consistent with the ARSC's view that access requires the ability to closely analyze one's own copy of a work, the type of access sought by libraries, archives, and scholarly commenters was by means of digital downloads or physical reissues. Such activities, when done by libraries or archives without the permission of the right holder, are not currently within the scope of section 108 and, as the *Section 108 Study Group Report* demonstrates, including them within a statutory limitation or exception for libraries and archives is a very controversial topic.[302]

Of course, one need not concern oneself with legal exceptions allowing for provision of public access if one seeks and receives permission from the right holder. However, with some exceptions, permissions was not a subject raised by most stakeholders, in the written comments or at the public meeting. There was some indication by libraries and archives that permission for use of commercial recordings was difficult to obtain[303] and, of course, that permission for use of many field and ethnographic recordings was simply impossible as the performers had died. Representatives from RIAA suggested that seeking permission remains a productive method for making preservation copies and providing access, especially regarding those early recordings that are now gathered under the Sony corporate umbrella.[304] Another right holder pointed out that the National Jukebox preservation and audio streaming partnership between the Library of Congress

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302 *Section 108 Report* at 57-60 ("Remote electronic access").

303 LOC at 7 ("In the case of both foreign and U.S. owned pre-1972 sound recordings, it is common to encounter rights holders who either no longer own any copies of recordings to which they hold the rights, or no longer have documentation of any kind that verifies their ownership interests. Likewise, it is common in regard to pre-1972 sound recordings of both foreign and U.S. origins, for there to be a lack of institutional memory within companies and/or documentation about the past sale or transfer of ownership of recordings to other parties. The effect on libraries, archives, etc., and members of the research public is confusion caused by cold information trails leading to long dead owners and record companies that have gone out of business.").

304 Chertkof T1 at 118-19.

and Sony was an example of a productive permission-based agreement for providing access to early sound recordings.[305]

a. *Federal Law*

Federal law provides an important backdrop for understanding the legal status of pre-1972 sound recordings, but again it is important to recall that it is currently inapplicable to most pre-1972 sound recordings. As discussed above, section 108 and fair use are the primary provisions of copyright law relied upon by libraries and archives to preserve and provide access to works. But it is the first sale doctrine in section 109 that authorizes the basic lending function of libraries. Section 109 states that,

> Notwithstanding the [exclusive right of distribution], the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.[306]

In other words a library is entitled to lend copies that it owns, including copies made under the authority of section 108, subject to the restrictions of that section.

In particular, libraries and archives may not make available to the public, "outside the premises of the library or archives," a digital preservation copy of an unpublished work or a digital replacement copy of a published work.[307] Although under certain conditions libraries may at a user's request copy a portion of a work in their collections (or even a complete work if it cannot be obtained at a fair price), these exceptions are carefully restricted.[308] For example, they extend only to "the isolated and unrelated reproduction or distribution of a single copy or

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305 Aronow T1 at 105-06.

306 17 U.S.C. § 109(a).

307 17 U.S.C. § 108(b)(2).

308 17 U.S.C. § 108 (d), (e).

phonorecord of the same material on separate occasions" and do not apply to systematic reproduction of multiple copies.[309]

However, there is one proviso to the copies-for-users subsections of section 108 that particularly affects libraries and archives with substantial recorded sound collections: those subsections do not apply to, *inter alia*, musical works.[310] Sound recordings frequently constitute performances of musical works; in other words, musical works are embodied in them. Since it is impossible to copy a sound recording without copying the musical work it embodies, it may not be copied for users pursuant to section 108 if the sound recording embodies a musical work that is still protected by copyright.[311]

In contrast, the section 108(h) exception for use of a work in its last 20 years of copyright protection does apply to the reproduction and distribution of sound recordings.

The question of availability of digitized pre-1972 sound recordings also would implicate section 110(2) of the federal copyright law if pre-1972 sound recordings were covered under title 17. This section permits a government body or "accredited nonprofit educational institution" to transmit "reasonable and limited portions" of a sound recording as part of distance education.[312] Section 110(2) is clearly an "access" provision, but it only provides access to a limited class of users, and under restricted circumstances. Moreover, because it only permits portions of sound recordings to be transmitted, it is of limited use to scholars of such materials.

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[309] 17 U.S.C. § 108(g).

[310] 17 U.S.C. § 108(i).

[311] Musical works are still protected by copyright if they were published after 1923 (provided that, if they were published in the United States before 1964, their copyrights were renewed). Prior to the enactment of the Copyright Renewal Act of 1992, title I of the Copyright Amendments Act of 1992, Pub. L. No. 102-307, 106 Stat. 264, a work for which copyright was secured prior to 1978 enjoyed an initial term of 28 years, subject to a renewal term only if the person entitled to renew the copyright submitted a renewal application to the Copyright Office during the 28th year of the initial copyright term.

[312] 17 U.S.C. § 110(2).

b. *State Law*

Just as the various state laws that protect pre-1972 sound recordings generally lack specific provisions allowing libraries and archives to make preservation copies, they also lack specific provisions permitting libraries and archives to provide access to those copies. The general discussion above of the uncertainty and lack of precedent in state law[313] applies as well to any public access activities.

c. *Risk Analysis*

While libraries may continue to preserve pre-1972 sound recordings in the face of ambiguous and inconsistent state law, they are less likely to provide public access to those recordings. Libraries and archives are particularly concerned about making those sound files generally available over the Internet because they believe that doing so could conceivably expose the posting institution to the laws of all 50 states.[314]

Of course, there will always be situations where an institution may determine that the risk of an infringement claim is relatively remote and that the importance of providing access to its digitized works justifies taking that risk. Such an institution may decide to post its preserved recordings on the Internet. For example, the Society of American Archivists spoke of

> a highly-regarded repository that makes available on the Internet rare sound recordings of Jewish music. It does so in the apparent belief that U.S. sound recordings made before 1923 are in the public domain. The good news is that current practice has not harmed any rights owners; the repository has received only acclaim, with no reported complaints.[315]

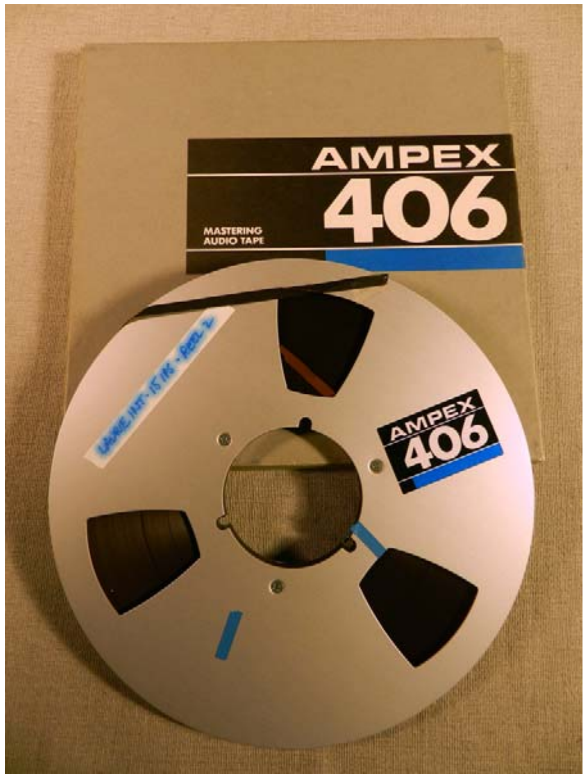
[313] *See supra* Chapter III.B.2.b.

[314] *See* SAA at 11.

[315] *Id.* at 4.

In addition, the ARSC reported that the larger the institution, the more likely it is to be risk-averse.[316]

[316] ARSC at 8.



Tape reel

IV. POLICY CONSIDERATIONS

There are many points of public policy to consider in determining the wisdom of federal protection for pre-1972 sound recordings. At the outset, there is the intelligibility of each regime: would federal protection improve the clarity, consistency and certainty of the law protecting pre-1972 sound recordings, or would those values be better achieved by retaining state law protection? The likely effects on preservation and public access must also be considered. All stakeholders support these goals, at least in the abstract, but disagree on how best to promote them. Likewise, stakeholders agree that any change in legal protection should not harm the reasonable economic interests of right holders. But such consensus still begs an important question: what economic interests are reasonable?

There are other questions with respect to the application of Title 17. This Chapter also addresses how section 512 (providing a limitation on liability for online service providers), and section 114 (providing a statutory license for digital public performance of sound recordings) would interact with provisions providing federal protection for pre-72 sound recordings. Finally, this Chapter considers some alternative protection schemes proposed by stakeholders.

A. Certainty and Consistency in Copyright Law

The majority of the stakeholder comments regarding the potential federalization of pre-1972 sound recordings mentioned the importance of certainty and consistency as policy lodestars by which to guide the recommendations of the Office.[317] While these are neutral values in the abstract, when applied to a particular issue they can cut more than one way. What appears consistent when measured against one set of facts may be a break from past practice, and thus inconsistent, from another perspective. The historical and policy importance of certainty and consistency (as well as neighboring values such as uniformity) to copyright owners and to users of copyrighted works is discussed below, along with an examination of stakeholders' views on how copyright law's certainty and consistency may be affected by putting pre-1972 sound recordings under federal protection.

1. Importance of Certainty and Consistency

Uniform national application has been a hallmark of copyright law since the first copyright law was enacted in 1790. The goal was underscored and strengthened by the Copyright Act of 1976, which extinguished – with the exception of pre-1972 sound recordings – the concept of state common-law copyright.[318]

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[317] *See, e.g.*, LOC at 4; Aronow T1 at 106.

[318] *See, e.g.*, ASRC Reply at 9-10 ("Uniformity has been widely recognized as essential to maintaining the marketability and, in the case of historic recordings, the continued existence of creative works. The very purpose behind Article I, Section 8 from which Congress derives its power to promulgate copyright law is inextricably rooted in the need for national uniformity of copyright law.").

Until the Copyright Act of 1976, federal copyright law protected only published works,[319] with unpublished works covered in perpetuity by state common-law copyright. This dual system applied to sound recordings along with every other type of work. The 1976 Act, with the goals of (1) promoting national uniformity; (2) eliminating divisions in copyrightable subject matter by publication status; (3) applying the Constitutional rule of "limited times" to unpublished works; and (4) improving international copyright dealings,[320] eliminated state common-law copyright and moved all unpublished works, both past and future, into the federal copyright system. As explained in Chapter II above, this unification measure was not applied to sound recordings fixed before February 15, 1972.

In excluding pre-1972 sound recordings from federal protection, Congress appears to have departed from those goals. Regardless of why Congress made that decision – and the record sheds little light on Congress's reasons – sound recordings in 1976 became the single inconsistency in what was intended to be a seamless national system of copyright protection. Additionally, what has grown out of that inconsistency is over a hundred years of a state-law regime upon which members of the RIAA and A2IM have come to rely.[321] So, while federal protection for pre-1972 sound recordings might be consistent with an overall federal policy of uniformity, it would arguably be *inconsistent* with the experience built up in the sound recording community with respect to state law.

Another issue for consideration is whether federalization of pre-1972 sound recordings would provide greater legal certainty than currently obtains. Most pre-1972 sound recordings are

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[319] There were some narrow exceptions. At the option of the copyright owner, certain works that typically were exploited not by means of publication, but rather by means of public performance or exhibition, were eligible for statutory copyright protection. Such works included lectures, etc., prepared for oral delivery; dramatic, musical, or dramatico-musical compositions; photographs; motion pictures; works of art; and plastic works or drawings. *See* 17 U.S.C.A. § 12 (repealed 1978).

[320] *See* S. REP. 94-473, at 112-14 (1975).

[321] *See* RIAA/A2IM at 26 ("This system may be complex, but at least there have been decades of litigation and precedent to resolve ownership issues under [state] laws.").

protected only under state law, but that just begins the inquiry.[322] In each case one must consider which state's laws apply to the particular activities, what the law is in that state, how the laws apply to preservation and public access, and what defenses are available. In many cases the law is ambiguous.[323] The issues become more complicated if the intention of the library or archives is to post copies of a work to a broadly accessible website, where potentially multiple states' laws could apply.

It is undoubtedly true that federal law does not provide complete clarity, as the RIAA, A2IM, ARL, ALA, and others assert. Because of the limitations of section 108, libraries and archives increasingly rely on fair use in undertaking digital preservation, and the scope of the fair use doctrine in this context has never been adjudicated. Furthermore, the RIAA and A2IM assert that, after over one hundred years of state-law practice, assessing rights and licenses concerning pre-1972 sound recordings under federal law would lead to great uncertainty in how right holders continue to manage their assets and could potentially unsettle existing contractual relationships.[324]

Before addressing whether federal protection of pre-1972 sound recordings would provide greater certainty and consistency, it is worthwhile to consider potential consequences of legal uncertainty. An environment in which rules are ambiguous and differ by region leads to problems of both overprotection and underprotection. Overprotection – where users develop a risk-averse attitude toward socially productive uses of copyrighted works due to the lack of explicit exceptions – has been much discussed among the stakeholders in this study. They have argued that institutions will not undertake preservation and access programs without some

322 While most pre-1972 sound recordings are protected only under state law, the exception created by the copyright restoration provisions can lead to uncertainty as to which body of law to apply to a particular recording.

323 For example, if a library's or archives' activities are looked at through the lens of a criminal law, then a defense that the activities are noncommercial appears likely to prevail. *See supra* Chapter II.E.1.b. Of course, it is far more likely that the activities would be looked at through a civil law lens, in which case the laws of most states offer no clear defenses although in many states the law of unfair competition would require that the defendant be in competition with the right holder. *See supra* Chapter II.E.2-5.

324 RIAA/A2IM at 24-28.

certainty that doing so will be within the law.[325] Underprotection, in contrast, results when the lack of clarity concerning the scope of rights allows users to make uses that are unfair or unreasonable, but right holders are discouraged by the law's ambiguity from pursuing effective remedies.[326] Unsurprisingly, comments by libraries, archives, and scholars have not stressed this side of the coin. But, particularly when there is little likelihood that more concrete rules and exceptions will be imposed, underprotection may be attractive for users.

A set of rules that are certain and consistent go a long way to eliminating both under- and overprotection, because they make the law itself, rather than the level of risk one is ready to accept, the guiding principle.

2. The Impact of Federalization upon Certainty and Consistency in Copyright Law

a. *Users' perspectives on effect of a single set of federal exceptions*

Many user groups (libraries, archives, and scholars) noted in their comments a number of ways in which they believe federal protection of pre-1972 sound recordings will improve consistency and certainty in copyright law. They believe that the availability of a single set of exceptions – exceptions with well-developed national jurisprudence – would encourage libraries and archives to make reasonable uses of pre-1972 sound recordings without having to seek permission. "The regularization of the law, the certainty of the law, the bright lines that the law would bring us," said the ARSC, "outweigh whatever negatives."[327] They predicted that federal

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[325] *See, e.g.*, SAA at 3 ("The danger exists that if archivists come to understand the uncertain legal foundation on which their current behavior rests, they may become hesitant to continue with their preservation activities. Providing a clear legal basis for preservation, therefore, would encourage archivists to be less risk-adverse when it comes to preservation.").

[326] *But see* ARL/ALA Reply at 6, providing a more critical view of the current federal exceptions and a more sanguine view of the state law regime.

[327] Brooks T1 at 18-19; *see also* Lipinski T1 at 59 ("One of the benefits that I see is uniformity and uniformity in the advantage of having a body of case law, for example, of theories that can be readily applied. I think that's a great advantage.").

protection would produce specific benefits in the areas of preservation and provision of public access, detailed below.

Federal protection of pre-1972 sound recordings would also enable owners and users of those works to benefit from future applicable amendments to the Copyright Act (for example, an amendment to deal with the problem of orphan works, or amendments to section 108). This would not be the case with respect to state protections, and the gap between the treatment of pre-1972 sound recordings and all other works would only increase if such amendments are enacted but pre-1972 sound recordings remained governed by state law.

Not everyone in the library community has concluded that federalization would be beneficial to libraries and archives. The ALA and ARL pointed out that many of the same organizations pressing for federal protection have been critical of the scope of federal exceptions, specifically section 108.[328] They have argued that section 108 is too outdated to be truly useful with respect to preservation and making materials available to users in the digital age.[329] Indeed, the Library of Congress wrote that

> As they now exist, Sections 108(b) and (c) [the preservation and replacement provisions, respectively] place recorded sound archivists who perform their duties to the highest professional standards, plus the libraries, archives, museums and other institutions for whom they work, at odds with the word of the law, if not its intention.[330]

Fair use would also be available under federalization. However, fair use is flexible – one might say uncertain – by design. It requires a case-by-case analysis, is extremely fact-specific, and for this reason does not lend itself to rules or policies for general application. Indeed, there is some irony in users seeking certainty in a statutory exception that may not allow uses to be made

[328] ARL/ALA Reply at 4-5.

[329] LOC at 5.

[330] *See id.*

with any confidence. Still, the four factors of fair use, along with extensive case law, are not necessarily available under state law.

One final aspect of federal protection that is a potential drawback for users is the availability of statutory damages. Some users were clearly concerned about the possibility of large statutory damage awards, which may be obtained without necessarily demonstrating specific monetary or other losses. On the other hand, the statute does provide protections for libraries, archives and nonprofit educational institutions. Specifically, the Copyright Act provides that statutory damages shall be remitted (*i.e.,* reduced) if the person making the allegedly infringing reproduction reasonably believes it was fair use under section 107 and is an employee or agent of a nonprofit educational institution, library, or archives, acting within the scope of employment.[331]

b. *Right holders' perspectives on the move from state to federal law*

RIAA and A2IM predicted that federalization of protection for such recordings would lead to greater uncertainty – not just for right holders, but for users as well. They predicted that federal protection would cause an "administrative nightmare"[332] and result in "significant economic harm"[333] to right holders. A2IM commented that it was quite comfortable with the current state regime, and that "it's something we understand,"[334] while Sony Music warned that moving to federal protection risked creating "more uncertainty rather than less uncertainty."[335] Right holders' objections to federal protection were phrased largely in terms of the economic

[331] *See* 17 U.S.C. § 504(c)(2). Note, however, that remission only applies to acts of reproduction, not to the infringement of other exclusive rights.

[332] RIAA/A2IM at 26.

[333] *See id.* at 5.

[334] Bengloff T1 at 33-34.

[335] Aronow T1 at 106.

harm and interference with settled business expectations that might result. These issues are dealt with in detail in Chapter IV.D below.

RIAA also suggested that if pre-1972 sound recordings are brought under federal law, ambiguities concerning the interpretation of sections 107 and 108, coupled with the risk-averse nature of libraries, would result in fewer recordings being made available to the public.[336] Another stakeholder asserted that because federal protection would provide a digital performance right to pre-1972 recordings, it would add another layer of complexity to libraries' and archives' digitization planning.[337]

RIAA and A2IM do not, of course, represent all right holders in pre-1972 commercial sound recordings, much less right holders of noncommercial or unpublished recordings. There is at least some evidence that non-affiliated owners may not all share their views. One stakeholder purporting to own the rights in approximately 800 pre-1972 sound recordings commented that it would prefer federal protection to the current state regime because it was "difficult and cost-prohibitive to pursue infringement litigation state-by-state.[338] It does intuitively make sense that right holders, particularly smaller ones, would prefer federal protection simply on the grounds that it would be easier to manage one's assets on the basis of a single set of laws rather than 50 sets.

Like users, right holders also expressed concerns – albeit quite different ones – about statutory damages. Pre-1972 sound recordings are not currently registered with the Copyright Office (since they are not eligible for copyright protection) but would have to be registered in order to qualify for statutory damages and awards of attorney's fees. This would be a significant

[336] RIAA/A2IM at 20-21.

[337] National Association of Broadcasters (NAB) Reply at 2-3.

[338] VAPAC Music Publishing Reply at 1.

undertaking. Moreover, RIAA indicated that it finds punitive damages available under state law more attractive than the prospect of statutory damages under federal law.[339]

c. *Application of the DMCA "Safe Harbor" of 17 U.S.C. § 512*

Section 512 of title 17, enacted as part of the Digital Millennium Copyright Act, provides certain limitations on liability for copyright infringement by online service providers. However, it is not settled whether the section 512 liability limitations apply to violations of the rights of owners of pre-1972 sound recordings.[340] If pre-1972 sound recordings were federalized, service providers would explicitly be entitled to the benefits of the section 512 safe harbor provisions with respect to those recordings.

In response to the Notice of Inquiry, only two stakeholders raised concerns regarding how the section 512 "safe harbor" limitations on liability for copyright infringement by online service providers may apply to the state law protection of pre-1972 sound recordings. The Electronic Frontier Foundation (EFF) noted the importance of the section 512 "safe harbor" provisions to online innovation. It suggested that Congress could not have intended that these provisions would not apply to pre-1972 sound recordings. At the same time it acknowledged that there remains some uncertainty because online service providers cannot easily predict whether a court would find the 512 "safe harbor" provisions applicable to certain copyright infringement claims under state law. It suggested that federalization would clarify that the section 512 "safe harbor" provisions apply to pre-1972 sound recordings.[341] At the roundtable, RIAA also

[339] Pariser T2 at 456.

[340] Courts have split as to the applicability of section 512 to pre-1972 sound recordings. *See infra* Chapter V.A.2.c. However, none of the stakeholders referred to this split in authority.

[341] EFF at 6-7.

appeared to question whether the section 512 "safe harbor" provisions apply to pre-1972 sound recordings.[342]

B. Preservation

1. Importance of Preservation

Preservation of important cultural works is of great importance to the nation generally, and stakeholders interested in pre-1972 sound recordings are in agreement that they should be preserved. Preservation is often undertaken by specialized libraries and archives so that future stakeholders, such as reissue producers and scholars, will have access to a particular aspect of the national cultural patrimony. Preservation is also performed so that stakeholders in the present day may be able to use the recordings. As discussed above, in many cases the media on which these works are recorded are deteriorating;[343] in other cases they are so fragile that the kind of playing necessary for scholarly study is simply unfeasible.[344] And, as explained above, preservation of sound recordings today means digitization, which entails reproduction.[345]

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342 Pariser T1 at 276.

343 J. Willard Marriott Library, University of Utah at 1 ("Many sound recordings produced before 1972 require immediate duplication if they are to be preserved. Significant forms of physical degradation affecting ephemeral sound media – wire recordings, magnetic tape recordings, and acetate transcription discs – include permanent deformation and breaking, tearing, and delamination which can be irreparable. All duplication has to be performed in real time making all preservation projects time consuming and expensive. The media in question are already at high risk of loss simply because they reside on impermanent substrates."); Buttler T1 at 46-47 ("I do know that some change needs to move forward or, otherwise, we're going to have a significant amount of material that is going to disappear from the historical record, and I don't think that's a good outcome just because we have a law that protects it for a really long time.").

344 *See* Loughney T1 at 69-70 ("I can testify to many formats now in the recorded sound collection of the Packard Campus of the Library of Congress that are deteriorating as we speak. These can be transcription disks, these can be wax cylinders, they can be more robust formats that have actually had quite a lot of longevity because they've been durable for four or five decades but are beginning to show signs of oxidation, shrinkage and all the other catalytic chemical reactions that can occur to these formats. Because they were never produced for longevity or for archival purposes; they were produced for home consumption and use in the marketplace, and it was never intended that they last forever.").

345 *See supra* Chapter III.B. Digitization brings its own set of problems. For example, the recordings must reside on a medium and in a format that can be easily migrated and transferred to more stable platforms as

2. Impact of Federalization upon Library and Archives Preservation Activities

Whether libraries and archives would engage in more preservation as the result of federalizing copyright protection for pre-1972 sound recordings appears to be an open question. Some representatives of libraries and archives contend application of a single set of norms – the federal copyright law – and the availability of the section 107 and 108 exceptions, would lead to more preservation activity with respect to pre-1972 sound recordings. However, opponents of federal protection asserted that it would discourage as much preservation activity as it would encourage, primarily for substantive reasons related to the federal exceptions.

a. *Likelihood of increased preservation*

At the very least, the relative certainty and consistency of federal copyright law provides a structural incentive for increased preservation of pre-1972 sound recordings. If a library, for example, were considering a program to digitize certain out-of-print 1930s 78 rpm phonorecords of Ukrainian music, a decision to forge ahead would be made easier if the library had to consider only federal copyright law, *i.e*., both the statute and its judicial interpretations. In the current environment, the library (or its counsel, if any) would at minimum have to consult the civil and criminal laws of the state in which it is located, along with the relevant judicial decisions which may not directly address sound recordings.[346] With some notable exceptions,[347] state civil and

they develop, and that is not beholden to outdated or obscure hardware or software in order to be played. These are far from trivial issues.

[346] *See, e.g.*, LOC at 3 ("uncertain legal treatment even for preservation copying . . . makes archive and education officials reluctant to fundraise for, or allocate resources for the acquisition and preservation of the culturally valuable material."); Syracuse at 4-5 ("any attempt to clear rights for the purpose of archival digitization requires [a library] to research and analyze several different areas of state's laws – across at least three eras – to determine their applicability, potential exceptions, and possible penalties. Doing this work requires such a tremendous resource allocation that many institutions . . . simply may choose not to make historical works available, thereby leaving a huge gap in the nation's cultural memory.").

criminal laws do not include guidance as to what exceptions might apply, whereas federal law provides a library-specific exception (section108), a well-developed and continuously evolving limitation that has the added benefit of decades of judicial interpretation and commentary (section 107), and the possibility of a robust public domain. To the extent these federal provisions are available, one would have to reasonably conclude that libraries and archives would have more clarity, and therefore more ability to make long term resource allocations, with respect to preservation copying.[348]

State copyright law does not have anything resembling these exceptions.[349] Section 107 – fair use – would be beneficial because courts have already applied it to the digital environment and will continue to do so. In some ways, it serves as a safety net (though by no means a panacea) where certain facts may favor the user over the copyright owner but where the four corners of section 108 are inapplicable. As cases relating to digital copying wind their way through the courts, section 107 will continue to evolve and libraries and archives across the country should be better able to create policies and practices in response. To the extent that these decisions come from appellate courts, libraries and archives throughout the United States could find themselves in a position to create national standards, rather than state-by-state projects, for pre-1972 sound recordings.

Section 108(h) provides an option not available in state law: it permits libraries and archives (and nonprofit educational institutions) to reproduce or distribute copies or phonorecords

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[347] *See, e.g.*, CALIF. PENAL CODE §§ 653h, 653w (providing limited exceptions for "not-for-profit educational institutions"); *see also EMI Records Ltd. v. Premise Media Corp.,* 2008 N.Y. Misc. LEXIS 7845, at **14-15 (Sup. Ct. Aug. 8, 2008) (recognizing a fair use defense to copyright infringement of sound recordings in New York).

[348] SAA at 3 ("Providing a clear legal basis for preservation, therefore, would encourage archivists to be less risk-adverse when it comes to preservation. The explicit and broad preservation exception for unpublished material found in 108(b) would be a definite improvement over the current confused state of the law for the vast number of unpublished sound recordings housed in archival repositories.").

[349] While it is likely that state courts presented with the issue would find that fair use is a defense to common law copyright infringement, we are aware of only a single state trial court case, *EMI Records Ltd. v. Premise Media Corp.,* supra note 140, in which fair use has actually been applied.

of a work for purposes of preservation, scholarship, or research in its last 20 years of federal protection when the work is not subject to normal commercial exploitation and a copy or phonorecord of the work cannot be obtained at a reasonable price. Additionally, some library groups have noted that digitization plans are more likely to receive approval from a library general counsel if based on the applicability of federal exceptions rather than state law.[350]

Presumably, these federal provisions would lead to better funding for preservation – at least relative to state law. Indeed, some libraries and archives believe that funding for preservation is often contingent on their ability to provide public access. Under this perspective, federal law is preferable.[351]

Moreover, in some circumstances, federalization could result in some pre-1972 sound recordings entering the public domain significantly earlier than 2067.[352] This would eliminate the legal barriers to preserving those recordings and making them available over the Internet.

b. *Likelihood of decreased preservation, or no change in preservation activities.*

A number of commenters, both copyright owners and users, contended that federal protection for pre-1972 recordings was unlikely to change the amount of digital preservation, and in fact might discourage it. Some stakeholders commented that federal protection offers no preservation advantages over state protection. They maintained that, because neither state nor federal protection schemes inhibit legitimate preservation activities, moving pre-1972 sound

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[350] *See* Brooks T1 at 194 ("Under a consistent regime, whether you like it or not, but a consistent and well understood and well studied [regime], and I think most counsels would understand something about federal law on this level . . . you would have far more certainty at that level about not only whether they could make it available, but if they want to legally make it available, how to go about doing it and what the fair use exceptions are, that kind of thing.").

[351] See LOC at 3; Roach at 3 ("by bringing this class of recordings under Federal law, some clarity would be lent to the copyright status of pre-1972 sound recordings. As a result, funding agencies may be more likely to provide grants or other funding to both preservation and access projects.").

[352] *See infra* Chapter VI.D.

recordings under the federal system will make no practical difference.[353] Additionally, RIAA and A2IM stated that the effort involved in amending Title 17 to include pre-1972 sound recordings, and the resolution of the many legal issues, would divert right holders' attention and resources "from more effective means to improve preservation and access" (*i.e*., partnerships with libraries and archives), hence leading to less preservation overall.[354] "Preservation can only be furthered by financial resources and better cooperation between rightsholders and archival institutions," they claimed, "rather than legal reforms."[355] This cooperation, maintained the right holder groups, is essential in order to provide libraries and archives with the money and technology they need to engage in best-practices digital preservation.[356]

ARL and ALA emphasized that the federal exceptions, particularly section 108, would limit preservation activities far more than state law currently does. They asserted that the risk of particular digitization activities being stymied by section 108's limits on the number of copies that can be made, or by its published/unpublished distinctions, was not worth the benefits of federal protection overall.[357] While they acknowledged that uses not currently allowed by section 108 might still be permitted by section 107, they pointed out that, regardless of the exception, statutory damages and other remedies not available at state law would apply to digitization activities found to be infringing. This, they asserted, presents risks that must be weighed against whatever rewards are offered by federal protection.[358]

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353 RIAA/A2IM at 18-19 ("the RIAA and A2IM believe that in fact, since they know of no such instances of litigation for legitimate preservation activities by libraries or archives, that the copyright law – state or federal – is largely not a factor or hindrance, by itself, to preservation activity.").

354 *Id.* at 2.

355 RIAA/A2IM Reply at 2.

356 RIAA/A2IM at 7.

357 ARL/ALA Reply at 4-6 (use of section 108 "risks the loss of important cultural artifacts, and raises the costs of preservation considerably and unnecessarily").

358 *See id.* at 2-3, 6; *see also* NAB Reply at 4 ("retroactive federal copyright protection for pre-1972 sound recordings could actually hinder preservation and access activities, as federalization would increase

C. Public Access

1. Importance of Public Access

Providing some level of access to digitally preserved works is important because without it, preservation is often merely an academic exercise. Obviously, researchers and the public must have access to digitized pre-1972 sound recordings for the furtherance of public knowledge about our cultural patrimony, and for the light that these recordings can shine on the times in which they were recorded – basically, for the reasons we study film, literature, music, and any other product of the mind.[359] Access also propels the "progress of science" in that current creators are able to build upon what has come before.

A more nuanced point suggested by several stakeholders in the written and oral comments is that access is the key to obtaining funding for preservation.[360] At a practical level, granting organizations are seemingly reluctant to fund projects that will have no visible public benefit.[361] To the extent a project manager can apply funds not only to the preservation of

remedies and could increase potential liabilities for infringement, thereby increasing the risk involved in judging the legality of any particular use").

[359] One commenter noted that, as a scholar focusing on music of the late 19th Century through the 1930s, he could upload prints and photographs to the web, but not sound recordings, a situation that he found "often blocks the academic sharing of sources in ways that could offer the best grounding for a study's interpretations; the best sense of key historical, aural contexts for those sources; the best platform from which other scholars might assess, recontextualize, reinterpret, and teach from those sources; and the richest means by which students and the public could explore and learn from documents of our musical past." Lancefield at 1.

[360] *See, e.g.*, LOC at 3 ("preservation funding is often tied to the ability to make material available to the public"); SAA at 3 ("the funding and scope of preservation programs are closely related to the extent to which the preserved items can be made readily available for research use").

[361] *See* MLA at 3 ("donors generally expect tangible results which show the funds were spent wisely. This becomes especially important when seeking follow-up grants or permanent institutional funding. Results are typically measured in terms of the project's impact: the number of people who have used the materials, the dissertations, articles or books that are generated from it, etc. A digitization project which saves materials for the future but which cannot make them widely accessible, does not tend to be viewed favorably").

important sound recordings, but also to making them available for the public to listen to, funding is more likely.[362]

One example of the importance of public access to receiving grants is the National Endowment for the Humanities (NEH) guidelines for humanities collections and reference resources grants. These describe the NEH's expectation that the products of its grants will be publicly available, preferably through the Internet, and in fact forbid the use of grants for "preservation, organization, or description of materials that are not regularly accessible for research, education, or public programming."[363] The importance of public access to the awarding of NEH grants was emphasized by a program officer who said that for an application, failing to provide for availability of preserved materials would be a "fatal flaw."[364]

The key question, then, is not "should this be accessible?" but "when should this be accessible, in what way, and to whom"? Sometimes the rights of authors or other interested parties may caution against making preserved works immediately available to the public via the Internet, because of copyright or privacy considerations. At other times, immediate access may be appropriate, but perhaps only to select credentialed researchers, or only on the premises of the custodial institution. In general, some level of access appears to be a goal that all stakeholders in pre-1972 sound recordings can share.[365]

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[362] *See* Brylawski T1 at 51 ("But now as we compete for grants, as our institutions compete for grants with other institutions, those institutions that can provide access to their preserved materials are – we find are the ones that are getting funding. This was brought up in much of the oral testimony at the hearings in Los Angeles and New York that were conducted for the National Recording Preservation Board.").

[363] *See* http://www.neh.gov/grants/guidelines/HCRR.html, last visited Dec. 1, 2011.

[364] Phone conversation with Charles Kolb, Senior Program Officer, National Endowment for the Humanities, Division of Preservation and Access, Nov. 10, 2011.

[365] *See* RIAA/A2IM at 4 ("The RIAA and A2IM take great pride and care in the preservation of the recordings in their respective catalogs, and consider it a part of their civic responsibility to work on or assist with the preservation of and access to all historical recordings, whether of commercial interest or not").

2. Impact of Federalization upon Library and Archives Public Access Activities

a. *Types of access expected*

When libraries, archives, and scholars speak of "access" it is not always clear whether they are referring to the entire spectrum of access, from on-premises only to posting on a website, or only to one or the other end of that spectrum. In the proceedings for this Report, some stated definitively that only physical reissues or downloads could meet the access needs of the scholarly community.[366] Others provided a range of access possibilities, from making digitized copies available to researchers and making copies for interlibrary loan, to creating digital exhibits and on-line curricula for independent learners.[367] In addressing public access, comments from the user community consistently asserted that they had no intention of impinging on commercial activity, which they conceded was the proper sphere of the record companies.[368]

b. *Likelihood of increased public access*

Not every provision of public access to a work necessarily implicates an exclusive right. Nevertheless, most stakeholders from the user community maintained that federal protection would encourage the provision of public access.[369]

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[366] *See* Brooks T1 at 110-12 ("I would be skeptical of considering streaming with no right to actually use the source sound document as constituting availability. We can debate that, but I would question that. On the other hand, availability through something like iTunes or something where you could actually get your hands on the file and hold the file and use and study the audio file might [constitute availability]."); *but see* Starr-Gennett 7b at 2 ("Our goal as a not-for-profit educational institution is to interpret the contributions of Gennett Records partly by making digital versions of its recordings (as well as the actual records) available to researchers and by streaming the digital versions of the recordings to the general public through our own website or through arrangements with third parties.").

[367] Harbeson T1 at 199-201.

[368] Loughney T1 at 203-04 ("It would be a real pressure valve to provide access without stepping on the rights of right holders or potential rights holders who might want to come in and relicense that material and reissue it, which I think is not our business and that's your business, and we are happy to help you do it.").

[369] *See* SAA at 5 ("Although the current provisions in Section 108, especially Sections 108(b) and 108(c), are inadequate at providing access in any meaningful way, the availability of provisions of Sections 108(d)

In copyright parlance, "access" can take the form of distribution (when a copy or phonorecord of a work is disseminated to the public "by sale or other transfer of ownership, or by rental, lease, or lending")[370] or public performance (a limited right in the context of sound recordings, which extends only to public performances "by means of a digital audio transmission").[371] Streaming, whether interactive or noninteractive, implicates the public performance right. The rights of distribution and public performance are exclusive rights of the copyright owner, although the public performance right for digital audio transmissions is subject to a statutory license for noninteractive transmissions.[372]

The distribution right is limited by section 109(a) of the Copyright Act (the "First Sale" exception),[373] which provides that the owner of any copy of a work may sell, lend, or otherwise dispose of it. This is the exception that allows libraries and used bookstores to operate without paying royalties to authors or other right holders – for instance, by lending copies of a CD. There is not, however, a federal exception expressly allowing libraries to publicly perform works over the Internet (*e.g.*, streaming).

Federalizing protection would make access to pre-1972 sound recordings through libraries lawful in many instances in which state law rules are unclear at best. To the degree that access is by means of an on-premises visit – for example, to listen to a non-digitized 78 or LP — federal protection would likely make little difference, since such listening has been going on for decades without any legal difficulties. If access involves listening to digitized sound recordings, such as by means of on-premises listening to an unpublished or replaced work copied under

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and 108(e) would provide a definite improvement in access to non-musical sound recordings for local and remote users"); MLA at 6.

[370] 17 U.S.C. § 106(3).

[371] 17 U.S.C. § 106(6).

[372] 17 U.S.C. § 114.

[373] 17 U.S.C. § 109(a).

section 108, then federal protection would certainly lead to (or at least make lawful) increased access. It would do so through the application of sections 108(b) and 108(c), which permit on-site access to copies made for preservation and replacement purposes. The same conclusion applies to certain uses of a sound recording in the last 20 years of its term of protection (section 108(h)), and to any uses that are legitimate under the fair use provision. These provisions would encourage the provision of public access, it was argued, by offering relatively clear and unambiguous exceptions that can be understood and implemented by libraries and archives.[374]

Additionally, federal protection might lead to increased access simply by virtue of putting pre-1972 sound recordings into the federal system. Once there, they will be eligible to benefit from any future changes to copyright law that may themselves directly affect public access, such as orphan works legislation or section 108 reform.

To the extent that federalization would result in some sound recordings entering the public domain before 2067 (discussed below in Chapter VI), access to those recordings would be substantially enhanced.

Much of the commentary from libraries and archives regarding public access under federal protection implicitly assumed that the fair use provision (section 107) would support greater public access.[375] The Office feels constrained to note, however, that unlike digital copying for preservation, as a general matter making protected works broadly available – particularly on the Internet – has a weaker claim to fair use since it risks undermining any current or future market for the work. Fair use does not ordinarily permit dissemination of a work in competition with the copyright owner or in ways that adversely affect the potential market for the work. On the other hand, fair use may permit a library, in appropriate circumstances, to make a

[374] LOC at 5.

[375] *See, e.g.*, LOC at 5.

single copy of a copyrighted recording for a scholar or researcher even where the underlying work remains protected by copyright.

c. *Likelihood of decreased public access*

Some stakeholders argued that federal protection may lead to decreased rather than increased access to pre-1972 sound recordings.[376] Right holders argued that the tendency towards risk-aversion that currently restrains libraries and archives from using the gaps in state law to provide public access to their digitized works would operate in the same way under federal protection. They suggested that the uncertainty of fair use could further inhibit public access because it would hold users back.[377] "The better goal" than seeking federal protection, the right holders maintained,

> is to encourage donation to public libraries and archives of master materials by record labels – large and small that cannot or are not able (for financial or other reasons) to preserve their own master materials – and to include access to such materials to the extent agreed upon. The same is true for bona fide record collectors and enthusiasts – of niche materials – to get more materials, especially rare cultural and historical materials, into public institutions, and ultimately to the general public.[378]

D. Economic Impact on Right Holders

The economic impact of federal protection on those who own the rights in pre-1972 sound recordings can be assessed in two ways. One way is to attempt to determine how federal protection will affect the value of pre-1972 sound recordings *per se*. That is, will the fact that a recording is protected by federal and not state law affect its worth in the marketplace? What aspects of federal protection will likely be most determinative? How does the nature of the effect change depending on what recording or group of recordings one is examining?

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[376] *See* RIAA/A2IM at 20-21; ARL/ALA at 4-6.

[377] RIAA/A2IM at 20-21.

[378] *Id.* at 21.

The second way of determining the economic impact of federal protection is to look at how federal protection might affect the settled business expectations of right holders. For example, if a contract is written with the expectation that state law will govern, what happens when the federal statute becomes the underlying law? Additionally, how would the federal rules governing initial ownership, transfer of ownership, termination of transfers and licenses, and registration affect a recording fixed under state law? The stakeholders had many views on these and related issues, which are set forth below.

1. Value of Pre-1972 Sound Recordings

The present value of pre-1972 sound recordings varies substantially. There is a small number (proportionate to the total number of sound recordings made) of commercial recordings that continue to prove remunerative to their owners, such as titles by Louis Armstrong, Bing Crosby, Frank Sinatra, Elvis Presley, and the Beach Boys, and record companies are continuing to reissue sound recordings for niche markets.[379] However, the vast majority of pre-1972 sound recordings are either unpublished (such as field recordings) or, if published, have ceased their commercial life.[380] In particular, scholars pointed to pre-1925 recordings, stating that "an average of fewer than 4% of historically important pre-1925 recordings have been reissued in any form by right holders, and the revenue from that 4% has to be tiny given the lack of marketing of such reissues."[381] They also stated that

> Fundamentally, older recordings that are still economically viable are nearly always those made within the lifespan of contemporary record buyers. This has been true throughout the history of the marketing of sound recordings.[382]

379 Bengloff T1 at 121-22.

380 *See, e.g.*, SAA at 7.

381 ARSC at 3.

382 *Id.* at 4.

a. *Benefits and disadvantages of federal protection*

Stakeholders presented competing views of how federal protection would affect the economic value of pre-1972 sound recordings. Given that most pre-1972 sound recordings likely have little or no economic life at all, the discussion centered on commercially released recordings.

A primary concern about the economic effect of federal protection was the likelihood of early sound recordings entering the public domain, and thus becoming less profitable for their former right holders. ARSC maintained that right holders could still enjoy a modest income from selling public domain works, given that in many cases they would still own the master recordings and could lease these to reputable reissue labels.[383] ARSC also pointed out that public domain reissues could be useful in identifying recordings with unexpected commercial viability, which the former right holder could then exploit.[384] MLA cited the competitive trade in public domain books as evidence that earning money through works in the public domain is possible.[385] RIAA, however, disagreed, saying that once a recording is available for free downloads, with no copyright for the uploader or the distribution site to worry about, the business model for record companies is extinguished: "there is all but zero value to a record company in a public domain recording."[386]

Some stakeholders also maintained that, while the entry of early sound recordings into the public domain might not redound to the profit of the (former) copyright owner, it could create economic value for third-party reissue labels.[387] Under this scenario, once libraries and archives

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383 ARSC at 7.

384 *See id.*

385 Harbeson T1 at 179.

386 Pariser T1 at 295.

387 *See* MLA at 10 ("The commercial value of the recording and the commercial value to the current copyright holder are not the same thing. A copyright holder may, for lack of interest or knowledge, fail to exploit a work to its full commercial value. In such a case, the value to the owner would be less than the value of the recording. A measure of the commercial value of the recording should include not only the

preserve and make public domain sound recordings publicly accessible, such access will spur demand for consumer-ready packages of these recordings, which will help third-party labels[388] (as well as, one supposes, the "original" labels that chose to compete in this sphere).[389]

b. *Effect of exclusive rights*

Federal protection would, for the first time, allow pre-1972 sound recordings to enjoy a defined set of unambiguous, though limited, exclusive rights. Specifically, the owner of a copyright in a sound recording enjoys the exclusive rights of reproduction, preparation of derivative works, distribution, and public performance via a digital audio transmission.[390] In contrast, the rights conferred by state law are typically either narrower or often ambiguous.[391] While some states' civil statutes confer exclusive rights upon owners of copyrightable works,[392] most do not. The economic effect of these additional exclusive rights conferred by federal law is that their holders are granted monopoly power over certain actions, and can exercise this power to their financial benefit by selling copies of the recordings, or licensing the rights to make derivative works from the recordings.

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revenue it brings to the copyright holder, but all potential revenue that it could command."); *see also* EFF at 12.

[388] *See* MLA at 10-11 ("bringing pre-1972 sound recordings under federal law best satisfies the Constitutional goals of copyright by insuring that as many lawfully-made recordings as possible are available to the public, whether it be through the marketplace or in libraries. Doing so can do no harm to the commercial viability of a recording; indeed, in some cases it may be beneficial by fostering renewed interest and demand.").

[389] Harbeson T1 at 179.

[390] 17 U.S.C. § 106. The exclusive right of public display does not apply to sound recordings.

[391] *See supra*, Chapter II.E.

[392] CAL. CIV. CODE § 980(a)(2) ("The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior sound recording . . .").

One notable aspect of federal protection that could well affect the value of pre-1972 sound recordings is the exclusive right "to perform the copyrighted work publicly by means of a digital audio transmission."[393] This is the legal mechanism, along with section 114, that insures royalty payments (and, in cases falling outside section 114's exceptions and its statutory license, exclusive rights) to owners of sound recordings that are publicly performed via the Internet or satellite radio. Like the rest of federal copyright law, the public performance right only applies to works protected by federal law. Thus, pre-1972 sound recordings that presently do not earn public performance royalties could become a significant revenue stream once incorporated into the federal statute.[394]

c. *"Long tail" effect on commercial prospects of older recordings*

A number of commenters, particularly ARSC, asserted that reissuing early (meaning, for the most part, acoustical-era) recordings is unlikely to be profitable. This point was made in the service of the argument that the movement of such early recordings into the public domain under federal protection would not negatively affect the record companies' bottom line.[395] In response, members of the right holder community maintained that (1) there is no way to truly know what old music styles will become popular again, and (2) it is necessary to retain state protection until 2067 because the so-called "long tail" phenomenon suggests that these older works take longer to earn a return on their investment.[396]

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[393] 17 U.S.C. § 106(6).

[394] *See* Brylawski T1 at 174-75.

[395] *See* ARSC at 4.

[396] Bengloff T1 at 31, 33-34; *see also* Chris Anderson, THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE (2006).

ASRC, citing to the Brooks Study findings that 4% of pre-1925 recordings have been reissued by right holders, with an increase to 12% for 1925-1939 recordings,[397] argued that these numbers showed that right holders historically have not put a lot of stock in the earning potential of early music reissues.[398] Both A2IM and NMPA made the point that one can never assume what will ultimately prove commercially viable, particularly for smaller labels catering to niche audiences,[399] and that it is too risky to base federal policy upon a presumption as to which pre-1972 sound recordings will have value in the future.[400]

Additionally, A2IM explained that under the "long tail" theory, a large number of heretofore-"niche" cultural products will earn as much as the small number of blockbuster works when viewed over a longer period of time, because it has become easier to exploit niche markets. Hence, it argued, pre-1972 sound recordings that would have been allowed to go out of print in the past are now being kept in the marketplace on the theory that they and their audience will find each other.[401] However, A2IM stated that bringing a high quality recording to market requires a financial investment, and in order for early recordings to earn the requisite return on investment they cannot be allowed to go into the public domain.[402]

2. Settled Expectations in Business Transactions

The second way in which federal protection might affect the economic value of pre-1972 sound recordings is by upsetting the settled business expectations of major sectors of the music

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397 ARSC at 3.

398 *See id.*

399 Bengloff T1 at 121; Rosenthal T1 at 62-63.

400 Rosenthal T1 at 62-63.

401 Bengloff T1 at 31-34.

402 *Id.* ("As technology changes, we have to go back and increase the number of kilobytes that are available so our music sounds like it should be sounding, be able to deliver it, bring it to market and a variety of other areas.").

industry. Stakeholders had very different views on the degree to which settled business practices might be altered, as well as on what economic impact such alteration would cause. All of the commenting parties were united, however, in wanting the least possible amount of disturbance to the current record company business model. Contractual arrangements, ownership, transfer, termination, and registration were among the topics addressed.

a. *Existing contractual arrangements*

In their written comments, RIAA and A2IM pointed out that many of the pre-1972 sound recordings to which their members own the rights are licensed in both hard copy and in digital form through multiple contracts. These contracts are predicated upon state laws, and the right holders claimed that putting pre-1972 sound recordings under federal protection would "render many deals unclear (at best), make others more difficult to interpret, and would likely result in financial losses."[403] The contents of entire catalogs, they warned, could be tied up in court, with the possibility that the recordings at issue would be withdrawn from public availability.[404] Beyond financially harming the recording industry and decreasing public access to pre-1972 sound recordings, RIAA also predicted that these complications would divert record companies from engaging in cooperative access programs with libraries and archives.[405]

In response to the expressed concerns about contract uncertainties, user groups stated that the contract issues "would continue to be resolved under state law as they had before" federal protection.

This raises an important point, that the degree to which contracts, as well as ownership, termination, and other matters discussed later in this Chapter are affected will be determined not

403 RIAA/A2IM at 31.

404 Schwartz T1 at 23; *see also* Rosenthal T1 at 245-46.

405 Schwartz T1 at 23.

by federal protection itself, but by the manner in which it is achieved – specifically, how federal copyright law will apply, and in what cases state laws would continue to control. These questions are addressed in detail in Chapter VI of this Report.

b. *Ownership, including transfer, termination, and registration*

The RIAA and A2IM stressed in their written and oral comments the great degree to which questions of ownership (such as transfer and termination) and related responsibilities (such as registration) would be thrown into chaos upon the institution of federal protection for pre-1972 sound recordings. In other words,

> all of the legal uncertainty and what we think would be litigation and other sorts of ways of sorting out how to deal with things like ownership and authorship and term and all that, it just detracts from the economic value of the rights.[406]

Recall that, when discussing preservation and access, libraries and archives were portrayed as overly risk-averse, and claimed they should not be forced to work under such legal uncertainty. In the discussion of how federal protection would affect ownership and related matters, the roles have switched, with record companies claiming they will be unfairly forced to face uncertainty, and user groups claiming that the cited risks being pointed out were overblown or nonexistent.

Regarding initial ownership (and it should be kept in mind that the following discussions will be expanded upon in Chapter VI), right holders expressed concern that what was clear under state laws would be unclear, or even invalidated, once ownership documents and chain of title were examined under federal law.[407] For example, it was noted that in some states ownership passes with the possession of the physical master recording, a situation that does not exist under federal law.[408] This conflict, warned the RIAA and A2IM, would lead to uncertainty and even

[406] Chertkof T1 at 176-77.

[407] RIAA/A2IM at 26-27.

[408] RIAA/A2IM at 26; Feaster at 8-9.

litigation in the course of attempting to reconcile the state and federal standards.[409] Another ownership concern was related to "works-made-for-hire": would a recording considered to be a work made for hire under state law at the time of its creation have to be reconsidered under the federal copyright law standards?[410] If such a reconsideration created a different ownership interest, how would this affect downstream contracts and licenses?[411] These conflicts, warned RIAA and A2IM, would lead to uncertainty and litigation in the course of attempting to reconcile the state and federal standards.[412]

The problems caused by differing interpretations of initial ownership would be compounded, according to the RIAA and A2IM, when considering transfer of title (how can you transfer if you do not know the owner?) and termination of transfers and licenses (when a deal is struck in the absence of a termination provision, is it fair to subsequently seek to terminate the transfer?).

Stakeholders representing users of pre-1972 sound recordings had varied responses to these right holders' concerns. The SAA pointed out that a similar "federalization" of state-protected works (namely unpublished works) occurred by reason of section 301(a) of the Copyright Act of 1976, and that it was unaware of any cases involving such works that hinged upon state definitions of ownership.[413] SAA conceded, however, that determining whether or not a recording was a work made for hire would be difficult.[414] ARSC took another position on the work made for hire issue, saying that "early sound recordings were generally made under true

[409] RIAA/A2IM at 27.

[410] *See id.* at 26.

[411] *See id.* at 24-25.

[412] RIAA/A2IM at 27.

[413] SAA at 7-8.

[414] *See id.* at 8.

employment conditions; these works would, therefore, qualify as works made for hire."[415] ARSC also pointed out that, for commercial recordings, the vast majority of commercial recordings continue to be owned by a known entity, and that the real problem is in determining who owns orphan and unpublished works.[416] Finally, ARSC also asserted that ownership simply wouldn't be affected by the advent of federal protection for pre-1972 sound recordings because

> federal copyright in a pre-1972 sound recording would vest in the initial owner of the work as determined by the law of the state with the most significant relationship to the sound recordings and the parties, and no divestiture or transfer of rights would result.[417]

With respect to termination of transfers and licenses of rights in pre-1972 sound recordings, one stakeholder commented that even if federal protection applies, pre-1923 sound recordings should continue to be exempt from the termination provision on the grounds that termination in general is contrary to free-market principles.[418] Another disagreed, arguing that performers of pre-1972 sound recordings should enjoy the same right of termination that their post-1972 colleagues enjoy.[419]

Copyright registration was another issue that right holders raised. Timely registration is required to preserve a copyright holder's ability to use the registration certificate as *prima facie* evidence of the validity of the copyright and the facts stated in the certificate.[420] Timely registration is also required for a copyright owner to be eligible for statutory damages and

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[415] ARSC Reply at 18.

[416] ARSC at 4-5.

[417] ARSC Reply at 13.

[418] Hoffman Reply at 1.

[419] Artist's Reprieve Reply at 1-2.

[420] 17 USC § 410(c). The certificate has prima facie weight only if registration was made before or within five years after first publication of the work.

attorney's fees as the prevailing party in an infringement suit.[421] Under section 411 of the Copyright Act, a right holder may not sue for infringement of a U.S. work unless it first registers the work with the U.S. Copyright Office. While some right holders register only just before going to court, the preferred method is to register upon creation or publication,[422] which preserves the ability under section 412 to seek an award of statutory damages and attorney's fees. Obviously, no pre-1972 sound recordings have been registered, because federal copyright law does not apply to them. If federal protection applies, will registration become a problematic issue? A2IM noted that

> To be able to defend your rights, you have to register your music. It would be a burden in terms of manpower, finances, and a variety of other ways for us to continue to protect our pre-1972 copyrights if they were federalized. A real cost burden.[423]

Alternatively, RIAA expressed concern that sudden imposition of a registration requirement would mean that pre-1972 sound recordings would be "devoid of effective remedies" under federal protection.[424] In response, ARSC said it would be "delighted" if federal protection produced a torrent of new sound recording registrations because it would "promote predictability and public access to these works, as well as aid in the preservation of historic recordings."[425]

[421] A prevailing plaintiff may seek an award of statutory damages and attorney's fees only if the infringed work was registered prior to the commencement of the infringement or within three months after first publication of the work. 17 U.S.C. § 412. Different rules apply to works that have been "preregistered" under section 408(f), but no pre-1972 sound recordings would qualify for preregistration. *See id.*

[422] Pariser T1 at 281.

[423] Bengloff T1 at 31.

[424] RIAA at 30.

[425] ARSC Reply at 18.

c. *Potential for a decrease in availability of pre-1972 sound recordings as result of business burdens*

RIAA and A2IM warned that the burdens caused by a "protracted legislative process" could redirect their members' resources away from cooperative preservation and access programs such as the Library of Congress's National Jukebox.[426] They also raised the specter of "a freeze on availability of many pre-1972 sound recordings" due to difficulties in tracing ownership.[427] Finally, A2IM suggested that the costs of dealing with ownership issues and registration could mean "less and less investment" in indigenous American music of the sort that demonstrates "America's cultural diversity and tradition."[428]

Concerning the potential of a "freeze" on availability of pre-1972 sound recordings, ARSC pointed out that "even traditional categories of works prepared before 1978 require a case-by-case examination to determine the federal rights as of the date of preemption; the complete freeze suggested by the RIAA/A2IM has not resulted from such a requirement."[429] The real source of scarce availability, ARSC said, is the confusion about which state laws apply and how to apply them.[430]

D. Alternatives to Federalization

Stakeholders were asked to address the possibility of bringing pre-1972 sound recordings under federal law only for limited purposes. The Notice of Inquiry noted that some stakeholders seek to ensure that current state law rights in pre-1972 sound recordings are subject to the fair use doctrine and the library and archives exceptions found in sections 107 and 108, respectively, of

[426] RIAA/A2IM at 5.

[427] *Id.* at 27.

[428] Bengloff T1 at 31-34.

[429] ARSC Reply at 13.

[430] *See id.* at 14-15.

the Copyright Act. It also noted that some would like to subject pre-1972 sound recordings to the section 114 statutory license, but otherwise keep them within the protection of state law rather than federal copyright law. The Office received a variety of comments in response to the proposals referred to in the notice, as well as some new proposals for alternatives to federalization of pre-1972 sound recordings.

1. Partial Federalization (*e.g.,* only applying sections 107, 108 and/or 114)

The Notice of Inquiry raised the possibility of bringing pre-1972 sound recordings under federal law only for limited purposes, *i.e.*, retaining state law protection for the recordings but subjecting them to the defenses provided by sections 107 and 108 of the Copyright Act and/or to the statutory license provided by section 114 of the Copyright Act.

a. *Sections 107 and 108*

Several parties, including SAA, LOC, RIAA and A2IM, expressed the view that partial federalization would be inappropriate. SAA offered that partial federalization would not resolve the current complexity that impedes preservation and access for pre-1972 sound recordings, but instead would merely add to the confusion and legal fees.[431] LOC agreed that partial federalization would lead to more confusion regarding the boundaries of federal and state protection.[432] RIAA and A2IM stated their belief that there are no advantages to providing partial federalization, and that overwhelming legal challenges would ensue.[433]

ARSC commented that partial federalization that simply applied the fair use doctrine and the library and archives exceptions found in sections 107 and 108 to currently held state rights in

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[431] SAA at 10-11.

[432] LOC at 12.

[433] RIAA/A2IM at 30-31.

pre-1972 sound recordings would be "extremely messy" in the real world. It added that such a proposal would unfairly privilege certain institutions, which did not fall within the section 108 criteria.[434] ARSC, while supporting full federalization, endorsed partial federalization to the extent necessary to ensure that First Amendment safeguards that are built into the current Copyright Act are applicable to pre-1972 sound recordings. In its view, without the fair use doctrine and the library and archives exceptions found in sections 107 and 108, state copyright laws regarding pre-1972 sound recordings could be subject to invalidation on Constitutional grounds.[435] MLA, while generally favoring complete federalization, reluctantly supported partial federalization over the *status quo*.[436]

b. *Section 114*

In 1995, Congress passed the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA")[437] which, for the first time, granted to copyright owners of sound recordings an exclusive right to make public performances of their works by means of certain digital audio transmissions, subject to a compulsory license for certain uses of these works codified in section 114 of title 17 of the United States Code. In the Digital Millennium Copyright Act of 1998 ("DMCA"),[438] Congress updated section 114 and expanded the scope of the compulsory license.

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434 ARSC at 7. In its comment, ARSC identified organizations in Europe, where the "widespread availability of historical public domain recordings … is precisely because *anyone* can make them available." *Id.*

435 ARSC Reply at 19-20. However, in its initial comment, ARSC observed that partial federalization that simply applied the fair use doctrine and the library and archives exceptions found in sections 107 and 108 to currently held state rights in pre-1972 sound recordings would be "extremely messy" in the real world. ARSC at 7.

436 MLA at 15-16.

437 Pub. L. No. 104-39, 109 Stat. 336 (1995).

438 Pub. L. No. 105-304, 112 Stat. 2286 (1998). Section 112 of the Copyright Act, 17 U.S.C. § 112, was also amended to provide a statutory license for the making of certain "ephemeral" copies "used solely for the transmitting organization's own transmissions originating in the United States" under the section 114

The result is that sound recordings are subject to a compulsory license for public performances by means of certain nonexempt, noninteractive digital subscription digital audio transmissions. All other public performances of sound recordings by means of certain digital audio transmissions, including interactive digital transmissions, are subject to an unfettered exclusive right.[439] The Office's Notice of Inquiry asked for input on the impact of bringing pre-1972 sound recordings into the section 114 statutory licensing mechanism, perhaps as an alternative to full federalization of protection for pre-1972 sound recordings.[440]

In its comments, SoundExchange stated that, while there is no need to completely federalize pre-1972 sound recordings, there would be a benefit to requiring statutory services to pay under the statutory license for pre-1972 sound recordings presently protected as a matter of state law. It estimated that pre-1972 sound recordings account for 10-15% of usage by services employing the section 114 license. It also observed that some services that publicly perform sound recordings by means of digital audio transmissions are already making statutory royalty payments under the section 114 license for pre-1972 sound recordings. It contended that such payments for public performance of pre-1972 sound recordings are appropriate, and that performances of pre-1972 sound recordings are subject to protection under state law, including a state law performance right.[441]

Both NAB and SiriusXM disputed SoundExchange's view that state law provides a public performance right in pre-1972 sound recordings.[442] NAB explained that SoundExchange was referring to statutory and case law that is designed to address bootlegging and establish

statutory license. Because the section 112 statutory license and the section 114 statutory license go hand in hand, this Report shall not specifically discuss the section 112 license beyond this footnote.

439 17 U.S.C. § 114.

440 Notice of Inquiry at 67780, 67781.

441 SoundExchange at 4-6.

442 SiriusXM Reply at 8-10; NAB Reply at 7-8.

reproduction and distribution rights and claims regarding unfair competition. It asserted that such law does not establish public performance rights.[443] SiriusXM added that requiring statutory services to pay under the statutory license for recordings currently protected under state law would provide an undeserved windfall for recordings created and paid for more than 40 years ago, at the expense of services like Sirius XM. It also noted that to the extent that any services are mistakenly making payments for public performance of pre-1972 sound recordings, that SoundExchange should not be accepting or distributing such payments.[444]

2. Limits on Remedies

At the public meeting, RIAA offered the concept of a registry containing data about pre-1972 sound recordings which libraries and archives sought to preserve and to which they sought to provide access.[445] This concept was also mentioned by Sony Music Entertainment, which suggested the possibility that libraries and archives could publicly state their intention to use certain identified works and have "some kind of potential immunity from litigation or prosecution or statutory damages."[446] MLA expressed interest in the value of such a proposal, and at the same time agreed that many details would need to be addressed.[447]

In a discussion with the Office subsequent to the roundtable, the NMPA also raised the concept of limiting remedies for good-faith preservation and public access uses of pre-1972 sound recordings that are determined to be orphan works. As an alternative to a registry, NMPA suggested a requirement of due diligence in the user's search for the owner of a pre-1972 sound

443 NAB Reply at 7-8.

444 SiriusXM Reply at 5-6.

445 Chertkof T1 at 153.

446 Aronow T1 at 247-49.

447 Harbeson T1 at 264.

recording, and suggested that the due diligence standard might vary according to the age of the work. Those who fulfilled the due diligence standard and used pre-1972 sound recordings that were therefore determined to be orphan works would be subject only to limited damages, perhaps only to injunctive relief.[448]

3. No Amendments to Federal Law, but Amendments to State Law Instead

At the public meeting, RIAA offered the possibility of amending state laws to provide explicitly that preservation copying and providing certain types of access for older sound recordings is permissible.[449] In response to this proposal, MLA raised concerns about the inevitable lack of uniformity that would result from pursuing legislative amendments to state laws to deal with what it perceives as a problem with broader scope. MLA noted that separate provisions in each state would require libraries and archives to operate in a manner that complied with the specifics of all, including the most restrictive, state provisions.[450] RIAA acknowledged MLA's concerns regarding uniformity, but suggested that amendments to state law were still a good way to begin to address libraries and archives' concerns.[451] It proposed that libraries, and archives and right holders work together to draft a model state law. It indicated that such a model state law could include "state fair use rights," and that the parties could jointly introduce it to the various state legislatures, beginning with the states that are already home to important preservation and archival facilities.[452]

The concept of a model state law received additional attention in a subsequent roundtable session. Tomas Lipinski of the School of Library and Information Science at Indiana University

[448] Copyright Office meeting with NMPA (June 21, 2011).

[449] Schwartz T1 at 95-96.

[450] Harbeson T1 at 95-97.

[451] Schwartz T1 at 97.

[452] Chertkof T1 at 145-47.

suggested that approaching state law reforms in a manner similar to the Uniform Commercial Code could help address issues of uniformity in the accommodations provided to libraries and archives from one state to another. Mr. Lipinski acknowledged that the disadvantages of this approach would include the risk of non-adoption or variation, and the fact that some sound recordings would be covered by state law and some sound recordings would continue to be covered by federal law.[453] He also clarified that a model state law would need to establish fair use along the lines already established by federal case law.[454] Dwayne Buttler of University of Louisville acknowledged the value in a model state law approach, especially one that included fair use and accommodations such as those found in section 108. However, he also expressed concerns about accomplishing universal implementation of any model law.[455] ARL expressed its view that a model state law which filled in details regarding accommodations setting out fair use and other exceptions for libraries and archives would be a wonderful alternative to federalization.[456] While MLA reiterated its general opposition to solutions that fell short of full federalization, it also noted that state law reforms could help its members considerably, especially if such reforms included state fair use provisions.[457] RIAA reiterated its support for reforming state laws and expressed optimism about developing a dialogue and working relationship with libraries and archives that can address preservation of and access of pre-72 sound recordings.[458]

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453 Lipinski T2 at 474-76.

454 Lipinski T2 at 509.

455 Buttler T2 at 481.

456 Butler T2 at 482.

457 Harbeson T2 at 477-78.

458 Marks T2 at 485-87.

4. No Amendments to Federal Law, but Use Private Agreements Instead

RIAA and A2IM pointed toward significant progress in the preservation of and access to pre-1972 sound recordings achieved through private two-party agreements, such as the National Jukebox and other private agreements with archives.[459] Sony Music Entertainment suggested that similar private agreements could yield further positive results and should be pursued in place of federalization.[460] Representatives of libraries and archives observed that private agreements, while laudable, are too limited in scope, since they address only those parties who enter into private relationships with right holders.[461]

In addition to private two-party agreements, RIAA raised the prospect of a third party entity, one that is not as risk-averse as libraries and archives, functioning as a clearinghouse that could provide digital access, in a manner similar to that provided by iTunes, to pre-1972 sound recordings for libraries and archives.[462] The Society for American Music (SAM) subsequently suggested the possibility of establishing a for-profit or non-profit trust that could receive donations or licenses from right holders that could be used to serve the preservation and access needs of libraries and archives.[463] MLA expressed concern with such a plan because of the poor quality of digital files for research purposes.[464]

In the public meeting, RIAA also introduced the notion of a consent-not-to-sue agreement that would be generally offered to libraries and archives for certain uses similar to those that would be included in a model state law.[465] While several libraries and archive groups

[459] RIAA/A2IM at 16-17.

[460] Aronow T1 at 103-04.

[461] ARSC Reply at 3-4.

[462] Marks T2 at 488.

[463] Brylawski T2 at 499-500.

[464] Harbeson T2 at 503-04.

[465] Marks T2 at 488.

expressed interest in various private agreement models and a willingness to engage in further dialogue, the consent-not-to-sue proposal did not result in any specific positive or negative feedback from libraries and archive groups.

Tape deck

V. DESIRABILITY OF FEDERALIZATION

While there are legitimate policy arguments on both sides of the question, the Copyright Office has determined that on balance, the better course of action is to bring pre-1972 sound recordings under federal jurisdiction.

When Congress abolished state common law copyright and brought almost all works of authorship within the scope of the federal copyright statute in the Copyright Act of 1976, it did so in order to substitute "a single Federal system for the present anachronistic, uncertain, impractical, and highly complicated dual system." It concluded that "the bill would greatly improve the operation of the copyright law and would be much more effective in carrying out the basic constitutional aims of uniformity and the promotion of writing and scholarship."[466] Congress offered four reasons for abolishing the dual system: (1) to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States; (2) because "publication" no longer served as a clear and practical dividing line between common law and statutory protection; (3) to

[466] H. R. REP. NO. 94-1476, at 129 (1976).

implement the "limited Times" provision of the Copyright Clause, by abrogating the state law system of perpetual copyright for unpublished works; and (4) to "adopt a uniform national copyright system [that] would greatly improve international dealings in copyrighted material."[467]

It is the first reason offered by Congress in 1976 that is most pertinent to whether pre-1972 sound recordings should be brought into the federal statutory scheme.[468] National uniformity of copyright law ensures that all users, consumers, intermediaries, and right holders are operating under a single, consistent set of laws. This has been the goal of copyright law since 1790, and federal protection for pre-1972 sound recordings would be the last step in making it a reality. A uniform national law also would ensure that all who operate under it would know what rights and exceptions apply to their activities.

National uniformity and clarity are particularly important in the digital era, when libraries and archives must reproduce works in order to preserve them and in many cases wish to make them publicly accessible by means of distribution of phonorecords or by transmissions of public performances. With a single set of applicable laws, even the most risk-averse institution can make informed decisions as to what laws and what exceptions apply to its activities.

Why Congress did not incorporate pre-1972 sound recordings into the federal statute in 1976 is an interesting question, but neither the stakeholders nor the Copyright Office have an answer to it. In fact, the reasons that compelled Congress to create a unitary federal copyright system in the 1976 Act justify inclusion of pre-1972 sound recordings in that federal system today. The policy considerations addressed above – certainty and consistency, preservation, public access, and avoiding economic harm – all fall on the side of seeking federal protection for pre-1972 sound recordings.

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[467] *Id.* at 129-30.

[468] However, reasons (3) and (4) are also applicable. Congress abrogated perpetual protection of pre-1972 sound recordings in the Copyright Act of 1976, but implementation of the recommendations set forth below would allow many of those works to enter the public domain before 2067. And bringing pre-1972 sound recordings into the federal statute will complete the process of adopting a national uniform copyright system, thereby facilitating international dealings in copyrighted material.

For those reasons, federalization should apply almost all parts of Title 17 to pre-1972 sound recordings, including for example section 106(6) (public performance right for digital audio transmissions), section 107 (fair use), section 108 (certain reproduction and distribution by libraries and archives), section 110 (exemption for certain performances and displays),[469] section 111 (statutory license for cable retransmission of primary transmissions), section 112 (ephemeral recordings), section 114 (statutory license for certain transmissions and exemptions for certain other transmissions), section 512 (safe harbor for Internet service providers), Chapter 10 (digital audio recording devices) and Chapter 12 (technological protection and copyright management information). Some parts of Title 17 will require modification to apply to pre-1972 sound recordings because the recordings were initially created, and in some cases exploited, outside the federal system.

To be clear, there are practical issues in implementing federalization, as noted by some stakeholders. However, the Office believes that those objections can be addressed. Likewise, while the Office appreciates the careful thought put into alternatives to federal protection, it finds that the proffered solutions would not go far enough to cure the difficulties caused by the current state-by-state regime.

A. Certainty and Consistency in Copyright Law

Both ARL and ALA have noted, and the Copyright Office agrees, that traditional library and archives activities are unlikely to violate state criminal sound recording piracy statutes. The Office, like the Section 108 Study Group, also believes that the section 108 exceptions for libraries and archives are out of date and should be updated.[470] However, these points do not compel the conclusion that the uncertainty of state law is preferable to federal protection. In fact,

[469] Note, however, that most of the subsections of section 110 do not apply to sound recordings. Only sections 110(1), (2), and (5) apply to sound recordings, among other categories of works.

[470] *See supra* Chapter III.B.2.a.

the reluctance of many sound recording archivists and librarians to preserve and make accessible pre-1972 sound recordings in cases where state law does not explicitly prohibit acts of preservation leads to the opposite conclusion.

The permissible scope of activities in which libraries and archives can engage under state civil law is more ambiguous than under criminal law, due to the variations among the states and the lack of established copyright exceptions.[471] The possibility that a library's activities in one state might subject it to the laws of another state where the scope of protection is different – a significant risk when works are made available online – creates additional uncertainty. Such uncertainty unfairly favors those willing to test legal limits while disfavoring the risk-averse.

Federal protection would not eliminate the uncertainty, but it would equalize rights and exceptions that would be applicable to sound recordings of all vintages. Section 108(h) may be especially helpful: this provision offers a clear exception for libraries and archives to engage in reproduction or distribution activities "for preservation, scholarship, or research" in the last 20 years of the term of protection of any published work.[472] Given the concern that many commenters expressed regarding the length of copyright protection, this exception should prove quite helpful in providing broader access to many pre-1972 sound recordings.

RIAA and A2IM have asserted that federal protection will actually create more uncertainty for their member companies because of their long-standing reliance upon state law. The Office does not take this reliance lightly. However, (1) the member companies of RIAA and A2IM own but a small fraction of pre-1972 sound recordings (when non-commercial recordings are taken into account), and of these, but a small fraction appear to enjoy any degree of commercial viability, and (2) the record companies are presumably just as familiar with federal copyright law, given their post-1972 recordings, as with state law, and should be able to

[471] It should be kept in mind that civil actions are much more likely than criminal prosecutions in the context of activities by libraries and archives.

[472] 17 U.S.C. § 108(h).

maneuver within the federal system. Additionally, one must weigh the *possibility* of uncertainty raised by RIAA and A2IM member companies under a federal system with the *actual* and *documented* uncertainty faced by libraries and archives under the multiple state systems. Finally, RIAA and A2IM raised the point that ownership of pre-1972 sound recordings may be difficult to resolve. Ownership challenges are real, but they can be addressed by stating that for all pre-1972 sound recordings newly brought into the federal system, the ownership on the day of enactment will be the same as the ownership on the day prior to enactment. (This would require a simple amendment to the Copyright Act and is further discussed below in Chapter VI.)

Most of the user groups who commented during the study stated that applying federal law would be, without more, a clear benefit simply from the perspective of providing consistent legal guidance. The Office agrees with this position, and believes that it conforms with the intent of Congress in 1976 when it sought to unify all kinds of copyrighted works (but one) under federal law. Moreover, once ensconced within the federal system, pre-1972 sound recordings will benefit from any changes made to Title 17 in the future, such as orphan works legislation or amendments to section 108.[473]

B. Promotion of Preservation and Appropriate Public Access

The Office believes that preservation of and provision of access to pre-1972 sound recordings, as afforded by federal statutory exceptions to copyright law, would provide an important public benefit. This is particularly true given the fragile physical state of many such recordings and the inaccessibility of so much of the nation's audio heritage. The Office also credits the claims by libraries and archives that reliance upon federal exceptions will lead to more

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473 These issues have seen considerable policy study and discussion in recent years and both are priorities of the U.S. Copyright Office. *See Priorities and Special Projects of the United States Copyright Office* at 7-8.

preservation and more public access, both from a structural (certainty and consistency of risk) and substantive (use of the section 108 and fair use exceptions) point of view.

As illustrated in Chapter IV, federal protection will likely save libraries and archives money and resources simply by virtue of providing a single source of law to consult when engaging in preservation or public access activities. Furthermore, the Office credits the argument that a legal advisor, such as a general counsel, will be more likely to approve a project that is consistent with federal norms that have been explicated in a statute and through litigation and commentary, rather than one based on uncertain or amorphous state law.[474]

A second structural element of federal copyright protection that is likely to encourage preservation and public access activities is the probability that if protection is federalized, some sound recordings will enter the public domain within the lifetime of today's practitioners. As explained below in Chapter VI.C., one key aspect of the Office's recommendations is that early sound recordings not available in the marketplace within a reasonable period after the effective date of legislation federalizing protection should enter the public domain at the end of a transition period. In addition, the terms of post-1923 works will expire – again, absent a showing of public availability – on the same schedule as other works of that vintage.

Substantively, the use of section 108 and the fair use exception should encourage more preservation and public access because they provide time-tested rules with which libraries and archives have experience. With respect to section 108, those rules offer specific safe harbors. And fair use offers the flexibility to address situations that do not meet the requirements of a section 108 provision but which nonetheless justify, under particular facts, an exemption from liability. One specific element of section 108 in particular should prove useful: the section 108(b) exception for making preservation copies of unpublished works. Because the majority of pre-1972 sound recordings are unpublished, risk-averse institutions with collections of such

474 *See supra* Chapter IV.C.2.a.

works would have clear legal guidance that digitizing for preservation and for deposit with other institutions under the terms of section 108(b) is a permissible activity.

"Access" is a term of art that itself raises complex questions of law and fact. As discussed above in Chapter IV.C, it can mean anything from making sound recordings available for on-premises listening to posting them online for downloading. Some commenters appeared to assume that federal protection, and fair use in particular, would necessarily permit the latter. In the Office's view, federal protection would simply make providing public access to pre-1972 sound recordings subject to the same principles applicable to other categories of copyrighted works. In the case of sections 108 and 107, they may allow some limited online access, but they would not permit the mass posting of entire works on the Internet for unrestricted downloading or streaming.

The Office believes that all of these considerations are important. Moreover, they are as critical to access as they are to preservation. Federalization would allow preservation of and access to more pre-1972 sound recordings, as well as finally bringing all fixed works of authorship under a federal system. The key question addressed below is how to implement a federalization scheme without harming the economic interests of right holders.[475]

C. Avoiding Economic Harm to Right Holders

In general, the Office believes that federalization along the lines proposed in this Report will not harm the reasonable economic interests of right holders because special provisions can be crafted to confirm ownership and term of protection. By "reasonable," it should be understood that the Office seeks to preserve right holders' ability to legitimately exploit economically viable

[475] Bringing pre-1972 sound recordings into the federal system would also enhance access because online music services and satellite radio services operating under the section 114 statutory license would have clear authorization to make digital transmissions of public performances of those recordings.

assets, but not to prevent third parties from using pre-1972 sound recordings in ways consistent with federal copyright law.

Under a federal scheme, right holders will have their pre-1972 sound recordings subject to the same rights and exceptions as their post-1972 recordings, as well as the same provisions regarding damages and statutory licenses. Federal protection has largely developed in the United States because it is better for right holders, not worse, a fact supported by how strongly the recording industry fought for inclusion of sound recordings in the federal copyright law.[476] And just as users of protected sound recordings will benefit from any new exceptions and limitations Congress may enact in the future, so too will right holders enjoy additional rights that may develop, and in this case, additional rights that already exist in federal but not state law. The digital public performance right in section 106(6) is the prime example. This right is not explicit in state law and not yet recognized by any state courts but provides revenue for the owners of sound recordings under section 114.

Some right holders have suggested that, should early recordings go into the public domain before 2067, they would be deprived of anticipated revenue, even if such recordings have been commercially dormant for decades. This argument is based upon the "long tail" theory that the ability to keep works commercially available, and reach niche markets, allows the right holder to continue to earn revenue indefinitely. Certainly, the legitimate investments of right holders are important, but most of the recordings that would go into the public domain immediately upon (or soon after) federalization are so old, obscure, and poor-sounding to modern ears that they are mainly of interest to scholars and hobbyists, and would fail to earn a meaningful return on investment for a record company, particularly given the expense of preparing reissues that the RIAA and A2IM noted. History shows, in fact, that record companies have heretofore reissued

[476] In fact, at least at times during the process that led to the general revision of the copyright law and the enactment of the Copyright Act of 1976, the recording industry supported bringing pre-1972 sound recordings into the federal statute. *See, e.g.*, *Hearings on S. 597 Before the Subcomm. on Patents, Trademarks and Copyrights of the S. Comm. on the Judiciary*, 90th Cong. at 519 (1st Sess. 1967) (Testimony of Clive Davis, CBS Records); *see id*. at 531-32 (Testimony of Henry Brief, RIAA).

only a miniscule percentage of early recordings, presumably because it is not profitable to do so.[477]

Indeed, for pre-1925 (acoustical era) recordings, libraries and archives are well-situated to play a role in making available to scholars and enthusiasts those works that most record companies have elected not to reissue. While it is true that popular recordings remain popular longer (was any recording from the 1920s as popular in the 1960s as the Beatles, or the Rolling Stones, or Aretha Franklin, are today?), the likelihood of a profitable major label reissue of acoustical-era recordings appears vanishingly remote. Indeed, the fact that a work may enter the public domain while it is still earning money for its right holder is not necessarily a bad thing. As Professor Elizabeth Townsend Gard observed at the roundtable,

> The [way the] system works is that you get a limited monopoly for a particular amount of time, and then when it's over, it goes into public domain. Even if it's making lots of money, it still goes into the public domain.[478]

Under this view, injecting into the public domain a work with earnings potential would not be contrary to copyright law and policy, but entirely consistent with it, even if the recording has some potential to earn a bit of money. The Office is aware that any federalization plan must be consistent not only with copyright law and policy, but also with the takings clause of the Fifth Amendment. That issue is explored below in Chapter VI.B.2.

D. Appropriate Application of Section 114 License and the "Safe Harbors" of 17 U.S.C. § 512 and the Communications Decency Act

The Copyright Office believes that all of the rights, limitations, and exceptions of Title 17 should apply to pre-1972 sound recordings, with the exception of certain sections dealing with

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[477] The Office's recommendation regarding term of protection for pre-1972 sound recordings – *see infra* Chapter VI.B.-C. – would allow right holders to retain copyright protection until 2067 for works that they keep reasonably available to the public until that date.

[478] Townsend Gard T2 at 430.

issues such as ownership, term of protection, and registration that should be specially modified to achieve the transition from state to federal law. Although some stakeholders, either at the roundtable or at separate meetings with Copyright Office staff, indicated some discomfort with the application of sections 114 and 512 of the Copyright Act to pre-1972 sound recordings, the Office concludes that both provisions should apply to pre-1972 sound recordings after federalization is effective. In contrast to sections 114 and 512, the Office does not believe the safe harbor of section 230(c) of the Communications Decency Act ("CDA") should apply to digital transmissions of phonorecords or public performances of pre-1972 sound recordings. In any event, federalization would clarify the issue by subjecting the use of sound recordings to the safe harbor of section 512 rather than the broader CDA safe harbor.

1. Section 114

In reviewing the potential application of section 114 to pre-1972 sound recordings, the Office believes that section 114's statutory royalty requirements should apply to nonexempt, noninteractive digital transmissions of those recordings, thereby providing an additional revenue stream for older artists and works. It would also moot the question of whether state laws should provide a public performance right for pre-1972 sound recordings, a question for which diverse practices have emerged. That is, while some services operating under the section 114 license pay royalties for the transmission of public performances of pre-1972 sound recordings, others do not. It is not clear from the record whether those services pay royalties due to their reading of state law (or out of an abundance of caution due to the uncertainty as to what state law might require), because they do not realize that the rules may be different with respect to pre-1972 sound recordings, or because it is too difficult (or not cost-effective) to determine which sound recordings are not protected by federal copyright law and arguably do not require payment. With federalization of protection for pre-1972 sound recordings, all sound recordings would be treated the same for purposes of Section 114.

The Office thinks it is unreasonable for the age of a sound recording to dictate whether royalties are paid on public performances by means of digital audio transmissions, so long as copyright subsists in that sound recording. Bringing pre-1972 sound recordings within the scope of federal protection would subject them to the statutory license and provide online music services with an easy means to offer lawful public performances of those recordings while offering copyright owners and performers a reliable new source of income.

2. Section 512

The Office sees no reason – and none has been offered – why the section 512 "safe harbor" from liability for monetary and some injunctive relief should not apply to the use of pre-1972 sound recordings. The Office understands and is not unsympathetic to the fact that many copyright owners are dissatisfied with the way in which some courts have interpreted aspects of section 512. It may well be that in light of the quantitative and qualitative changes involving so-called "user-generated content" on the Internet as well as the practical difficulties, for both copyright owners and Internet service providers, of dealing with the unanticipated large volume of "take-down" notices generated in response to massive infringement on the Internet, Congress might want to take another look at section 512 to determine whether it requires updating or other refinements to reflect current conditions. To be clear, section 512 was innovative legislation when it was enacted in 1998 and the concept of providing safe harbors for certain good faith acts on the Internet remains a sound principle. The point for purposes of this Report is that there is no policy justification to exclude older sound recordings from section 512 or other future provisions of law to the extent other sound recordings – and for that matter other works of authorship – remain subject to its provisions.

One court has ruled that section 512 currently applies to pre-1972 sound recordings. However, the ruling in *Capitol Records, Inc. v. MP3tunes* was made on highly questionable grounds.[479] The text of section 512(c) states that a "service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider" if the service provider complies with a number of requirements.[480] The court in *MP3tunes* stated that "[t]he text of the DMCA limits immunity for the 'infringement of copyrights' without drawing any distinction between federal and state law."[481] The court in *MP3Tunes* made this determination despite the fact that section 301(c) states "[w]ith respect to sound recordings first fixed before February 15, 1972, any rights or remedies under the common law or statute of any State shall not be annulled or limited by this title until February 15, 2067."[482] The court in *MP3Tunes* correctly observed that "section 301(c) does not prohibit all subsequent regulation of pre-1972 recordings."[483] However, its conclusion that Congress did in fact subsequently regulate pre-1972 sound recordings in section 512(c) is difficult to square.

Section 512(c) does not include any provision explicitly limiting remedies available for owners of pre-1972 sound recordings. Instead, section 512(c) refers to "infringement of copyright"[484] which is defined in section 501(a) as the violation of "any of the exclusive rights of the copyright owner as provided by sections 106 through 122."[485] The fact that the term "infringement of copyright" only refers to infringement of rights protected under title 17, and

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[479] *Capitol Records, Inc. v. MP3tunes, LLC*, ___ F.Supp.2d ___, 2011 U.S. Dist. LEXIS 93351, 2011 WL 5104616 (S.D.N.Y. Oct. 25, 2011).

[480] 17 U.S.C. § 512(c).

[481] *MP3tunes*, 2011 U.S. Dist. LEXIS 93351, at *27.

[482] 17 U.S.C. § 301(c).

[483] *MP3tunes*, 2011 U.S. Dist. LEXIS 93351, at *27.

[484] 17 U.S.C. § 512(c).

[485] 17 U.S.C. § 501(a).

does not include infringement of rights protected under common law or statute of any State, could not be more clear. The statute's plain text reveals a narrow definition of "copyright infringement" which is buttressed by the language of section 301(c). The court in *MP3Tunes* concluded that such a narrow reading would be at variance with the policy of the DMCA as a whole and would "spawn legal uncertainty" and that therefore such an interpretation should be rejected. However, the court in *MP3Tunes* did not offer any evidence that Congress intended section 512(c) to apply to pre-1972 sound recordings.

The court in *MP3tunes* not only ignored the plain text of the statute, it also ignored the general rule of statutory construction that exemptions from liability, such as those established in section 512(c), must be construed narrowly, "and any doubts must be resolved against the one asserting the exemption."[486] Furthermore, the court's interpretation of section 512(c) runs afoul of the "cardinal rule" of statutory construction that one section of a statute cannot be interpreted in a manner that implicitly repeals another section.[487] In light of these rules of statutory construction, any exemption of liability for violations of rights under the common law or statute of any State for pre-1972 sound recordings must be explicit in its intent to override the provisions of section 301(c).

The Office observes that numerous other limitations and exceptions in Title 17, including those in sections 107 and 108, are also express limitations on the right to recover for "infringement of copyright."[488] Yet none of these exceptions in the federal copyright statute has ever been applied directly to any claims under state law. In short, it is for Congress, not the courts, to extend the Copyright Act to pre-1972 sound recordings, both with respect to the rights granted under the Act and the limitations on those rights (such as section 512) set forth in the Act.

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486 *Tasini v. New York Times Co.*, 206 F.3d 161, 168 (2d Cir. 2000), *aff'd*, 533 U.S. 483 (2001).

487 *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189 (1978); *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 145 (2d Cir. 2002).

488 *See also* 17 U.S.C. §§ 110, 111(a), 112, 121(a), (c).

3. Application of the Communications Decency Act

The discussion concerning section 512 is related to another issue that was not raised in the Notice of Inquiry and comments or at the roundtable: whether the safe harbor of section 230(c) of the CDA applies to state law protection for pre-1972 sound recordings. Section 230(c) provides certain immunity from liability for providers and users of "interactive computer services" who publish information provided by others. Specifically, it states that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[489] Concerning its effect on other laws, section 230(e) provides that no liability may be imposed under any state or local law that is inconsistent with section 230. In effect, section 230(e) provides blanket immunity from liability for providers and users of an "interactive computer service" who publish information provided by others. However, section 230(e)(2) of the CDA also provides that the law does not "limit or expand any law pertaining to intellectual property."[490]

It is not settled whether the CDA limitations on liability apply to claims under state law that may arise from violation of the rights of owners of pre-1972 sound recordings, or whether such claims arise from a "law pertaining to intellectual property" and are thus outside the CDA liability limitations. The U.S. Court of Appeals for the Ninth Circuit, in *Perfect10, Inc. v CCBill, LLC*, held that the carve-out from the immunity provided in the CDA for laws pertaining to intellectual property applies only to federal intellectual property, and that therefore the CDA provides immunity for claims under state laws protecting intellectual property. The court stated that while the scope of federal intellectual property law is relatively well-established, state laws protecting "intellectual property" (including trademark, unfair competition, dilution, right of publicity and trade defamation) are by no means uniform. The court concluded that any

[489] 47 U.S.C. § 230(c).

[490] 47 U.S.C. § 230(e)(2).

interpretation of the CDA that failed to immunize Internet service providers from claims arising under these diverse state laws would undermine Congress's goal of fostering the development of the Internet.[491]

Several other courts have declined to follow the reasoning of the Ninth Circuit in *Perfect10 v CCBill,* concluding instead that the CDA provides no immunity from claims under state laws protecting intellectual property.[492] In *Doe v. Friendfinder Network, Inc.*, the District Court for the District of New Hampshire noted that prior to the *Perfect 10* decision, the general consensus was that the CDA did not shield service providers from state intellectual property law.[493] Both the *Friendfinder Network* decision and *Atlantic Recording Corp. v. Project Playlist, Inc.* criticized the Ninth Circuit's failure to analyze the text of the statute.[494] The *Project Playlist* decision noted that the approach taken in *Perfect 10 v. CCBill LLC* appeared to be inconsistent with Ninth Circuit precedent governing statutory interpretation.[495] The courts in both *Project Playlist* and *Friendfinder Network* found that the language of the statute itself does not suggest that the carve-out from immunity in the CDA applies solely to federal intellectual property law, noting that Congress's use of the modifier "any" in setting forth which laws pertaining to intellectual property were to be carved out from the CDA immunity provisions does not suggest a limitation to federal intellectual property law. On the contrary, the modifier "any" constitutes expansive language and there is no indication that Congress intended a limiting construction.[496]

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[491] *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118-19 (9th Cir. 2007).

[492] *See, e.g., Universal Commun. Sys. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008).

[493] *See Friendfinder Network, Inc.*, 540 F. Supp. 2d at 301-02 .

[494] *See id.*; *Project Playlist, Inc.*, 603 F. Supp. 2d at 703.

[495] *See Project Playlist, Inc.*, 603 F. Supp. 2d at 703.

[496] *See id.*; *Friendfinder Network, Inc.*, 540 F. Supp. 2d at 301-02.

No stakeholders specifically addressed the possible application of the CDA to the state law protection of pre-1972 sound recordings. However, there is little question that if pre-1972 sound recordings were brought under federal law, they would be excluded from the CDA. And as a matter of policy, that is the correct result. Congress properly determined that Internet service providers should not receive the CDA's more comprehensive immunity with respect to infringement of copyrighted works, but should be subject to the more limited safe harbor of section 501. Pre-1972 sound recordings should be treated no differently in this respect than post-1972 sound recordings, or any other works of authorship**.**

E. Alternatives to Federal Protection

The Copyright Office appreciates stakeholders' efforts to devise ways to encourage preservation and public access to pre-1972 sound recordings without amending the Copyright Act. Those suggestions include "partial federalization" – *i.e.*, applying only selected portions of federal copyright law to pre-1972 sound recordings, limiting remedies for infringement of orphan works, reforming the existing state laws governing pre-1972 sound recordings, confirming that the fair use defense is applicable to claims of violation of state laws protecting sound recordings – and negotiated agreements between record companies and libraries. However, each of the suggested alternatives falls short of federalization in terms of promoting legal uniformity, preservation, and public access.

The Office agrees with those stakeholders who opposed the concept of "partial federalization," or only applying sections 107 and 108 to pre-1972 sound recordings. Such an approach would only increase confusion regarding what parts of pre-1972 sound recording protection are governed by state law and what parts fall under federal law. This result would not promote clarity and consistency. Moreover, the Office sees no benefit in retaining state law rules for all aspects of protection for pre-1972 sound recordings other than certain selected exceptions and limitations. Pre-1972 sound recordings should either be part of the federal statutory scheme or they should not be part of that scheme.

Regarding the proposal of limiting remedies for good-faith preservation and public access uses of pre-1972 sound recordings that are also orphan works,[497] the Office agrees that an orphan works provision would be a valuable addition to federalization, but it is not a substitute. An approach consisting only of limiting remedies for this group of works would leave too many non-orphan works unaddressed, and would, like partial federalization, increase confusion as to where to draw the line between federal and state protection.

Reforming state laws rather than amending federal copyright law is simply impractical, given the effort and uncertainty involved in trying to obtain consistent statutory reforms in all fifty states. Such an endeavor would be time-consuming and expensive, and achieving uniformity is highly unlikely. Moreover, even if uniformity in state statutory law were achieved, there would be no way to ensure uniformity in the decisions of the courts of all fifty states.[498] Additionally, only one state would have to reject a proposed model law for the purpose of the project to falter. Finally, given the Office's strong belief that the correct policy choice is to unify all copyright law under *federal* control, a state-by-state approach would be a major step in the wrong direction.

ALA and ARL have requested that the Office "confir[m] the availability of a flexible fair use doctrine under state law in all 50 states."[499] Given that we are aware of only a single state court case – from a trial court – that has actually applied fair use to a common law copyright

[497] *See supra* Chapter IV.E.2.

[498] While it is true that various federal district courts and courts of appeals may interpret federal laws differently, the Supreme Court ultimately can resolve those differences. But the Supreme Court has no power to resolve issues of state law, even in cases where the laws of all states are identical.

[499] ARL/ALA Reply at 1.

claim,[500] that is a rather ambitious request. Of course, the Copyright Office has no authority to confirm the substance of state law. Nonetheless, the Office believes that, under proper facts, it is likely that any state court would find that fair use is a defense that can be considered and applied under principles of state common law copyright. Note, however, that traditionally fair use was not available for unpublished works[501] – and for the most part state common law copyright has protected only unpublished works. But at least with respect to commercially distributed sound recordings, arguments based on the unpublished nature of a work are not very persuasive. Moreover, because fair use is a judge-made doctrine (merely codified after the fact in the Copyright Act of 1976), there is no reason to believe that state courts considering common law copyright claims would not find that the defense does exist under appropriate circumstances.

As noted above,[502] common law copyright is not the primary means by which pre-1972 sound recordings are protected under state law. The states more frequently protect those recordings under theories of unfair competition, which typically do not include a fair use defense, and through statutes that include no such defense.[503] However, some courts have constructed analogous defenses to torts separate from but similar to copyright.[504] It seems likely that in any case in which an action by a library or archives would be considered a fair use under federal copyright law, it would also likely be considered permissible under state law.

Finally, the Office applauds the recent agreements between record companies and the Library of Congress. Such agreements, however, should take place against the backdrop of

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[500] *EMI Records, supra* note 140.

[501] *See Harper & Row Publishers Inc. v. Nation Enterprises*, 471 U.S. 539 (1985); *EMI Records*, *supra* note 140.

[502] Chapter II.E.3.

[503] However, as discussed above, many activities that would qualify as fair use under federal law may not even be embraced in the tort. *See id.*

[504] *See, e.g., Comedy III Prods. v. Gary Saderup, Inc.,* 25 Cal.4th 387, 408, 21 P.3d 797, 106 Cal.Rptr.2d 126 (2001) (recognizing a modified fair use defense to a claim of violation of the right of publicity).

federal protection of all sound recordings, so that federal copyright exceptions can facilitate reasonable uses of recordings that are not covered by a use agreement.

Wire recorder

VI. MEANS OF BRINGING PRE-1972 SOUND RECORDINGS UNDER FEDERAL JURISDICTION

It is not enough to conclude that pre-1972 sound recordings should be protected under federal copyright law. A number of decisions must be made with respect to how they are brought into the federal system, including issues involving ownership, term of protection, and registration. Indeed, an understanding of how these issues are to be addressed is crucial not only to determining whether it is feasible to federalize protection, but also to determining how to do so.

A. Ownership

The Notice of Inquiry identified ownership of rights in pre-1972 sound recordings as a key issue. The Office sought information about how the various state law principles regarding ownership of sound recordings compare with principles of copyright ownership under federal law. In particular, it requested information on the relevant state law principles of authorship and initial ownership, and how they compare with those of federal copyright law. This inquiry included issues surrounding application of work made for hire principles under state law. It also sought information on the relevant state law principles concerning transfers and how they compare with those under federal law. As discussed above, the Office also expressed a desire for input on how ownership issues might affect termination and reversion rights that are available to works under federal law.[505]

1. Determining Ownership

Under federal law, the owner of rights in a sound recording will generally be, in the first instance, the performer(s) whose performance is recorded, the producer of the recording, or both. In addition, many sound recordings qualify as works made for hire under the Copyright Act of 1976, either because they are works prepared by employees in the scope of their employment, or because they were specially ordered or commissioned, the parties agreed in writing that the works would be works made for hire, and the works fall within one of nine specific categories of works eligible to be commissioned works made for hire.[506] If a work qualifies as a work made for hire, it is the employer or commissioning party who is the legal author and initial right holder, rather than the individual creator of the work.[507] Under the 1909 Act, the courts recognized the work for hire doctrine with respect to works created by employees in the course of their employment, and particularly from the mid-1960s on, they recognized commissioned works made for hire, under such standards as whether the work was created at the hiring party's "instance and expense" or

[505] *See supra* Chapter IV.D.2.b.

[506] 17 U.S.C. § 101.

[507] The parties may agree otherwise in a signed writing. 17 U.S.C. § 201(b).

whether the hiring party had the "right to control" or exercised "actual control" over the creation of the work.[508] The Office sought information about the extent to which laws of the various states recognize the work made for hire doctrine with respect to sound recordings and, if so, the extent to which state laws differ from federal law.

Under federal copyright law, ownership of rights is distinct from ownership of the material object in which the copyrighted work is embodied. Transferring ownership of such an object – including the "original," *i.e.,* the copy or phonorecord in which the copyrighted work was first fixed – does not convey rights in the copyright.[509] A transfer of copyright ownership must be made in a writing signed by the owner of the rights or by his or her authorized agent.[510] In contrast, some state laws provide (or for a period of time provided) that transferring the original copy of a work could operate as a transfer of copyright ownership, unless the right holder specifically reserved the copyright rights. This principle is sometimes referred to as the "Pushman doctrine" for one of the earliest cases in which it was applied.[511] The Office sought information about the extent to which such state law principles have been applied with respect to "master recordings" and how, if at all, they would affect who would own the federal statutory rights if pre-1972 sound recordings were brought under federal law.

a. ***State vs. federal ownership rules***

In their comments and at the roundtable, RIAA and A2IM cautioned that perhaps the most troublesome issue for federal copyright protection for pre-1972 sound recordings would be how to effectuate a transition of the rules regarding the vesting of ownership from existing state

[508] *See* NIMMER ON COPYRIGHT § 5.03 (2011).

[509] 17 U.S.C. § 202.

[510] 17 U.S.C. § 204(a).

[511] *Pushman v. New York Graphic Soc'y, Inc.*, 287 N.Y. 302, 39 N.E.2d 249 (1942).

laws to federal law. They acknowledged that there is precedent for bringing works that are already in existence under federal copyright law at a later time. For example, the URAA restored copyright protection to certain works previously in the public domain (including foreign sound recordings). However, they noted that the URAA provisions restored ownership under federal law and vested it "initially in the author or initial rightholder of the work as determined by the law of the source country of the work."[512] They pointed out that the question of "changing" ownership of rights from one party to another was not at issue under the URAA, but that it might become contentious in the case of federalized protection for pre-1972 sound recordings.[513]

RIAA and A2IM noted that if current federal law were applicable to pre-1972 sound recordings, vesting of initial ownership would have to be determined on a case-by-case basis. They predicted that such inquiries would require looking at the circumstances under which each recording originated to determine the owner (including, for example, to determine whether the work might be a work made for hire, or one jointly owned by the performers, producers and others). RIAA and A2IM noted that transfers, assignments, other contracts and corporate mergers would raise additional ownership questions. They remarked that the existing rights, remedies, licenses, representations and warranties and other provisions in contracts and licenses could be called into question. They suggested that such costly inquiries would be "ripe [sic] with errors, challenges and litigation," which would likely result in a complete freeze on the availability of many pre-1972 sound recordings.[514]

RIAA and A2IM conceded that there is some, albeit very limited, precedent for dealing with existing contractual obligations that are changed by later provisions in title 17. They suggested that section 104A(f) could provide guidance on how to address contractual liability

512 RIAA/A2IM at 24 (citing 17 U.S.C. § 104A).

513 RIAA/A2IM at 24-27; RIAA/A2IM Reply at 3-4.

514 RIAA/A2IM at 27.

arising from new federal copyright protections for pre-1972 U.S. sound recordings. That section provides immunity to any person who had, prior to the effective date of restoration of copyright under the URAA, warranted, promised or guaranteed that a work did not violate an exclusive right granted in 17 U.S.C. § 106, under the assumption that the work was in the public domain.[515] They suggested that similar provisions could be adopted, but thought that this would be a minor fix for a major problem – the uncertainties brought on for the many existing contractual relations, chains of title, rights and remedies for existing uses, licenses and the like.[516]

RIAA and A2IM pointed out that the system of state statutes and common law governing pre-1972 sound recordings vests a variety of rights, sometimes to different right holders than those who would be copyright owners under current federal law.[517] They acknowledged that the current system may be complex, but also noted that there have been decades of litigation and precedent to resolve ownership issues under the various state laws. They remarked that the existing system is understood and has been relied upon by the music industry and related industries for a century. RIAA and A2IM suggested that if this existing system were suddenly replaced by a new federal regime, the transition to new laws from these state law schemes for each sound recording would be an administrative nightmare.[518] A2IM noted that this would include the cost of updating ownership metadata, which is routinely relied upon in today's marketplace.[519]

At the roundtable, NMPA said that several of the concerns raised by RIAA and A2IM are shared by music publishers. It asserted that any changes in ownership of sound recordings could require publishers to change information in their databases "relating to old recordings right across

[515] *See id.* at 32 (citing 17 U.S.C. § 104A(f)).

[516] *See id.* at 31-32.

[517] *See id.* at 26 (citing BESEK, COMMERCIAL SOUND RECORDINGS STUDY); Schwartz T1 at 25.

[518] RIAA/A2IM at 24-27.

[519] Bengloff T1 at 291.

the board," requiring publishers to devote resources to address the costs of updating their records. NMPA added that uncertainty regarding ownership would be problematic for music publishers' ability to promptly receive revenue for the use of their musical works by owners of sound recordings.[520]

ARSC disputed the detrimental effects claimed by RIAA and A2IM. It asserted that state law would continue to govern prior contracts and that ownership would therefore remain the same under federal protection for pre-1972 recordings. It also asserted that the standard term for recording agreements, including standard agreements used by owners of sound recordings to grant master use licenses, is limited in duration, and the term of federal copyright duration would generally extend well beyond the term of current contracts.[521]

ARSC pointed out that RIAA and A2IM failed to offer examples of contracts regarding pre-1972 sound recordings that would be undermined by federal protection. It added that even if such a case did arise, RIAA and A2IM correctly observed that the URAA safeguards in section 104A could provide a model for addressing such issues. ARSC also countered RIAA and A2IM statements that issues of initial ownership would be complicated by federalization. ARSC noted that ownership is not a particularly difficult question for commercial pre-1972 sound recordings, because virtually all such recordings were produced as works made for hire, and are now claimed by corporations rather than by individuals, a point which was also made independently by Patrick Feaster.[522] ARSC suggested that any new federal legislation for pre-1972 recordings should

[520] Rosenthal T1 at 60-61, 86-87.

[521] ARSC at 4; ARSC Reply at 21 (citing legal practice guides, *e.g.*, *Recording Agreements*, *in* 8 ENTERTAINMENT INDUSTRY CONTRACTS (Donald C. Farber & Peter A. Cross eds., 2008) (advising that the term of engagement "can range from a few hours to several years") *and* Bonnie Greenberg, *Master Use Licenses*, *in* 9 ENTERTAINMENT INDUSTRY CONTRACTS (Donald C. Farber & Peter A. Cross eds., 2008) (estimating a term of five years for the use of a sound recording on network television versus three years for exploitation on cable television).

[522] ARSC at 4; Feaster at 8-13.

clearly indicate the source law governing the question of whether a work qualifies as a work made for hire.[523]

In response to the statement by RIAA and A2IM that evaluating ownership under federalization would require costly case-by-case analysis, which would diminish the availability of many pre-1972 recordings, ARSC pointed out that ownership of already-existing works other than sound recordings under the 1976 Act is determined as of the effective date of the Copyright Act (*i.e.*, ownership is based on the *status quo* that existed just prior to the effective date), and not by retrospective application of the Copyright Act to the date the works were created.[524] ARSC suggested that similar treatment could easily be implemented for any federalization of pre-1972 recordings. ARSC noted that although neither federal nor state rights in sound recordings were created under the 1909 Copyright Act, by analogy, prior state law could apply for pre-1972 recordings. Furthermore, it offered that even traditional categories of works prepared before 1978 require a case-by-case examination to determine the federal rights as of the date of preemption, and that no diminished availability of such works has been attributed to such analysis.[525]

The Starr-Gennett Foundation addressed the difficulty of case-by-case analysis of ownership by pointing out the challenges in determining both the facts surrounding creation of works as well as in the application of various state laws regarding transfers and corporate mergers. It suggested that federalization could ease the impact of current questions regarding ownership status of pre-1972 recordings, implying that federalization would mean that ownership would be determined under federal law.[526]

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[523] ARSC Reply at 13-15.

[524] *Id.* at 13-14.

[525] *Id.*

[526] Starr-Gennett Foundation 7b at 3.

b. *Effect of rule in some states equating physical ownership of master with ownership of all rights*

ARSC stated that it is unaware of state cases that have invoked the Pushman doctrine, equating ownership of the original master recording with ownership of the sound recording. However, ARSC went on to note that a correspondent to the ARSC Journal raised this question in 2006, citing specific statutes of Connecticut, Georgia, Hawaii, Illinois, Alabama, Alaska, Arizona and California that indicate those states recognize some version of this principle. ARSC also acknowledged that it is theoretically possible that courts could apply the principle.[527]

Patrick Feaster provided an explanation of the historical methods of creation and duplication of pre-1972 sound recordings. This history provided information about the reasons why many state statutes concerning pre-1972 sound recordings equate ownership of the original master recording with ownership of the sound recording. Feaster noted that some sound recordings never had masters because they were never intended for mass duplication. He also pointed out that many masters were destroyed, yet duplicates survive. He suggested that federalization should include a requirement that owners be required to demonstrate ownership of a physical master as a condition to bringing a copyright claim.[528]

RIAA and A2IM stated that the Pushman doctrine applied to master recordings, at least in some states, and noted that federalization would pose difficulty and increased costs for investigations of chain of title.[529]

c. *Termination*

Regarding the possibility of termination rights under a federal regime for protection of pre-1972 sound recordings, RIAA and A2IM stated that any uncertainty as to the initial and

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[527] ARSC at 4 (citing ARSC JOURNAL, Fall 2006 at 211-12).

[528] Feaster at 8-13.

[529] RIAA/A2IM at 27-28.

subsequent ownership (and authorship) of a sound recording would be exacerbated by the difficulty in addressing issues such as who, if anyone, had or has the ability to terminate any grant, how to treat joint author scenarios, and when and under what circumstances, if at all, works would be eligible for termination.[530]

Ivan Hoffman stated that any federalization of pre-1972 sound recordings should continue to exempt those recordings from the termination of transfer provisions. He noted that as of now, pre-1972 sound recordings are not subject to termination of transfer provisions and recommended against expanding such provisions to the detriment of current owners.[531]

Artist's Reprieve commented that termination of transfer provisions should extend to federalized pre-1972 sound recordings. It suggested that failure to provide such provisions may result in age discrimination against older artists as a direct result of a federal statute that grants federal copyrights (and permits copyright terminations) to younger artists who recorded post-1978.[532] The Office also heard informally from other representatives of recording artists from the pre-1972 era who pointed out the inequity of depriving them of termination rights enjoyed by those who performed on post-1972 sound recordings.

2. Recommendation

The concerns raised by RIAA, A2IM and NMPA deserve serious consideration. However, these concerns are based on the assumption that federalization would occur by incorporating pre-1972 sound recordings into the existing framework of the Copyright Act, without any modifications or accommodations. It appears that the copyright owners' concerns regarding ownership can be addressed by adopting a rule along the lines of ARSC's proposal, providing that ownership of newly federalized pre-1972 sound recordings should be determined

[530] *See id.* at 29.

[531] Hoffman T1 at 228-33.

[532] Artist's Reprieve Reply at 1-2.

not by applying existing federal law retrospectively, but by applying state law as it exists as of the effective date of federalization. That is, whoever owned the rights immediately before pre-1972 sound recordings are given federal protection would own those rights when federal protection takes effect.

Determining ownership of pre-1972 sound recordings by deferring to the ownership as of the effective date of federalization would avoid creating new questions regarding ownership but instead would preserve the *status quo*, including any disputes regarding ownership that may or may not exist at the time of enactment. Following this path would prevent the imposition of undue administrative costs or the predicted freeze on the availability of many pre-1972 sound recordings. Determinations of initial ownership would be controlled by existing state laws, including the application of work for hire principles and the Pushman doctrine where it applies, as the rules in existence at the time of transfers and assignments that took place prior to federalization.

Termination rights pose a more difficult question. As both the House and Senate Reports on the Copyright Act of 1976 stated, termination provisions were included in the 1976 Act "because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited."[533] The Office has long recognized that "[s]ince authors are often in a relatively poor bargaining position * * * some other provision should be made to permit them to renegotiate their transfers that do not give them a reasonable share of the economic return from their works."[534] As a general matter, the Office strongly supports termination rights as a means to give authors the opportunity to recapture the value of their authorship years after they have assigned the rights.

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[533] H.R. REP. NO. 94–1476, at 124 (1976); S. REP. NO. 94-473, at 108 (1975).

[534] *See Report of the Register of Copyrights on the General Revision of U.S. Copyright Law* 92 (1961).

However, to recognize termination rights for grants of copyright transfers or licenses that were made prior to the enactment of a statute granting federal copyrights would be unprecedented and would raise significant concerns relating to retroactive legislation and possible takings.[535] Because of those concerns, the Office is reluctant to recommend that termination rights should apply to any grants that have already been made with respect to pre-1972 sound recordings.[536] However, the termination right in section 203 should be applicable with respect to any grants made by authors after the effective date of any legislation that federalizes protection of pre-1972 sound recordings. In such cases, there could be no concerns about retroactivity or takings, since any post-effective date grants would be subject to the law in existence at that time. Addressing termination in this fashion would preserve the expectations of all parties with respect to pre-federalization grants.

B. Term of Protection

The Notice of Inquiry identified the term of protection for pre-1972 sound recordings and related constitutional considerations as key issues. The Office sought information about how federal law regarding term of protection should apply to pre-1972 sound recordings. If the ordinary federal statutory terms were applied to pre-1972 sound recordings, then all works published prior to 1923 would immediately go into the public domain and many and perhaps most other works would go into the public domain prior to 2067, the date upon which current state protection is set to be preempted. Unlike under current law, works created between 1923 and 1972 and now protected under state law would not necessarily enjoy protection until 2067. Therefore, the Notice inquired whether it would be desirable to provide a term of protection for

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[535] *See* U.S. Copyright Office, *Analysis of Gap Grants under the Termination Provisions of Title 17* at 6 (2011), *available at* http://www.copyright.gov/reports/gap-grant%20analysis.pdf.

[536] There would presumably be no occasion to recognize termination rights for pre-1978 grants under section 304(c) or (d), since the premise for those provisions is that the authors, rather than the grantees, should obtain the benefit of the extensions of copyright term enacted in 1976 and 1998. No similar extension of term is proposed for pre-1972 sound recordings.

pre-1972 sound recordings that is different than the terms set forth for other works protected by federal copyright law, in order to ensure that federalization of pre-1972 sound recordings would not give rise to potentially successful takings claims under the Fifth Amendment. The Notice further inquired whether federalization would encounter constitutional problems such as due process or takings issues if all pre-1972 recordings were not provided with at least some minimum term of federal protection.

1. Current and Proposed Terms of Protection

Currently, pre-1972 sound recordings may be protected by state law until February 15, 2067, at which point such protection is preempted by federal law. The duration of protection would potentially change if sound recordings were brought under federal copyright law and given the term applicable for other works. Specifically, the term of protection for a published pre-1972 sound recording presumably would be 95 years from publication.[537] An unpublished pre-1972 sound recording would have a term of the life of the author plus 70 years unless it is a work made for hire or is anonymous or pseudonymous, in which case the term would be 120 years from creation.[538]

When unpublished works other than sound recordings were incorporated into the federal copyright statute in 1978, older works were given an adjustment in the term of protection to take into account the fact that the potentially perpetual protection of such works under state law was being abrogated. Section 303 provided, as a transitional matter, that all unpublished works would get at least 25 years of federal protection, until December 31, 2002. Thus, a work created by an author who had died in 1929, 49 years before the effective date of the 1976 Act, might have been expected to enter the public domain at the end of 1979, 50 years after the death of the author. But

[537] *See* 17 U.S.C. § 304.

[538] 17 U.S.C. § 303(a).

section 303 provided that copyright would subsist in the work until at least December 31, 2002, and that it would subsist for an additional 25 years – to the end of 2027 – if it was published before the end of 2002.[539] If a similar accommodation were to accompany federalization of pre-1972 sound recordings, sound recordings published in 1922 or earlier would not go directly into the public domain, but would continue to enjoy copyright protection for a prescribed period of years.

Most stakeholders proposed some modification of the current terms of protection to pre-1972 sound recordings.

a. *50 years from publication*

Several stakeholders, including Nicola Battista, Feaster, and LOC, suggested a term of 50 years from the date of publication.[540] Under such a proposal, pre-1923 sound recordings would go directly into the public domain. In support of such a term, LOC noted that virtually all the commercial benefits accruing to right holders from historic sound recordings released in past decades occur within a period of fewer than 70 years.[541] LOC suggested that a term of protection under federal law longer than 50 years has not proved to be an incentive to right holders to keep historic recordings commercially available in the market place. LOC and Battista offered that the current protection for sound recordings until the year 2067 creates a "dead zone" during which culturally and historically important recordings are not commercially available, and are often lost, perhaps forever.[542] Finally, LOC and Battista noted that for some interested in listening to and researching older recordings, the lack of commercial availability of phonorecords authorized by

[539] With the enactment of the Sonny Bono Copyright Term Extension Act in 1998, the additional 25 year period was extended by yet another 20 years, until the end of 2047.

[540] Battista at 2; Feaster at 1, 7; LOC at 10.

[541] LOC at 10.

[542] LOC at 10; Battista at 2.

the right holder creates an incentive to seek out copies produced in other countries with shorter terms of copyright protection, where they are already in the public domain.[543]

b. *50 years from fixation*

EFF expressed a preference for a term of 50 years from the date of fixation. Under such a proposal, pre-1923 sound recordings would go directly into the public domain. EFF believed that the general rule of protection, where pre-1972 sound recordings do not enter the public domain until 2067, is too long and should be shortened under federal copyright law. EFF stated its view that 50 years is a reasonable length that is appropriate under the Copyright Clause's “limited times” provision.[544] It also suggested that making the terms of protection of sound recordings closer to the terms of protection of the underlying works, such as musical compositions, would clarify their status and better facilitate archiving and other productive uses.[545]

SAA also preferred a term of 50 years from the date of fixation, with pre-1923 sound recordings going directly into the public domain. SAA noted that because of the difficulty of establishing whether particular sound recordings were works made for hire, adopting the basic rules regarding term would not be a good solution. SAA pointed out that a term of 50 years from creation would be in compliance with most international agreements.[546]

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543 *See id.*

544 U.S. CONST. Art. I, § 8. cl. 8.

545 EFF at 11-12.

546 SAA at 8.

c. *95 years from creation*

MLA suggested that 95 years from creation, regardless of whether the work is published or unpublished, would be a second best alternative to a 50 year term. It expressed the view that all pre-1923 works should fall into the public domain in order to mirror the protection afforded other classes of works.[547] In making this recommendation, MLA noted that when Congress indicated that pre-1972 sound recordings would enter the public domain in 2067, it clearly chose 2067 (originally 2047, but extended to 2067 in the Copyright Term Extension Act) to ensure a minimum 95 year term for all such recordings. According to the House Report on the 1976 Copyright Act, enacting a provision that takes away subsisting common law rights and substitutes statutory rights would be "fully in harmony with the constitutional requirements of due process" provided that the statutory rights endure for a reasonable period.[548] MLA reasoned that because Congress has already established a term of at least 95 years of potential protection under state law for pre-1972 sound recordings, Congress must have determined that a 95-year term would comply with the requirements of due process.[549]

d. *Expiration in 2067*

While RIAA and A2IM generally opposed federalization, they expressed the position that the only way to create clarity with regard to term of protection is to base the term on the year of first fixation of any sound recording (because determining the date of "first publication" for very old recordings would be a nearly impossible factual task in many instances), or to fix an end of term (2067) that matches existing law. Under their proposal, all pre-1923 works would continue to enjoy protection until 2067. RIAA and A2IM concluded that legislation that cuts off

[547] MLA at 12.

[548] H.R. REP. NO. 94-1476, at 139 (1976).

[549] MLA at 13.

protections for existing state- and common law-protected recordings would deny right holders of "all economically viable use of those works," and takings claims would arise.[550]

e. *Other alternatives*

In their reply comment, Professor Elizabeth Townsend Gard and her 2011 copyright class at Tulane University School of Law suggested that sound recordings created before February 15, 1972 should enjoy a term that endures for 50 years from fixation. However, under their proposal, in no case would the term of copyright in such a work expire before five years from enactment of federalization, and if the work is made available to the public by the copyright holder within five years of enactment, the term of copyright would not expire before February 15, 2067.[551]

Professor Townsend Gard and her class pointed toward several benefits of such a term structure. They posited that a significant number of works that have no commercial value or known owner interested in commercialization would enter the public domain and would thus be available for unfettered preservation and access. They pointed out that the structure would allow right holders who saw value in their recordings to secure a term that lasted until 2067 by making the work available to the public during a reasonable transition period. Such owners would not be deprived of any property and no takings concerns would arise. Finally, they noted that the structure, based on date of creation, would reasonably allow the public to determine whether a work was under copyright protection.[552]

This proposal was the subject of much discussion during the June 3, 2011 roundtable. RIAA raised concerns that a requirement that the work must be made available to the public in order to secure protection until 2067 would lead to costly litigation as to whether that requirement

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[550] RIAA/A2IM at 29,.33-34.

[551] Townsend Gard Reply at 22.

[552] *Id.*

had indeed been met.[553] Professor Townsend Gard responded to the litigation concern by noting that there was no significant litigation regarding compliance with section 303(a) after enactment of the 1976 Act.[554]

Professor Townsend Gard suggested that the reasonable transition period in and of itself may suffice to address takings concerns, a suggestion that was strongly disputed by RIAA.[555] The length of the transition period was also a disputed matter. ARSC stated that as its goal is access and preservation, it would not necessarily object to a reasonable transition period within which an owner may make the work available to the public in order to secure a longer term. At the same time it flatly rejected the notion that a transition period of 25 years was reasonable.[556]

2. Fifth Amendment Takings Claims

Before recommending the term of protection to be provided for pre-1972 sound recordings under federal law, it is necessary to review an additional issue: whether shortening the term of protection currently provided under state law would constitute a "taking" for which compensation must be paid.[557] Federalization of pre-1972 sound recordings would entail preempting state law protection, which would deprive owners of vested interests currently held under state law and therefore could raise Fifth Amendment takings claims. So long as the state law-based property right is replaced by a federal right of equal strength and duration, no issues should arise, but what would be the result if the federal term of protection were shorter than that which is currently enjoyed under state law?

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553 Pariser T2 at 425-26.

554 Townsend Gard T2 at 429.

555 Pariser T2 at 439-41.

556 Brooks T2 at 450-51.

557 The Fifth Amendment provides that "No person shall be … deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. *See generally* 1 NIMMER ON COPYRIGHT §1.11.

A takings claim may be facial or it may be "as applied." In either type of claim, the property must be taken for the "public use." The Supreme Court has embraced a broad interpretation of "public use" as "public purpose."[558] Furthermore, the Court reiterated that its public use jurisprudence has eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.[559] While there is no reported case law directly addressing whether the sort of alleged taking that may occur under federalization of pre-1972 sound recordings would be for the public use, this Report concludes that federalization would advance preservation of and access to copyrighted works. Such preservation and access appear to be a rational exercise of the Copyright Clause authority to promote the progress of science and useful arts, and a legitimate public purpose.[560]

a. *Facial takings*

A facial challenge requires a court to conclude that the mere enactment of legislation constitutes a taking. The test to be applied in a facial challenge is "fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his [property].'"[561] It is rare for facial takings claims to succeed because it is usually impossible to ascertain the economic impact of legislation until specific applications can be considered.[562] Not surprisingly, no stakeholders commented on whether federalization would give rise to facial takings claims.

558 *See Kelo v. City of New London*, 545 U.S. 469, 480 (2005).

559 *See id*. at 483.

560 *See Eldred v. Ashcroft*, 537 U.S. 186, 204 (2003) (Supreme Court's substantial deference to Congress's rational exercise of its Copyright Clause authority).

561 *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981).

562 *See General Agreement On Tariffs And Trade (GATT): Intellectual Property Provisions, Joint Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the H. Comm. on the*

b. *As-applied takings*

Reviews of Fifth Amendment as-applied takings claims consider the claim of a particular party who asserts that he or she has been deprived of property as a result of the specific application of the statute to him or her. Such claims are generally assessed under the framework articulated in *Penn Central Transp. Co. v. City of New York*.[563] The principal consideration is "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."[564] A further consideration is the nature of the governmental action. Interference with property that can be characterized as a physical invasion by government may be more readily found to be a taking than interference that arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[565] Additional relevant points in analyzing a takings claim include the fact that "a reduction in the value of property is not necessarily equated with a taking;"[566] statutory provisions that "moderate and mitigate the economic impact" are relevant to the analysis;[567] and regulation of property rights does not constitute a taking when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulations.[568]

Judiciary and the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary, 103rd Cong. at 150 (1994)("*GATT Hearing*") (testimony of Christopher Schroeder, Counsel to the Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice).

563 438 U.S. 104 (1978). This brief discussion of takings is derived from Eva Subotnik and June Besek, Fifth Amendment Considerations: Extending Federal Copyright to Pre-1972 Sound Recordings (unpublished manuscript on file with author).

564 *Penn Central*, 438 U.S. at 124.

565 *See id*.

566 *Andrus v. Allard*, 444 U.S. 51, 66 (1979).

567 *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225-26 (1986).

568 *See U.S. v. Locke*, 471 U.S. 84, 107-108 (1985) (citing *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) ("this

In the 1976 Copyright Act, Congress considered as-applied takings concerns similar to those raised by federalization of pre-1972 sound recordings when it removed perpetual protection for unpublished works and substituted limited terms of federal copyright protection. In the 1976 Act, Congress ensured that all works being brought under federal copyright would enjoy at least 25 years of protection, until the end of 2002.[569] If works were published on or before that date, they received another 25 years of protection, until 2027, a date that was extended by 20 years in the Sonny Bono Copyright Term Extension Act, thus affording protection until the end of 2047.[570]

The House Report on the 1976 Copyright Act explained the purpose of the provision, 17 U.S.C. § 303:

> Theoretically, at least, the legal impact of section 303 would be far reaching. Under it, every "original work of authorship" fixed in tangible form that is in existence would be given statutory copyright protection as long as the work is not in the public domain in this country. The vast majority of these works consist of private material that no one is interested in protecting or infringing, but section 303 would still have practical effects for a prodigious body of material already in existence. Looked at another way, however, section 303 would have a genuinely restrictive effect. Its basic purpose is to substitute statutory for common law copyright for everything now protected at common law, and to substitute reasonable time limits for the perpetual protection now available. In general, the substituted time limits are those applicable to works created after the effective date of the law; for example, an unpublished work written in 1945 whose author dies in 1980 would be protected under the statute from the effective date through 2030 (50 years after the author's death).
>
> A special problem under this provision is what to do with works whose ordinary statutory terms will have expired or will be nearing expiration on the effective date. The committee believes that a provision taking away subsisting

Court has never required [Congress] to compensate the owner for the consequences of his own neglect.")).

569 17 U.S.C. § 303(a) provides:

> Duration of copyright: Works created but not published or copyrighted before January 1, 1978
> (a) Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047.

570 Pub. L. No. 105-298, 112 Stat. 2827 (1998).

> common law rights and substituting statutory rights for a reasonable period is fully in harmony with the constitutional requirements of due process, but it is necessary to fix a "reasonable period" for this purpose. Section 303 provides that under no circumstances would copyright protection expire before December 31, 2002, and also attempts to encourage publication by providing 25 years more protection (through 2027) if the work were published before the end of 2002.[571]

Congress again considered as-applied takings concerns in 1994 in connection with the provisions of URAA,[572] which restored copyright protection to certain works of foreign origin that were in the public domain in the United States. This restoration arguably usurped the rights of "reliance parties"[573] whose rights to use certain public domain works may have been curtailed. In hearings addressing these provisions, Congress was advised that it could successfully address this concern by providing reliance parties with a reasonable period of time during which they could continue certain uses of restored works, and by limiting the liability reliance parties may face for their use of restored works.[574]

Several stakeholders addressed the notion that federalization would bring about as-applied takings claims. RIAA and A2IM observed that if federalization placed older sound recordings into the public domain, either immediately upon enactment or at some future date prior to 2067, it would raise serious takings concerns. They noted that there are many examples of back-catalog materials that have commercial viability, and asserted that reducing the term would cut off property rights in those recordings. They acknowledged that the economic impact of federalization is measured on an as-applied basis, and that it is therefore difficult to make broad predictions of the value of such takings. They noted that when previous copyright legislation, such as the URAA, raised potential takings concerns, provisions were included to

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[571] H.R. REP. NO. 94-1476, at 138-39 (1976).

[572] Pub. L. No. 103-465, 108 Stat. 4809, 4973 (1994).

[573] *See* 17 U.S.C. § 104A(h)(4).

[574] *See* 17 U.S.C. § 104A(d); *see also GATT Hearing*, *supra* note 562, at 159 (1994) (testimony of Christopher Schroeder, Counsel to the Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice).

diminish those concerns. In their initial comments, RIAA and A2IM stated that it is not clear how any similar fixes for right holders could be formulated to overcome the takings problems posed by federalization of pre-1972 sound recordings, which would touch a far wider set of right holders than those affected by the URAA.[575]

SAA commented that generally there was no need for additional protection for pre-1972 sound recordings because owners already had a significant, exclusive period of protection to exploit the works. However, SAA acknowledged that there may be some unpublished recordings for which extended protection may be appropriate. SAA suggested that it may be appropriate to treat such works in a manner similar to the way unpublished items were brought under federal copyright protection in the Copyright Act of 1976, where such works were given a minimum term of 25 years of federal protection and an extended term of protection if they were published within that twenty-five year period. However, SAA suggested that the window that is available to secure extended protection should be short – no longer than 5 years – and it should not extend to pre-1923 sound recordings.[576]

ARSC remarked that it did not see any need for federal protection of pre-1923 sound recordings because such works already had a significant period of protection under state law.[577] It went on to assert in its reply comment that federalization would not result in a total divestiture of rights, and thus no taking would occur. It added that even if a taking were found to exist, any compensation due would be extremely low.[578] Both ARSC and MLA concluded that pre-1923 recordings are clearly not valued by their owners, as evidenced by the almost complete unavailability of those recordings. They went on to question whether any just compensation is

575 RIAA/A2IM at 33-34.

576 SAA at 9.

577 ARSC at 6.

578 ARSC Reply at 22-24.

due for takings of property which has *de minimis* economic value.[579] MLA added to its takings analysis in its reply comment, stating that right holders whose works may be injected into the public domain by federalization would not lose *all* economically productive use of their property. Instead, MLA maintained that such right holders would not be foreclosed from making use of the works; they just would not have exclusive rights.[580]

At the June 3, 2011 roundtable, much of the discussion regarding takings revolved around whether federalization could be instituted in a manner that provided "just compensation" for the extinguishment of ownership under state law. While "just compensation" is technically a remedial matter to be considered after a finding that a taking has in fact occurred,[581] it is relevant to consider whether provisions included as part of federalization, such as those that would enable right holders to obtain reasonable, investment-backed expectations, would prevent the finding of a taking under the criteria set forth in *Penn Central Transp. Co. v. City of New York*.[582] Stakeholders who focused most intently on preservation and access, such as MLA and ARSC, suggested that application of the ordinary federal statutory terms to pre-1972 sound recordings should be sufficient to address any takings concerns. They proposed varying terms that should be available under federalization, which are discussed in further detail above. They also maintained that pre-1923 sound recordings could go immediately into the public domain without significant takings concerns because they had already enjoyed a significant term of protection, and because such works had only *de minimis* value.[583]

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579 ARSC at 6; MLA at 13-14.

580 MLA Reply at 8-9.

581 An award of "just compensation" is the fair market value of the property at the time of the taking. *New York v. Sage*, 239 U.S. 57, 61 (1915).

582 *Penn Centra* identified the principle criteria for determining a taking as "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations" and the nature of the governmental action. 438 U.S. at 124.

583 Brooks T2 at 450-451; Harbeson T2 at 451-53.

Participants representing right holders in pre-1972 sound recordings generally observed that the takings problem is directly proportionate to the degree to which state laws are affected, *i.e*. the more state laws are left intact, the less a taking would exist.[584] In response to the proposal by Professor Townsend Gard and her Tulane Law School copyright law class, which included suggestions for providing an avenue for right holders to secure protection for works until 2067,[585] RIAA acknowledged that if sound recording right holders were able to obtain a term of protection that lasted until 2067, federalization would "probably not" present a takings problem.[586] RIAA also commented that if federal copyright law covered pre-1972 sound recordings until 2067, then such legislation would not have "taken away rights, however grand or *de minimis* they may be, and we don't have to worry about takings."[587]

3. Recommendation

The Office recognizes that pre-1972 sound recordings are both numerous and unique, and that the economic impact of altering the current 2067 date for expiration of protection could vary widely. It is reasonable to conclude that at least in some cases, the reduction of term that would result from applying ordinary federal terms could produce a loss of significant economic value. Most pre-1972 sound recordings, however, have little or no economic value. The Office does not wish to advise Congress to protect all pre-1972 sound recordings under federal law until 2067 when only a fraction have economic value, particularly when it would be a significant public benefit to make the others widely available for study and research.

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[584] Pariser T2 at 424.

[585] Townsend Gard Reply at 22-23.

[586] Pariser T2 at 460-61.

[587] *Id.* at 424.

In the past, when Congress considered copyright legislation that might have curtailed parties' vested ownership interests, *e.g.* in the Copyright Act of 1976 and the URAA, it prudently chose to address right holders' reasonable investment-backed expectations in the legislation itself. The Office recommends similar prudent attention to the takings concerns raised here. It recommends providing an avenue for right holders to realize reasonable investment-backed expectations, in order to ensure that no unlawful takings occur as a consequence of federalization.

Federalization would provide a public benefit by enhancing preservation of and access to these old recordings that are an important part of our culture. The Office believes that federalization, in effect, constitutes a "public program adjusting the benefits of public life to promote the common good."[588] Having considered the views of the various stakeholders on the issue, the Office believes, in principle, that a term of protection for all pre-1972 sound recordings that extends until 2067 is excessive, and that pre-1972 sound recordings should have their term of protection harmonized with that of other works from the same time period. Absent takings clause considerations, the Office would therefore recommend that (1) all published pre-1923 sound recordings enter the public domain immediately, (2) other published pre-1972 sound recordings remain protected by copyright until 95 years after their date of first publication, and (3) unpublished pre-1972 sound recordings enter the public domain 120 years after they were created. However, as noted above, the Office understands the prudence of making adjustments to address takings concerns.

In order to ensure that federalization does not effect an unlawful taking, the Office recommends that all published pre-1972 sound recordings other than those first published before 1923 receive a term of protection of 95 years from publication, and that all unpublished pre-1972 sound recordings receive a term of 120 years from creation. However, in all cases, those recordings would be *eligible* for protection until February 15, 2067, when federal preemption of

[588] *Penn Central*, 438 U.S. at 124.

state law protection is currently set to expire.[589] To secure the full term of protection until 2067, the right holder of a pre-1972 sound recording would have to take certain actions during a reasonable transition period, described in the section below.[590] The required actions include (1) making the work available to the public, and (2) providing notice to the Copyright Office that the work has been made available at a reasonable price and that the right holder intends thereby to secure a full term of protection.

For works first published before 1923, the Office cannot recommend that the term of copyright subsist until 2067. Such a term – of 144 years or more following publication – would be unprecedented and, in the view of the Office, unjustified. Moreover, since all such works are from the acoustical era and are usually of such low quality that relatively few of them are marketable, it is difficult to fathom how the right holder could offer a compelling justification for continuing to own exclusive rights for the next 55 years.[591] While a handful of pre-1923 works may still have some commercial value,[592] that in and of itself does not justify maintaining copyright protection for another half century. The fact is that all other works published before 1923 have entered the public domain. The Office sees no reason to create an anomaly by offering continued protection of such sound recordings until 2067. On the other hand, Congress recognized in the 1976 Copyright Act that providing at least an additional 25 years of protection for works protected at common law would constitute a "reasonable period" that would satisfy constitutional requirements of due process.[593] Following that precedent, the Office believes that

[589] However, in all cases the term of protection for pre-1972 sound recordings would end no later than February 15, 2067, when federal preemption of state law protection is currently scheduled to end. Thus, the term of protection for an unpublished sound recording fixed in 1971 would end in 2067 rather than in 2091, 120 years after it was fixed. The rationale for this is that under current law, protection will end in 2067, and the Office sees no reason to extend the term even further.

[590] Chapter VI.C.

[591] *See* ARSC at 3; Brooks T2 at 347-48.

[592] *See, e.g.,* Pariser T2 at 425 (recordings by Caruso and Sousa).

[593] H.R. REP. NO. 94–1476, at 139 (1976); *see* 17 U.S.C. § 303(a).

giving owners of rights in sound recordings published before 1923 an opportunity to retain exclusive rights for an additional 25 years after federalization of protection would constitute a similar reasonable period.

The Office therefore recommends that a right holder of a sound recording first published before 1923 should be permitted to obtain an additional 25 years of protection under federal law if, during a reasonable transition period (but one that is somewhat shorter than the transition period for other pre-1972 sound recordings), the right holder makes the work available to the public and notifies the Copyright Office of that fact and of its intent to secure protection for that 25-year period.

Requiring right holders to take some affirmative action to retain their rights in this situation is consistent with the Takings Clause.[594] In the case of pre-1972 sound recordings, right holders would only lose the benefit of extended protection if they fail to make their works available and provide notice of such use, requirements which are designed to advance the interests of preservation of and public access to sound recordings.

For published pre-1972 sound recordings, the recommended term of 95 years from publication is the term that the recordings would have if they had obtained a federal copyright upon first publication.[595] For unpublished works, the recommended term of 120 years from creation is the term the works would have received if they were anonymous or pseudonymous works or if they were created as works for hire and had entered the federal copyright system in 1978 along with other unpublished works previously protected under state law.[596] The Office believes that the 120-year term should apply even if the sound recording was not anonymous,

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[594] *See U.S. v. Locke*, 471 U.S. 84, 107-108 (1985) (citing *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) ("this Court has never required [Congress] to compensate the owner for the consequences of his own neglect")).

[595] *See* 17 U.S.C. § 304(a), (b).

[596] *See* 17 U.S.C. §§ 303, 302(c).

pseudonymous, or a work made for hire, and notwithstanding the general rule in Title 17 that unpublished works receive a term of the life of the (last surviving) author plus 70 years.[597] The Office believes that giving all unpublished pre-1972 sound recordings a fixed term of 120 years from creation,[598] rather than a term based on the year in which the author (or the last surviving co-author) died, is the best approach as a practical matter. This is due to a combination of factors such as the collaborative nature of sound recording authorship, the difficulties in calculating term of protection based upon the life of an author (or, in many cases, multiple authors) who may have died many decades ago, and the likelihood that many pre-1972 sound recordings were created as works for hire.

As indicated above, the process for assessing as-applied takings claims is articulated in *Penn Central Transp. Co. v. City of New York*. The principal consideration is "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."[599] In the case of pre-1972 sound recordings, which are numerous and unique, the economic impact will vary widely, but it is reasonable to conclude that reducing the term for certain works may result in a loss of significant economic value.

Therefore, the recommendation includes an avenue for right holders to fulfill reasonable investment-backed expectations in the form of both a reasonable automatic transition term of federal protection and a means to exercise an option to extend protection to 2067 – an option likely to be exercised only for works with commercial value. The Office understands that providing such an opportunity for right holders to "moderate and mitigate the economic impact"

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[597] Sections 303 and 302(a) and (b) of the Copyright Act of 1976 would have provided a term of life of the author plus 50 years, with a minimum term ending at the end of 2002, but the Sonny Bono Copyright Term Extension Act of 1998 extended that term to life plus 70 years. Pub. L. No. 105-298, 112 Stat. 2827, section 102(b)(1) and (2)(1998) (amending 17 U.S.C. § 302(a) and (b)).

[598] Subject to an absolute end of protection on February 15, 2067 in all cases.

[599] *Penn Central*, 438 U.S. at 124.

significantly diminishes the legitimacy and likelihood of success of any takings claims that might be asserted.[600]

C. Transition Period

The Notice of Inquiry pointed out that it may be necessary to provide a transition period to accommodate the switch from state protection of pre-1972 sound recordings to federal protection. The Office sought comments on whether provision should be made for recordings for which the statutory term of protection would already have expired, or would be expiring shortly, by providing federal protection for a "reasonable period," possibly with an opportunity for a further extension of protection if the recordings are made available to the public during that interim period. As indicated above, Congress has in the past determined that taking away subsisting common law rights and substituting statutory rights for a reasonable period is fully in harmony with the constitutional requirements of due process.[601] However, it is necessary to determine what constitutes a "reasonable period."[602]

1. Length of Transition Period

There is some precedent on the question of what constitutes a reasonable transition period. Congress addressed the potential effects on vested rights in the 1976 Copyright Act, when it removed perpetual state law protection for unpublished works but provided that all unpublished works would continue to enjoy copyright for at least an additional 25 years. So far as the Office is aware, no takings claims were made as a result of this legislation.

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[600] *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225-26 (1986).

[601] *See supra* Chapter VI.B.2.b.

[602] To be clear, it is possible that providing a reasonable transitional period may in and of itself serve as providing reasonable just compensation for any taking of common law rights.

The stakeholders in the current proceeding held varying views as to what sort of transition period, if any, would be appropriate in the case of federalization of pre-1972 sound recordings. Professor Townsend Gard expressed the view that either a one-year or five-year transition period would be sufficient.[603] ARSC considered a brief transitional period to be acceptable, but cautioned that it would be unreasonable to provide for a term that would extend to 2067.[604] SAA stated that a five year transition period would be reasonable, but also expressed the view that it would be unreasonable to provide for a term that would extend to 2067.[605] Several parties said that a transition period of 25 years would be unreasonable and excessive.[606] In fact, no party endorsed a transition period of 25 years. However, stakeholders representing rights holders maintained their general opposition to federalization or to any shortening of the terms currently enjoyed under state law.

2. What Constitutes "Publicly Available" and "Notice Filed in the Office"

The questions of what would qualify as making a sound recording "publicly available," and what should be included in the "notice filed in the Office" for purposes of obtaining a term of protection that extends until 2067, were first raised at the roundtable. No stakeholders provided specific proposals. However, several raised concerns that should be considered in setting the requirements for obtaining protection until 2067. These concerns included whether merely making a recording available as a noninteractive stream could qualify as making the work "publicly available;" whether there would be an ongoing obligation for a right holder to state that

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[603] Townsend Gard Reply at 22-23; Townsend Gard T2 at 438, 440.

[604] Brooks T2 at 438-39.

[605] SAA at 9.

[606] Brooks T2 at 450-51; Harbeson T2 at 451-53.

it is still exploiting a work; the economic and procedural burdens of a notice requirement; and whether a notice requirement would constitute a type of formality.[607]

3. Recommendation

The Office recommends a transition period falling between six and ten years for all pre-1972 sound recordings other than those first published before 1923. Whether the period is closer to six years or closer to ten is a question on which affected parties should provide additional input. Such a transition period is somewhat longer than the range of one to five year transition periods preferred by non-right holder stakeholders and is well short of the 25-year minimum transition period provided in the 1976 Act. In addition, a six year transition period coincides with the existing statute of limitations for a takings claim as set forth in 28 U.S.C. § 2501, which would ensure that no right holder could initiate a takings claim after the opportunity to exercise the option to extend the term has expired. As a practical matter, providing for a transition period of at least six years would force right holders to decide whether to assert a takings claim before the end of the transition period. Few if any are likely to do so, since the option of obtaining the extended term by making the work available and notifying the Copyright Office would not be very burdensome. But providing for a transition period that is sufficiently long that a takings claim must be asserted by the end of that period would also have the benefit of obtaining finality on the takings issue in a relatively short period of time.

Works first published before 1923 warrant special consideration because, relative to other works of authorship under the Copyright Act, they would be in the public domain by now had they been federalized in 1976. Therefore, although a transition period is still prudent to address takings concerns, the Office recommends a shorter transition period of three years. A shorter period is justified for such works in light of (1) the likelihood that very few, if any, right holders will seek to extend the duration of their exclusive rights in those works, and (2) the great age of

[607] Rosenthal T2 at 401; Schwartz T2 at 402-04; Townsend Gard T2 at 404-05, 408-09.

those recordings and the concomitant need to permit preservation activities unfettered by concerns that such activities might constitute copyright infringement.[608]

Concerning what constitutes making the work sufficiently available to qualify for protection until 2067 (or, in the case of works published before 1923, for an additional 25 years), the Office again recommends that additional input be sought from the affected parties. However, the Office believes that a work should be deemed available only if (1) it is available to the public at a reasonable price, and (2) phonorecords are available to users. The latter point is especially important. The Office does not believe that the requirement of making recordings available to the public should be satisfied merely by providing non-interactive streaming access to the works.[609] Many stakeholders asserted that making works available only by means of streaming does not provide sufficient access.[610] This suggests that the requirement should be met by distribution of phonorecords of the recordings, which could but need not be achieved solely by means of digital transmissions of phonorecords. As indicated above, the price must be reasonable.

The notice provided to the Office might be as simple as a notice similar to the one prescribed in 17 U.S.C. § 108(h)(2)(C) that a work is subject to normal commercial exploitation or that a copy or phonorecord of the work can be obtained at a reasonable price.[611] Alternatively, it might be satisfied by submitting an application to register the copyright in the sound recording, with a statement that the work has been made available to the public at a reasonable price.

[608] See MLA at 6-7, 10; SAA at 2.

[609] It may be useful to seek further input as to whether provision of interactive (*i.e.*, "on-demand") streaming ought to be sufficient to satisfy the requirements to secure protection through 2067. However, for reasons discussed immediately below, the Office is skeptical that such access should be considered sufficient.

[610] A number of commenters pointed out that research often requires the ability to physically handle phonorecords, for example to study them in greater detail, to filter elements out, and to occasionally adjust the rotation speed of cylinder and disk phonorecords. Brylawski T1 at 52; Brooks T1 at 110-12, T2 at 380-82; Loughney T2 at 348-49. It is not clear whether all of those acts, or their equivalents, could be achieved with a downloaded copy. Nevertheless, the Office is not inclined to recommend a requirement that the recordings be distributed in the form of tangible phonorecords.

[611] *See* 37 C.F.R. § 201.39.

Consideration should also be given to whether additional periodic notices should be required, to confirm that the sound recording continues to be available to the public.[612]

D. Registration

1. Stakeholder Concerns about Registration

Owners of copyrighted works who register their works in a timely manner are eligible for statutory damages and attorney's fees. Moreover, registration is a prerequisite for a suit for infringement of copyright in a United States work. While the Notice of Inquiry did not specifically seek input on registration issues, a handful of stakeholders offered views on the effect that federalization would have on copyright owners of pre-1972 sound recordings in light of the registration provisions of the Copyright Act.

RIAA and A2IM questioned whether federalization would require that an entire catalog of sound recordings must be immediately registered in order to ensure their ability to enforce rights in their recordings. They expressed concern that this would be an undue burden on right holders who would have to submit thousands of copyright registrations and recordations for these recordings, and on the Copyright Office, which would have to process them, within a short time after the law went into effect. They cited the requirements of section 411 of the Copyright Act, which establishes registration as a prerequisite for an infringement suit.[613] They also pointed to

[612] RIAA suggested that a requirement of "you must assert the rights or you lose the rights" is "anathema to copyright law." Schwartz T2 at 391, 402-04. However, the notice requirement suggested herein, and any possible additional periodic notices, would be required only if a copyright owner wishes to secure the additional benefit of an extraordinarily long term, one that is beyond (1) that which other works enjoy under U.S. copyright law, (2) that provided by the laws of most countries around the world, and (3) that which is required by international obligations. The Copyright Act already offers certain additional benefits that copyright owners may enjoy only if they comply with certain formalities. *See, e.g.*, 17 U.S.C. § 412 (registration as prerequisite for statutory damages and attorney's fees); 17 U.S.C. § 108(h)(2)(c) (notice by copyright owner that a work is subject to normal commercial exploitation or that a copy of the work may be obtained at a reasonable price makes inapplicable the privilege of libraries and archives to reproduce, distribute, display or perform copies or phonorecords of works during the last 20 years of copyright term).

[613] 17 U.S.C. § 411(a) provides, in pertinent part:

section 412, which sets forth "timely" registration as an eligibility requirement for statutory damages or attorney's fees.[614] They stated that such provisions would have to be modified to accommodate registrations for pre-1972 sound recordings to avoid providing federal rights devoid of effective remedies.[615] Similar sentiments regarding the burdens of registration were expressed in the roundtable by A2IM and NMPA.[616]

In its reply comment, ARSC stated that it would be delighted if federalization encouraged thousands of copyright registrations. It claimed that federal registrations provide a means of enforcing compliance with other requirements of copyright; enhance publicly available information; increase the value of the works to proprietors and users; and aid title searches. It asserted that extending these inducements for registration and deposit to pre-1972 sound

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> Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights.

[614] 17 U.S.C. § 412:

> In any action under this title, other than an action brought for a violation of the rights of the author under section 106A(a), an action for infringement of the copyright of a work that has been preregistered under section 408(f) before the commencement of the infringement and that has an effective date of registration not later than the earlier of 3 months after the first publication of the work or 1 month after the copyright owner has learned of the infringement, or an action instituted under section 411(c), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for—
> (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or
> (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

[615] RIAA/A2IM at 30. They repeated these assertions at the public meeting. Schwartz T1 at 27, 95; Pariser T1 at 234-37, 273-79.

[616] Bengloff T1 at 281-84; Rosenthal T1 at 288-90.

recordings would promote predictability and public access to these works, as well as aid in the preservation of historic recordings.[617]

The application of registration requirements as well as other provisions of current law to pre-1972 sound recordings presents legitimate concerns. Specifically: sections 405 and 406 would need to be amended to clarify that the validity of a copyright in a pre-1972 sound recording is not affected by the distribution, before the effective date of the Berne Convention Implementation Act of 1988, of phonorecords of the sound recording without a copyright notice or with a defective copyright notice; section 407 regarding deposit requirements may need to be amended to accommodate instances in which best edition deposits are no longer available; section 410 regarding *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate may need to be altered in recognition of the fact that registration of pre-1972 sound recordings will occur well beyond five years from first publication of the work; and section 205 regarding priority of conflicting transfers may need to be reconsidered in recognition of the fact that for over a century, transfers of ownership of rights in pre-1972 sound recordings have taken place without recording the documents of transfer with the Copyright Office.

2. Recommendation

The Office does not see a need to amend the section 411 requirement of registration as a prerequisite for an infringement suit for pre-1972 sound recordings.[618] If a pre-1972 sound recording is infringed, registration of the copyright could be made easily and quickly. However,

[617] ARSC Reply at 18-19; *see also* Brooks T1 at 239-40.

[618] Some courts have erroneously interpreted section 411(a) as being satisfied merely by submitting an application, fee and deposit to the Copyright Office, rather than by the Office's issuance of a certificate of registration or its refusal to issue a certificate. *See, e.g.*, *Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612 (9th Cir.), *cert. denied*, 131 S.Ct. 686 (2010). *But see La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1202-04 (10th Cir. 2005). At most, a transitional amendment providing that, for a period of perhaps three to five years, an owner of a copyright in a pre-1972 sound recording could satisfy the requirements of section 411(a) simply by submitting the required elements to the Copyright Office, would remedy any short-term disadvantage experienced by copyright owneres with respect to these newly federalized works.

the Office understands the desirability of modifying section 412 eligibility requirements for statutory damages and attorney's fees for pre-1972 sound recordings. Section 412 provides as a general matter that a copyright owner who prevails on a claim of copyright infringement is eligible to seek an award of statutory damages or attorney's fees if the infringed work was registered prior to the commencement of the infringement or within 3 months after the work was first published. For pre-1972 sound recordings that are infringed on or shortly after the date on which federal protection commences, a "timely" registration under section 412 would be difficult if not impossible to accomplish. To avoid placing an unreasonable burden on right holders to submit registration applications in the first days following the effective date of federal protection for pre-1972 sound recordings, and the resulting burden on the Copyright Office, the Office recommends a transitional provision that would permit, for a period of perhaps three to five years, owners of copyrights in pre-1972 sound recordings to seek statutory damages and attorney's fees notwithstanding their failure to register the copyright prior to the commencement of infringement. Such a provision would encourage registration within a reasonable time but make accommodations for copyright owners – as well as for the registration staff of the Copyright Office – faced with the sudden need to register great numbers of works in a short period of time.

While the Office does not at this time have specific recommendations for dealing with the remaining issues relating to registration of pre-1972 sound recordings, it has suggested in the preceding section how those issues might be resolved. Certainly none of those issues is insuperable, but they may require additional consideration and input from stakeholders.

LP disc

VII. RECOMMENDATIONS

The U.S. Copyright Office hereby makes the following recommendations:

- Federal copyright protection should apply to sound recordings fixed before February 15, 1972, with special provisions to address ownership issues, term of protection, transition period, and registration.
- Federal copyright protection for pre-1972 sound recordings means that all of the rights and limitations of Title 17 of the U.S. Code applicable to post-1972 sound recordings would apply, including section 106(6) (public performance right for digital audio transmissions), section 107 (fair use), section 108 (certain reproduction and distribution by libraries and archives), section 110 (exemption for certain performances and displays),

section 111 (statutory license for cable retransmissions of primary transmissions), section 112 (ephemeral recordings by broadcasters and transmitting organizations), section 114 (statutory license for certain transmissions and exemptions for certain other transmissions), section 512 (safe harbor for Internet service providers), Chapter 10 (digital audio recording devices), and Chapter 12 (copyright protection and management systems), as well as any future applicable rights and limitations (*e.g.,* orphan works) that Congress may choose to enact.

- The initial owner(s) of the federal copyright in a pre-1972 sound recording should be the person(s) who own(s) the copyright under applicable state law at the moment before the legislation federalizing protection goes into effect.
- Section 203 of the Copyright Act should be amended to provide that authors of pre-1972 sound recordings are entitled to terminate grants of transfers or licenses of copyright that are made on or after the date federal protection commences. However, termination of pre-federalization grants made under state law prior to federalization presents serious issues with respect to retroactivity and takings, so the Office does not recommend providing termination rights for grants made prior to federalization of protection.
- The term of protection for sound recordings fixed prior to February 15, 1972, should be 95 years from publication (with "publication" as defined in section 101) or, if the work had not been published prior to the effective date of legislation federalizing protection, 120 years from fixation. However,
  - In no case would protection continue past February 15, 2067, and
  - In cases where the foregoing terms would expire before 2067, a right holder may take the action described below to obtain a longer term.
- For pre-1972 sound recordings other than those published before 1923, a transition period lasting between six and ten years from enactment of federal protection should be

established, during which a right holder may make a pre-1972 sound recording available to the public and file a notice with the Copyright Office confirming availability at a reasonable price and stating the owner's intent to secure protection until 2067. If a right holder does this, the term of protection of the sound recording will not expire until 2067, provided that the recording remains publicly available at a reasonable price during its extended term of protection.

- For sound recordings published before 1923, a transition period lasting three years from enactment of federal protection should be established, during which a right holder may make a pre-1923 sound recording available to the public and file a notice with the Copyright Office confirming availability at a reasonable price and stating the owner's intent to secure protection for 25 years after the date of enactment of the legislation that federalizes protection. If a right holder does this, the term of protection of the sound recording will not expire until the end of the 25-year period, provided that the recording remains publicly available at a reasonable price during its extended term of protection.
- Regardless of a right holder's actions, all pre-1972 sound recordings should enjoy federal protection at least until the end of the relevant transition period described above.
- Regarding the requirement of timely registration in order to recover statutory damages or attorney's fees in an infringement suit, a transitional period of between three and five years should be established, during which right holders in pre-1972 sound recordings can seek statutory damages and attorney's fees notwithstanding the lack of registration prior to filing suit.
- Adjustments should be made or at least considered with respect to certain other provisions of the Copyright Act to take into account difficulties that owners of rights in pre-1972 sound recordings may encounter. Among those provisions are: section 405 (notice of copyright: omission of notice on certain copies and phonorecords), section 406

(notice of copyright: error in name or date on certain copies and phonorecords), section 407 (deposit of copies or phonorecords for Library of Congress), section 410 (*prima facie* weight of certificate of registration), and section 205 (regarding priority between conflicting transfers recorded in the Copyright Office).

APPENDIX A Initial Public Notice

U.S. National Income and Product Accounts (NIPAs) published by the Bureau of Economic Analysis (BEA). The output data are based on a value-added concept and come from product-side estimates of Gross Domestic Product.

The primary source of hours data is the BLS Current Employment Statistics (CES) program, which collects hours paid for nonsupervisory workers. These data are adjusted using data from the Current Population Survey, the National Compensation Survey, and other sources to account for differences between the desired concept of hours (hours worked for all employed persons) and the CES concept (hours paid for production and nonsupervisory employees).

For detailed industries, annual output measures represent the total value of goods and services produced, and are based primarily on data from the U.S. Census Bureau. These measures use a sectoral output concept, which differs from real gross output in that it excludes output that is shipped to other establishments in the same industry. As with the nonfarm business sector productivity, industry hours are constructed primarily from payroll data from the BLS CES survey, supplemented with data from the CPS and other Federal data sources.

Multifactor productivity is estimated in a conceptual framework based on the economic theory of the firm. This framework guides the construction and interpretation of the measures. For the private business and nonfarm business sectors, value added output is compared to inputs of labor and capital. For detailed industries, sectoral output is compared to capital and labor inputs as well as intermediate inputs of energy, non-energy materials and business services provided by establishments outside of each industry or sector.

III. Desired Focus of Comments

Comments and recommendations are requested from the public on the following aspects of the BLS productivity measurement program:

- The scope and amount of detail covered by and published in the productivity datasets.
- The concepts and frameworks used in measuring outputs, inputs, and productivity.
- The sources of data used in productivity measurement.
- Areas of research that the BLS productivity program should emphasize.

In your recommendations to the productivity program, it would be particularly helpful if you could explain how the changes would make the data more accurate or more useful.

Signed at Washington, DC, this 28th day of October 2010.

Kimberley Hill,

Chief, Division of Management Systems, Bureau of Labor Statistics.

[FR Doc. 2010–27727 Filed 11–2–10; 8:45 am]

BILLING CODE 4510–24–P

LIBRARY OF CONGRESS

[Docket No. 2010–4]

Copyright Office; Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of inquiry.

SUMMARY: Congress has directed the Copyright Office to conduct a study on the desirability and means of bringing sound recordings fixed before February 15, 1972, under Federal jurisdiction. Currently, such sound recordings are protected under a patchwork of State statutory and common laws from their date of creation until 2067. This notice requests written comments from all interested parties regarding Federal coverage of pre-1972 sound recordings. Specifically, the Office seeks comments on the likely effect of Federal protection upon preservation and public access, and the effect upon the economic interests of rights holders. The Office also seeks comments on how the incorporation of pre-1972 sound recordings into Federal law might best be achieved.

DATES: Initial written comments must be received in the Office of the General Counsel of the Copyright Office no later than December 20, 2010. Reply comments must be received in the Office of the General Counsel of the Copyright Office no later than December 3, 2010.

ADDRESSES: The Copyright Office strongly prefers that comments be submitted electronically. A comment page containing a comment form is posted on the Copyright Office Web site at *http://www.copyright.gov/docs/sound/comments/comment-submission-index.html.* The Web site interface requires submitters to complete a form specifying name and organization, as applicable, and to upload comments as an attachment via a browse button. To meet accessibility standards, each comment must be uploaded in a single file in either the Adobe Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The maximum file size is 6 megabytes (MB). The name of the submitter and organization should appear on both the form and the face of the comments. All comments will be posted on the Copyright Office Web site, along with names and organizations.

If electronic submission of comments is not feasible, comments may be delivered in hard copy. If hand delivered by a private party, an original and five copies of a comment or reply comment should be brought to the Library of Congress, U.S. Copyright Office, Room LM–401, James Madison Building, 101 Independence Ave., SE., Washington, DC 20559, between 8:30 a.m. and 5 p.m. The envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office.

If delivered by a commercial courier, an original and five copies of a comment or reply comment must be delivered to the Congressional Courier Acceptance Site ("CCAS") located at 2nd and D Streets, SE., Washington, DC between 8:30 a.m. and 4 p.m. The envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office, LM–403, James Madison Building, 101 Independence Avenue, SE., Washington, DC 20559. Please note that CCAS will not accept delivery by means of overnight delivery services such as Federal Express, United Parcel Service or DHL.

If sent by mail (including overnight delivery using U.S. Postal Service Express Mail), an original and five copies of a comment or reply comment should be addressed to U.S. Copyright Office, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Chris Weston, Attorney Advisor. Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707–8380. Telefax: (202) 707–8366.

SUPPLEMENTARY INFORMATION:

Introduction

The Copyright Office is conducting a study on "the desirability of and means for bringing sound recordings fixed before February 15, 1972, under federal jurisdiction." When it enacted the Omnibus Appropriations Act of 2009, Congress directed the Register of Copyrights to conduct such a study and seek comments from interested parties. H. Comm. On Appropriations, H.R. 1105, Public Law 111–8 [Legislative Text and Explanatory Statement] 1769

(Comm. Print 2009). With this notice, the Copyright Office explains the background to the study and seeks public comment on whether pre-1972 sound recordings should be brought within the Federal copyright statute. The Office also poses a number of questions on specific topics relevant to the overall inquiry.

Background

Sound recordings are "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes or other phonorecords, in which they are embodied." 17 U.S.C. 101. Until 1972, sound recordings were not among the works of authorship protected by the Federal copyright statute; they enjoyed protection only under State law. In 1971, Congress passed the Sound Recording Amendment, which provided that sound recordings first fixed on or after February 15, 1972, would be eligible for protection under Federal copyright law. Sound recordings first fixed prior to that date (pre-1972 sound recordings) continued to be protected under State law.

In 1976, when Congress passed the Copyright Revision Act, it created a unitary system of copyright, by bringing unpublished works (until then protected by State law) under the Federal copyright law, and preempting all State laws that provided rights equivalent to copyright. 17 U.S.C. 301(a). However, it explicitly excluded State laws concerning pre-1972 sound recordings from the general preemption provision, allowing those laws to continue in effect until 2047. 17 U.S.C. 301(c). That date was later extended by the Copyright Term Extension Act (CTEA) until 2067. Public Law 105–298, 112 Stat. 2827 (1998). On February 15, 2067, all State law protection for pre-1972 sound recordings will be preempted by Federal law and will effectively cease.

Thus, there are currently two primary regimes of protection for sound recordings: State law protects pre-1972 recordings, and Federal copyright law protects sound recordings of U.S. origin first fixed on or after February 15, 1972.

Federal law also protects pre-1972 sound recordings of foreign origin that were eligible for copyright restoration under the Uruguay Round Agreements Act (URAA). Public Law 103–465, 108 Stat. 4809, 4973 (1994). This legislation, passed in 1994 in order to implement U.S. obligations under the TRIPS ("Trade Related Aspects of Intellectual Property") Agreement, "restored" copyright protection to certain works of foreign origin that were in the public domain in the United States on the effective date, which for most works was January 1, 1996. Because most other countries provide a 50-year term of protection for sound recordings, generally only those foreign sound recordings fixed in 1946 and after were eligible for restoration under the URAA.

One consequence of the continued protection under State law of pre-1972 sound recordings is that there are virtually no sound recordings in the public domain in the United States. Pre-1972 sound recordings, no matter how old, can have State law protection until 2067, so that some sound recordings will conceivably be protected for more than 170 years. Even pre-1972 foreign sound recordings that were ineligible for copyright restoration because their term of protection had expired in their home countries are eligible for State law protection, at least in New York. *See Capitol Records, Inc.* v. *Naxos of America, Inc.,* 830 N.E.2d 250 (N.Y. 2005). Those sound recordings that do have Federal copyright protection will not enter the public domain for many years. For example, sound recordings copyrighted in 1972 will not enter the public domain until the end of 2067.

State law protection for pre-1972 sound recordings is provided by a patchwork of criminal laws, civil statutes and common law. Almost all States have criminal laws that prohibit duplication and sale of recordings done knowingly and willfully with the intent to sell or profit commercially from the copies. Most States also have some form of civil protection, sometimes under the rubric of "common law copyright," sometimes under "misappropriation" or "unfair competition," and sometimes under "right of publicity." Occasionally these forms of protection are referred to collectively as "common law copyright" or "common law protection," but in fact not all civil protection for sound recordings is common law—some States have statutes that relate to unauthorized use of pre-1972 sound recordings—and a true "common law copyright" claim differs from a claim grounded in unfair competition or right of publicity. In *Capitol Records, Inc.* v. *Naxos of America, Inc.,* the New York Court of Appeals (the highest court of the State) explained that a common law copyright claim in New York "consists of two elements: (1) The existence of a valid copyright; and (2) unauthorized reproduction of the work protected by copyright." *Id.* at 563. It went on to state that "[c]opyright law is distinguishable from unfair competition, which in addition to unauthorized copying and distribution requires competition in the marketplace or similar actions designed for commercial benefit." *Id.*

The scope of civil protection varies from State to State, and even within a State there is often uncertainty because there are few court decisions that have defined the scope of the rights and the existence and scope of exceptions. What is permissible in one State may not be in another. This uncertainty is compounded by the unsettled state of the law concerning the activities that subject an entity to a State's jurisdiction.

In general, Federal law is better defined, both as to the rights and the exceptions, and more consistent than State law. In some respects Federal law provides stronger protection. For example, owners of copyrighted works who timely register are eligible for statutory damages and attorneys fees. 17 U.S.C. 412, 504, and 505. In addition, copyright-protected sound recordings are eligible for protection under 17 U.S.C. 1201, which prohibits circumvention of technological protection that protects access to a copyrighted work. At the same time Federal law provides a more consistent and well-articulated set of exceptions. While some States include exceptions in their laws protecting sound recordings, the Federal "fair use" and library and archives exceptions—17 U.S.C. 107 and 108, respectively—are likely much more robust and effective in providing safety valves for the unauthorized but socially valuable use of copyrighted works.

The Copyright Office Study

Faced with the uncertain patchwork of State laws that cover pre-1972 recordings, libraries, archives and educational institutions have voiced serious concerns about their legal ability to preserve pre-1972 recordings, and provide access to them to researchers and scholars.[1] A 2005 study concluded that copyright owners had, on average, made available on CD only 14 percent of the sound recordings they control that were released from 1890 through 1964.[2] Reissues of recordings from before World War II are particularly scarce. While the statistics and conclusions from that report are now five years old, the Copyright Office knows of no reason to believe that the

[1] *See generally* Rob Bamberger and Sam Brylawski, National Recording Preservation Board, The State of Recorded Sound Preservation in the United States: A National Legacy At Risk in the Digital Age (2010).

[2] Tim Brooks, National Recording Preservation Board, Survey of Reissues of U.S. Recordings 7 (2005). For more recent years in that period, the percentage of recordings that were available reached 33 percent.

situation has changed significantly since that time.

Copies of many recordings from these eras reside in libraries and archives. Their custodians, however, are concerned that without the certainty of Federal copyright exceptions, the reproduction and distribution activities necessary to preserve and provide access to these recordings will lack clear legal bases. As a result, some have urged that consideration be given to bringing pre-1972 sound recordings under Federal copyright law, so that users have to contend with only a single set of laws.

When it directed the Register of Copyrights to conduct a study on the desirability of and means for bringing sound recordings fixed before February 15, 1972 under Federal jurisdiction, Congress specifically stated:

> The study is to cover the effect of federal coverage on the preservation of such sound recordings, the effect on public access to those recordings, and the economic impact of federal coverage on rights holders. The study is also to examine the means for accomplishing such coverage.

H.R. 1105, Public Law 111–8 [Legislative Text and Explanatory Statement] 1769. As part of the study, the Register is to provide an opportunity for interested parties to submit comments. The Register's report to Congress on the results of the study is to include any recommendations that the Register considers appropriate.

The body of pre-1972 sound recordings is vast. Commercially released "popular" recordings come most readily to mind—from Rudy Vallee to Frank Sinatra and Ella Fitzgerald to the Beatles and the Rolling Stones. But pre-1972 commercial recordings encompass a wide range of genres: ragtime and jazz, rhythm and blues, gospel, country and folk music, classical recordings, spoken word recordings and many others. There are, in addition, many unpublished recordings such as journalists' tapes, oral histories, and ethnographic and folklore recordings. There are also recordings of old radio broadcasts, which were publicly disseminated by virtue of the broadcast, but in many cases are technically unpublished under the standards of the U.S. Copyright Act.

The Copyright Office requests that parties with an interest in the question of whether to protect pre-1972 sound recordings as part of the Federal copyright statute submit their comments on the issue and, in those comments, respond to the specific questions below. A party need only address those issues on which it has information or views, but the Office asks that all answers be as comprehensive as possible.

Specific Questions

Preservation of and Access to Pre-1972 Sound Recordings

The following questions are meant to elicit information about how Federal protection of pre-1972 sound recordings will affect preservation and public access.

Preservation

1. Do libraries and archives, which are beneficiaries of the limitations on exclusive rights in section 108 of the Copyright Act, currently treat pre-1972 sound recordings differently from those first fixed in 1972 or later ("copyrighted sound recordings") for purposes of preservation activities? Do educational institutions, museums, and other cultural institutions that are not beneficiaries of section 108 treat pre-1972 sound recordings any differently for these purposes?

2. Would bringing pre-1972 sound recordings under Federal law—without amending the current exceptions—affect preservation efforts with respect to those recordings? Would it improve the ability of libraries and archives to preserve these works; and if so, in what way? Would it improve the ability of educational institutions, museums, and other cultural institutions to preserve these works?

Access

3. Do libraries and archives currently treat pre-1972 sound recordings differently from copyrighted sound recordings for purposes of providing access to those works? Do educational institutions, museums, and other cultural institutions treat them any differently?

4. Would bringing pre-1972 sound recordings under Federal law—without amending the current exceptions—affect the ability of such institutions to provide access to those recordings? Would it improve the ability of libraries and archives to make these works available to researchers and scholars; and if so, in what way? What about educational institutions, museums, and other cultural institutions?

5. Currently one group of pre-1972 recordings does have Federal copyright protection—those of foreign origin whose copyrights were restored by law. (*See* the discussion of the URAA above.) In order to be eligible for restoration, works have to meet several conditions, including: (1) They cannot be in the public domain in their home country through expiration of the term of protection on the date of restoration; (2) they have to be in the public domain in the United States due to noncompliance with formalities, lack of subject matter protection (as was the case for sound recordings) or lack of national eligibility; and (3) they have to meet national eligibility standards, *i.e.,* the work has to be of foreign origin. 17 U.S.C. 104A(h)(6). In determining whether a work was in the public domain in its home country at the time it became eligible for restoration, one has to know the term of protection in that country; in most countries, sound recordings are protected under a "neighboring rights" regime which provides a 50-year term of protection. As a result, most foreign sound recordings first fixed prior to 1946 are not eligible for restoration. To be of foreign origin, a work has to have "at least one author or rightholder who was, at the time the work was created, a national or domiciliary of an eligible country, and if published, [must have been] first published in an eligible country and not published in the United States during the 30-day period following publication in such eligible country." 17 U.S.C. 104A(h)(6)(D).

Does the differing protection for this particular group of recordings lead to their broader use? Have you had any experience with trying to identify which pre-1972 sound recordings are (or may be) so protected? Please elaborate.

6. Are pre-1972 sound recordings currently being treated differently from copyrighted sound recordings when use is sought for educational purposes, including use in connection with the distance education exceptions in 17 U.S.C. 110(2)? Would bringing pre-1972 sound recordings under Federal law affect the ability to make these works available for educational purposes; and if so, in what way?

7. Do libraries and archives make published and unpublished recordings available on different terms? What about educational institutions, museums, and other cultural institutions? Are unpublished works protected by State common law copyright treated differently from unpublished works protected by Federal copyright law? Would bringing pre-1972 sound recordings under Federal law affect the ability to provide access to unpublished pre-1972 sound recordings?

Economic Impact

Likely economic impact is an important consideration in determining whether pre-1972 sound recordings should be brought under Federal law, and how that change might be accomplished. The questions below are intended to elicit information regarding what revenue expectations copyright owners have with respect to pre-1972 sound recordings, and how these expectations would be affected by bringing these recordings under Federal protection. These questions are also intended to elicit information concerning the determination of ownership in such recordings.

Value of the Recordings

8. Are there commercially valuable sound recordings first fixed before 1923 (*e.g.,* that would be in the public domain if the ordinary Federal term of protection applied) that would be adversely affected? Please describe these recordings, including whether or not they are currently under commercial exploitation (and if not, why not) and elaborate on the nature and extent of their commercial value.

9. Are there commercially valuable sound recordings first fixed from 1923–1940 that would be adversely affected? Please describe these recordings, including whether or not they are currently under commercial exploitation (and if not, why not) and elaborate on the nature and extent of their commercial value.

10. With regard to commercial recordings first fixed after 1940: What is the likely commercial impact of bringing these works under Federal copyright law?

11. Would there be any negative economic impact of such a change, *e.g.,* in the scope of rights, or the certainty and enforceability of protection?

12. Would there be any positive economic impact of such a change, *e.g.,* in the scope of rights, or the certainty and enforceability of protection?

13. What would be the economic impact of bringing pre-1972 sound recordings into the section 114 statutory licensing mechanism applicable to certain digital transmissions of sound recordings? Would there be other advantages or disadvantages in bringing pre-1972 sound recordings within the scope of the section 114 statutory license?

14. Does the uncertainty of different regimes under State law make it less practical for rights holders to bring suit under State law? Are you aware of any infringement suits concerning pre-1972 sound recordings brought in the past 10 years?

15. Would business arrangements concerning sampling of sound recordings be affected by bringing pre-1972 recordings under Federal law; and if so, how would they be affected? Are pre-1972 sound recordings currently treated differently with respect to sampling?

Ownership of Rights in the Recordings

It is worthwhile to explore State law principles applicable to authorship and ownership of rights in sound recordings to determine whether there would be any tension with Federal copyright law principles.

16. Under Federal law the owner of the sound recording will generally be, in the first instance, the performer(s) whose performance is recorded, the producer of the recording, or both. Do State laws attribute ownership differently? If so, might that lead to complications?

17. Under Federal law, some copyrighted sound recordings qualify as works made for hire, either because (1) they are works prepared by employees in the scope of their employment, or (2) they were specially ordered or commissioned, if the parties agree in writing that the works will be works made for hire, and the works fall within one of nine specific categories of works eligible to be commissioned works made for hire. 17 U.S.C. 101.[3] If a work qualifies as a work made for hire, it is the employer or commissioning party who is the legal author and initial rights holder, rather than the individual creator of the work. Prior to the January 1, 1978, the courts recognized the work for hire doctrine with respect to works created by employees in the course of their employment, and particularly from the mid-1960s on, they recognized commissioned works made for hire, under such standards as whether the work was created at the hiring party's "instance and expense" or whether the hiring party had the "right to control" or exercised "actual control" over the creation of the work.

To what extent does State law recognize the work made for hire doctrine with respect to sound recordings? To what extent does State law recognize commissioned works for hire, and under what standard? Have State laws in this respect changed over time? Is there any likelihood that, if Federal standards were applied, ownership of pre-1972 sound recordings would be attributed differently? Is there any reason to believe that, if pre-1972 sound recordings were to become protected under Federal copyright law, their ownership would then become subject to Federal work-made-for-hire standards?

[3] The types of works that can qualify as commissioned works for hire include: A contribution to a collective work, a part of a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, answer material for a test, or an atlas. 17 U.S.C. 101(2).

18. Under Federal copyright law, ownership of rights is distinct from ownership of the material object in which the copyrighted work is embodied. Transferring ownership of such an object, including the "original," *i.e.,* the copy or phonorecord in which the copyrighted work was first fixed, does not convey rights in the copyright. 17 U.S.C. 202. A transfer of copyright ownership must be made in a writing signed by the owner of the rights or her authorized agent. *Id.* 204.

Some State laws provide (or for a period of time provided) that transferring the original copy of a work could operate as a transfer of copyright ownership, unless the rights holder specifically reserved the copyright rights. To what extent have these State law principles been applied with respect to "master recordings"? How if at all would they affect who would own the Federal statutory rights, if pre-1972 sound recordings were brought under Federal law?

19. If pre-1972 sound recordings were to be given protection under the Federal copyright statute, how would or should copyright ownership of such recordings be determined? Has the issue arisen with respect to pre-1978 unpublished works that received Federal statutory copyrights when the Copyright Act of 1976 came into effect?

20. What other considerations are relevant in assessing the economic impact of bringing pre-1972 sound recordings under Federal protection?

Term of Protection and Related Constitutional Considerations

Term of Protection

21. If pre-1972 sound recordings are brought under Federal copyright law, should the basic term of protection be the same as for other works—*i.e.,* for the life of the author plus 70 years or, in the case of anonymous and pseudonymous works and works made for hire, for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first? Can different treatment for pre-1972 sound recordings be justified?

22. Currently, States are permitted to protect pre-1972 sound recordings until February 15, 2067. If these recordings were incorporated into Federal copyright law and the ordinary statutory terms applied, then all works fixed prior to 1923 would immediately go into the public domain. Most pre-1972 sound recordings, including all published, commercial recordings, would experience a shorter term of protection. However, as the date of the recording approaches 1972, the terms under

Federal and State law become increasingly similar. For example, a sound recording published in 1940 would be protected until the end of 2035 instead of February 15, 2067; one published in 1970 would be protected until the end of 2065 instead of February 15, 2067. In the case of one category of works—unpublished sound recordings whose term is measured by the life of author—there would actually be an extension of term if the author died after 1997. For example, if the author of an unpublished pre-1972 sound recording died in 2010, that sound recording would be protected under Federal law until the end of 2080.

In the 1976 Copyright Act, Congress made all unpublished works being brought under Federal law subject to the ordinary statutory term that the 1976 Act provided for copyrighted works: life of the author plus 50 years (later extended by the CTEA to life of the author plus 70 years). However, Congress was concerned that for some works, applying the ordinary statutory copyright terms would mean that copyright protection would have expired by the effective date of the 1976 Copyright Act, or would expire soon thereafter. Congress decided that removing subsisting common law rights and substituting statutory rights for a "reasonable period" would be "fully in harmony with the constitutional requirements of due process." H.R. Rep. No. 94-1476, at 138–39 (1976). Accordingly, the 1976 Copyright Act included a provision that gave all unpublished works, no matter how old, a minimum period of protection of 25 years, until December 31, 2002. 17 U.S.C. 303. If those works were published by that date, they would get an additional term of protection of 25 years, to December 31, 2027 (later extended by the CTEA to 2047).

If pre-1972 sound recordings were brought under Federal copyright law, should a similar provision be made for those recordings that otherwise would have little or no opportunity for Federal copyright protection? If so, what would be a "reasonable period" in this context, and why? If not, would the legislation encounter constitutional problems (*e.g.*, due process, or Takings Clause issues)?

Increasing the Availability of Pre-1972 Sound Recordings

23. If the requirements of due process make necessary some minimum period of protection, are there exceptions that might be adopted to make those recordings that have no commercial value available for use sooner? For example, would it be worthwhile to consider amending 17 U.S.C. 108(h) to allow broader use on the terms of that provision throughout any such "minimum period?" Do libraries and archives rely on this provision to make older copyrighted works available? If not, why not?

24. Are there other ways to enhance the ability to use pre-1972 sound recordings during any minimum term, should one be deemed necessary?

25. How might rights holders be encouraged to make existing recordings available on the market? Would a provision like that in section 303—an extended period of protection contingent upon publication—be likely to encourage rights holders to make these works publicly available?

Partial Incorporation

26. The possibility of bringing pre-1972 sound recordings under Federal law only for limited purposes has been raised. For example, some stakeholders seek to ensure that whether or not pre-1972 sound recordings receive Federal copyright protection, they are in any event subject to the fair use doctrine and the library and archives exceptions found in sections 107 and 108, respectively, of the Copyright Act. Others would like to subject pre-1972 sound recordings to the section 114 statutory license, but otherwise keep them within the protection of State law rather than Federal copyright law.

Is it legally possible to bring sound recordings under Federal law for such limited purposes? For example, can (and should) there be a Federal exception (such as fair use) without an underlying Federal right? Can (and should) works that do not enjoy Federal statutory copyright protection nevertheless be subject to statutory licensing under the Federal copyright law? What would be the advantages or disadvantages of such proposals?

Miscellaneous Questions

27. Could the incorporation of pre-1972 sound recordings potentially affect in any way the rights in the underlying works (such as musical works); and if so, in what way?

28. What other uses of pre-1972 recordings, besides preservation and access activities by libraries and other cultural institutions, might be affected by a change from State to Federal protection? For example, to what extent are people currently engaging in commercial or noncommercial use or exploitation of pre-1972 sound recordings, without authorization from the rights holder, in reliance on the current status of protection under State law? If so, in what way? Would protecting pre-1972 sound recordings under Federal law affect the ability to engage in such activities?

29. To the extent not addressed in response to the preceding question, to what extent are people currently refraining from making use, commercial or noncommercial, of pre-1972 sound recordings in view of the current status of protection under State law; and if so, in what way?

30. Are there other factors relevant to a determination of whether pre-1972 sound recordings should be brought under Federal law, and how that could be accomplished?

Dated: October 29, 2010.

David O. Carson,

General Counsel.

[FR Doc. 2010–27775 Filed 11–2–10; 8:45 am]

BILLING CODE P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before December 3, 2010. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be

APPENDIX B Supplemental Public Notice

Permanent Membership

Chair—Deputy Secretary—Seth D. Harris
Vice-Chair—Assistant Secretary for Administration and Management—T. Michael Kerr
Executive Secretary—Director, Executive Resources—Crystal Scott
Alternate Vice-Chair—Director, Human Resources Center—Eugenio (Gene) Ochoa Sexton

Rotating Membership

ASP Kathleen E. Franks, Director, Office of Regulatory and Programmatic Policy—appointment expires on 09/30/12
BLS John M. Galvin, Associate Commissioner, Office of Employment and Unemployment Statistics—appointment expires on 09/30/2013
EBSA Sharon S. Watson, Director, Office of Participant Assistance—appointment expires on 9/30/12
EBSA Jonathan Kay, Regional Administrator (New York)—appointment expires on 9/30/13
ETA Grace A. Kilbane, Administrator, Office of Workforce Investment—appointment expires on 09/30/11
ILAB Marcia M. Eugenio, Director, Office of Child Labor, Forced Labor Human Trafficking—appointment expires on 09/30/12
MSHA Maureen Walsh, Director, Administration and Management—appointment expires on 09/30/12
OASAM Charlotte A. Hayes, Deputy Assistant Secretary for Policy—appointment expires on 09/30/12
OASAM Milton A. Stewart, Director, Business Operations Center—appointment expires on 09/30/12
OASAM Ramon Suris-Fernandez, Director, Civil Rights Center—appointment expires on 09/30/11
OCFO Karen Tekleberhan, Deputy Chief Financial Officer—appointment expires on 09/30/2013
OFCCP Sandra S. Zeigler, Regional Director (Chicago)—appointment expires on 9/30/12
OLMS Stephen J. Willertz, Director, Office of Enforcement and International Union Audits—appointment expires on 09/30/2012
OWCP Rachel P. Leiton, Director, Energy Employees' Occupational Illness Compensation—appointment expires on 09/30/11
SOL Katherine E. Bissell, Associate Solicitor for Civil Rights and Labor Management—appointment expires on 09/30/11
SOL Michael D. Felsen, Regional Solicitor, Boston—appointment expires on 09/30/12
SOL Deborah Greenfield, Deputy Solicitor—appointment expires on 9/30/12
SOL Jeffrey L. Nesvet, Associate Solicitor for Federal Employees' and Energy Workers' Compensation—appointment expires on 09/30/13
VETS Ismael Ortiz, Jr., Deputy Assistant Secretary—appointment expires on 9/30/12
WHD Cynthia C Watson, Regional Administrator (Dallas)—appointment expires on 09/30/13

FOR FURTHER INFORMATION CONTACT: Ms. Crystal Scott, Director, Office of Executive Resources, Room C5508, U.S. Department of Labor, Frances Perkins Building, 200 Constitution Ave., NW., Washington, DC 20210, telephone: (202) 693–7628.

Signed at Washington, DC, on 24th day of November 2010.

Hilda L. Solis,

Secretary of Labor.

[FR Doc. 2010–30210 Filed 11–30–10; 8:45 am]

BILLING CODE 4510–23–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2010–4]

Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of inquiry: Extension of comment period; extension of reply comment period.

SUMMARY: The Copyright Office of the Library of Congress is extending the time in which comments and reply comments can be filed in response to its Notice of Inquiry requesting public input on the desirability and means of bringing sound recordings fixed before February 15, 1972, under Federal jurisdiction.

DATES: Initial written comments must be received in the Office of the General Counsel of the Copyright Office no later than January 31, 2011. Reply comments must be received in the Office of the General Counsel of the Copyright Office no later than March 2, 2011.

ADDRESSES: The Copyright Office strongly prefers that comments be submitted electronically. A comment page containing a comment form is posted on the Copyright Office Web site at *http://www.copyright.gov/docs/sound/comments/comment-submission-index.html.* The Web site interface requires submitters to complete a form specifying name and organization, as applicable, and to upload comments as an attachment via a browse button. To meet accessibility standards, each comment must be uploaded in a single file in either the Adobe Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The maximum file size is 6 megabytes (MB). The name of the submitter and organization should appear on both the form and the face of the comments. All comments will be posted on the Copyright Office Web site, along with names and organizations.

If electronic submission of comments is not feasible, comments may be delivered in hard copy. If hand delivered by a private party, an original and five copies of a comment or reply comment should be brought to the Library of Congress, U.S. Copyright Office, Room LM–401, James Madison Building, 101 Independence Ave., SE., Washington, DC 20559, between 8:30 a.m. and 5 p.m. The envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office.

If delivered by a commercial courier, an original and five copies of a comment or reply comment must be delivered to the Congressional Courier Acceptance Site ("CCAS") located at 2nd and D Streets, SE., Washington, DC between 8:30 a.m. and 4 p.m. The envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office, LM–403, James Madison Building, 101 Independence Avenue, SE., Washington, DC 20559. Please note that CCAS will not accept delivery by means of overnight delivery services such as Federal Express, United Parcel Service or DHL.

If sent by mail (including overnight delivery using U.S. Postal Service Express Mail), an original and five copies of a comment or reply comment should be addressed to U.S. Copyright Office, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Chris Weston, Attorney Advisor. Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707–8380. Telefax: (202) 707–8366.

SUPPLEMENTARY INFORMATION: To assist in the preparation of its study on federal protection for pre-1972 sound recordings, the Office published a Notice of Inquiry seeking comments on many detailed questions regarding various aspects of the study. *See* 75 FR 67777 (November 3, 2010). Initial comments were due to be filed by December 20, 2010; reply comments were due to be filed by January 19, 2011.

The Copyright Office has received a request from the Recording Industry Association of America to extend the comment period to January 31, 2011, in order to allow sufficient time to gather relevant information from its member companies and to provide the Office with comprehensive comments. Given the need for more factual data regarding pre-1972 sound recordings, and the complexity of the issues raised by the Notice of Inquiry, the Office has decided to extend the deadline for filing comments by a period of 42 days, making initial comments due by January 31, 2011. The period for filing reply comments will be similarly extended, making reply comments due by March 2, 2011.

Dated: November 24, 2010.

David O. Carson,

General Counsel.

[FR Doc. 2010–30213 Filed 11–30–10; 8:45 am]

BILLING CODE 1410–30–P

NUCLEAR REGULATORY COMMISSION

[EA–10–152; Project No. 52–0001; NRC–2010–0368]

In the Matter of Toshiba America Nuclear Energy Corporation and All Other Persons Who Seek or Obtain Access to Safeguards Information Described Herein; Order Imposing Safeguards Information Protection Requirements for Access to Safeguards Information (Effective Immediately)

I

On June 12, 2009, the U.S. Nuclear Regulatory Commission (the Commission or NRC) published a rulemaking in the **Federal Register** (74 FR 28112), that requires applicants for a variety of licensing activities, including nuclear power plant designers, to perform a design-specific assessment of the effects of a large, commercial aircraft impact and to incorporate design features and functional capabilities into the nuclear power plant design to provide additional inherent protection with reduced operator actions. Section V of the **Federal Register** notice contains specific requirements for applicants for new nuclear power reactors. To assist designers in completing this assessment, the Commission has decided to provide the detailed aircraft impact characteristics that reactor vendors and architect/engineers who have the need to know and who meet the NRC's requirements for the disclosure of such information should use as reasonable input in studies of the inherent capabilities of their designs.

The NRC derived these characteristics from agency analyses performed on operating reactors to support, in part, the development of a broadly effective set of mitigation strategies to combat fires and explosions from a spectrum of hypothetical aircraft impacts. Although the NRC did not select these detailed characteristics as a basis for designing new reactors, the staff is suggesting that designers use them as a starting point for aircraft impact assessments. As stated in the rulemaking, the Commission will specify, in a safeguards information (SGI) guidance document, the detailed aircraft impact characteristics that should be used in a required assessment of the new reactor designs. The agency is working to finalize the form and values of those detailed characteristics. On July 10, 2009, the NRC issued Draft Regulatory Guide (DG)–1176, "Guidance for the Assessment of Beyond-Design-Basis Aircraft Impacts," to assist applicants in the completion of the assessment. The agency did not receive any comments on DG–1176. The staff is currently finalizing the regulatory guide. In addition, the staff recognizes that no national or international consensus has been reached on the selection of appropriate characteristics for such analyses. Therefore, applicants should consider the information preliminary and subject to authorized stakeholder comment. The detailed aircraft characteristics that are the subject of this Order are hereby designated as SGI,[1] in accordance with Section 147 of the Atomic Energy Act of 1954, as amended (AEA).

On October 24, 2008, the NRC revised Title 10 of the *Code of Federal Regulations* (10 CFR) Part 73, § 73.21, "Protection of Safeguards Information: Performance Requirements," to include applicants in the list of entities required to protect SGI (73 FR 63546). The NRC is issuing this Order to Toshiba America Nuclear Energy Corporation (TANE) to impose requirements for the protection of SGI in addition to the requirements in the revised 10 CFR 73.21. These additional requirements include nomination of a reviewing official, restrictions on the storage of SGI, and access to SGI by certain individuals.

[1] SGI is a form of sensitive, unclassified, security-related information that the Commission has the authority to designate and protect under Section 147 of the AEA.

To implement this Order, TANE must nominate an individual, known as the "reviewing official," who will review the results of the Federal Bureau of Investigation (FBI) criminal history records check to make SGI access determinations. The reviewing official must be someone who seeks access to SGI. Based on the results of the FBI criminal history records check, the NRC staff will determine whether this individual may have access to SGI. If the NRC determines that the individual may not be granted access to SGI, the enclosed Order prohibits that individual from obtaining access to any SGI. Once the NRC determines that the nominated individual may have access to SGI, and after TANE has completed the background check on the reviewing official and has determined that he or she is trustworthy and reliable, and has approved the individual as the reviewing official, that reviewing official, and only that reviewing official, can make SGI access determinations for other individuals who have been identified by TANE as having a need to know SGI and who have been fingerprinted and have had a criminal history records check in accordance with this Order. The reviewing official can only make SGI access determinations for other individuals; he or she cannot approve other individuals to act as reviewing officials. If TANE wishes to nominate a new or additional reviewing official, the NRC must first determine whether that individual may have access to SGI before he or she can act in the capacity of a reviewing official.

The regulations at 10 CFR 73.59, "Relief from Fingerprinting, Identification and Criminal History Records Checks and Other Elements of Background Checks for Designated Categories of Individuals," relieve certain categories of individuals from fingerprinting requirements. Those individuals include: (1) Federal, State, and local law enforcement personnel, (2) Agreement State inspectors who conduct security inspections on behalf of the NRC, (3) members of Congress, (4) employees of members of Congress or congressional committees who have undergone fingerprinting for a prior U.S. Government criminal history check, and (5) certain representatives of the International Atomic Energy Agency or certain foreign government organizations. In addition, the NRC has determined that individuals who have had a Favorably-decided U.S. Government criminal history check within the last 5 years or individuals

APPENDIX C Notice of Public Meeting

Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $32 for complete Consent Decree or $15.75 for the Consent Decree without the appendices (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Robert E. Maher, Jr.,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2011–11174 Filed 5–6–11; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Employment and Training Administration

Workforce Investment Act of 1998 (WIA); Notice of Incentive Funding Availability Based on Program Year (PY) 2009 Performance

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Department of Labor, in collaboration with the Department of Education, announces that four states are eligible to apply for Workforce Investment Act (WIA) (Pub. L. 105–220, 29 U.S.C. 2801 *et seq.*) incentive grant awards authorized by section 503 of the WIA.

DATES: The four eligible states must submit their applications for incentive funding to the Department of Labor by June 23, 2011.

ADDRESSES: Submit applications to the Employment and Training Administration, Office of Policy Development and Research, Division of Strategic Planning and Performance, 200 Constitution Avenue, NW., Room N–5641, Washington, DC 20210, *Attention:* Karen Staha and Luke Murren, Telephone number: 202–693–3733 (this is not a toll-free number). Fax: 202–693–2766. *E-mail: staha.karen@dol.gov* and *murren.luke@dol.gov.* Information may also be found at the ETA Performance *Web site: http://www.doleta.gov/performance.*

SUPPLEMENTARY INFORMATION: Four states (see Appendix) qualify to receive a share of the $10.2 million available for incentive grant awards under WIA section 503. These funds, which were contributed by the Department of Education from appropriations for the Adult Education and Family Literacy Act (AEFLA), are available for the eligible states to use through June 30, 2013, to support innovative workforce development and education activities that are authorized under title IB (Workforce Investment Systems) or Title II (AEFLA) of WIA, or under the Carl D. Perkins Career and Technical Education Act of 2006 (Perkins IV), 20 U.S.C. 2301 *et seq.,* as amended by Public Law 109–270. In order to qualify for a grant award, a state must have exceeded its performance levels for WIA title IB and adult education (AEFLA). (Due to the lack of availability of PY 2009 performance data under the Carl D. Perkins Vocational and Technical Education Act of 1998 (Perkins III), the Department of Labor and the Department of Education did not consider states' performance levels under the Perkins Act in determining incentive grants eligibility.) The goals included employment after training and related services, retention in employment, and improvements in literacy levels, among other measures. After review of the performance data submitted by states to the Department of Labor and to the Department of Education, each Department determined for its program(s) which states exceeded their performance levels (the Appendix at the bottom of this notice lists the eligibility of each state by program). These lists were compared, and states that exceeded their performance levels for both programs are eligible to apply for and receive an incentive grant award. The amount that each state is eligible to receive was determined by the Department of Labor and the Department of Education, based on the provisions in WIA section 503(c) (20 U.S.C. 9273(c)), and is proportional to the total funding received by these states for WIA Title IB and AEFLA programs.

The states eligible to apply for incentive grant awards and the amounts they are eligible to receive are listed in the following chart:

State	Amount of award
1. Arizona	$3,000,000
2. Minnesota	3,000,000
3. North Dakota	1,210,964
4. Texas	3,000,000

Dated: May 2, 2011.

Jane Oates,

Assistant Secretary for Employment and Training.

[FR Doc. 2011–11191 Filed 5–6–11; 8:45 am]

BILLING CODE 4510–FN–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2010–4]

Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of public meeting.

SUMMARY: The Copyright Office will host a public meeting to discuss the desirability and means of bringing sound recordings fixed before February 15, 1972 under Federal jurisdiction. The meeting will provide a forum, in the form of a roundtable discussion, for interested parties to address the legal, policy, and factual questions raised so far regarding pre-1972 sound recordings. It will take place on June 2 and 3, 2011 at the Copyright Office in Washington, DC. In order to participate in the meeting, interested parties should submit a request via the Copyright Office Web site.

DATES: The public meeting will take place on Thursday, June 2, 2011 from 9 a.m. to 5 p.m. and Friday, June 3, 2011 from 9 a.m. to 1:30 p.m. Requests for participation must be received in the Office of the General Counsel of the Copyright Office no later than Monday, May 16, 2011 at 5 p.m. E.D.T.

ADDRESSES: The public meeting will take place in the Copyright Office Hearing Room, Room LM–408 of the Madison Building of the Library of Congress, 101 Independence Ave., SE., Washington, DC. The Copyright Office strongly prefers that requests for participation be submitted electronically. A public meeting page containing a request form is posted on the Copyright Office Web site at *http://www.copyright.gov/docs/sound/.* Persons who are unable to submit a request electronically should contact Attorney-Advisor Chris Weston at 202–707–8380.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Chris Weston, Attorney-Advisor, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. *Telephone:* (202) 707–8380. *Telefax:* (202) 707–8366.

SUPPLEMENTARY INFORMATION:

Background

Congress has directed the U.S. Copyright Office to conduct a study on the desirability and means of bringing sound recordings fixed before February 15, 1972 under Federal jurisdiction. Currently, such sound recordings are protected under a patchwork of state statutory and common laws from their date of creation until 2067. The legislation mandating this study states that it is to:

> cover the effect of federal coverage on the preservation of such sound recordings, the effect on public access to those recordings, and the economic impact of federal coverage on rights holders. The study is also to examine the means for accomplishing such coverage.

H.R. 1105, Public Law 111–8 [Legislative Text and Explanatory Statement] 1769.

On November 3, 2010, the U.S. Copyright Office published a Notice of Inquiry seeking comments on the question of bringing pre-1972 sound recordings under Federal jurisdiction. 75 FR 67777 (November 3, 2010). The notice provided background as to why state law protection of pre-1972 sound recordings has not been preempted, unlike state law protection of other kinds of potentially copyrightable works. It also discussed the belief of some in the library and archives community that the absence of a Federal protection scheme for sound recordings has impeded the preservation and public availability of these recordings. In an attempt to understand the various effects that federalizing protection for pre-1972 sound recordings might have, the notice posed 30 specific questions to commenters regarding preservation and access, economic impact, term of protection, constitutional considerations, and other aspects of federalization.

The Copyright Office received 58 comments in response to its inquiry, along with 231 copies of a form letter. The Office subsequently received 17 reply comments. All comments, along with the notice of inquiry, are available at *http://www.copyright.gov/docs/sound/*. The comments ran the gamut from general policy arguments to proposals for new legislative language and, as anticipated, illuminate a variety of experiences and perspectives. Some comments raised new legal questions, and others deepened the Office's understanding of the number and variety of pre-1972 sound recordings at issue. The Copyright Office is holding a public meeting in order to permit interested parties to present their views and discuss areas of agreement and disagreement through a roundtable discussion.

Requests for Participation

The Office has divided up the topics it wishes to discuss into nine sessions—five on June 2, 2011 and four on June 3, 2011—and briefly describes them below. These descriptions only note the major issues for each session and do not necessarily list every subject appropriate for discussion.

Day 1, Session 1—Assessing the Landscape: What are the legal and cultural difficulties—as well as benefits—attributable to state law protection of pre-1972 sound recordings?

Day 1, Session 2—Availability of Pre-1972 Sound Recordings: What is the true extent of public availability of pre-1972 sound recordings? In relation to the overall availability of such recordings, how significant are rights-holder reissue programs and recent donations to the Library of Congress?

Day 1, Session 3—Effects of Federalization on Preservation, Access, and Value: What benefits would federalization have with respect to preservation of and public access to pre-1972 sound recordings? Are those benefits quantifiable (i.e., in economic or cultural terms)? How would federalization affect the economic and cultural value of pre-1972 sound recordings? Are such effects quantifiable?

*Day 1, Session 4—Effects of Federalization on Ownership and Business E*xpectations: What effects would federalization have with respect to ownership status, publication status, contracts, termination rights, registration requirements, and other business aspects of pre-1972 sound recordings? To what extent would these results depend on the manner in which federalization might be effected?

Day 1, Session 5—Effects of Federalization on Statutory Licensing: As a matter of logic, policy, and law, should pre-1972 sound recordings be eligible for the section 114 statutory license? Can and should they be subject to the section 114 statutory license if they are not otherwise brought into the Federal statutory scheme?

Day 2, Session 1—Term of Protection: Assuming that copyright protection for pre-1972 sound recordings is federalized, what are the best options for the term of protection of federalized pre-1972 sound recordings? Should pre-1923 recordings be considered separately? What about unpublished recordings? If federalized pre-1972 sound recordings are given shorter terms than they had under state law, should term extensions be offered as an incentive to rights-holders who make their recordings publicly available within a specified period of time?

Day 2, Session 2—Constitutional Considerations: Is it appropriate to grant Federal copyright protection to works already created, fixed, and in some cases published? Are there circumstances under which federalization of pre-1972 sound recordings would effect a "taking" under the Fifth Amendment? If so, how could this be addressed in the legislation?

Day 2, Session 3—Alternatives to Federalization: What alternatives to federalization, if any, should be considered and why?

Day 2, Session 4—Summing Up: In light of this public meeting and of the comments received, please sum up your views on (1) whether pre-1972 sound recordings should be brought within the protection of Federal copyright law and (2) in the case of federalization, what adaptations to existing law would be necessary or advisable.

Requests to participate should be submitted online at *http://www.copyright.gov/docs/sound/*. The online form asks for the requestor's name, organization, title, postal mailing address, telephone number, fax number, and an e-mail address, although not all of the information is required. The requestor should also indicate, in order of preference, the sessions in which the requestor wishes to participate. Depending upon the level of interest, the Copyright Office may not be able to seat every participant in every session he or she requests, so it is helpful to know which topics are most important to each participant. In addition, please note that while an organization may bring multiple representatives, only one person per organization may participate in a particular session. A different person from the same organization may, of course, participate in another session.

Requestors who have already submitted a comment, or who will be representing an organization that has submitted a comment, are asked to identify their comments on the request form. Requestors who have not submitted comments should include a brief summary of their views on the topics they wish to discuss, either directly on the request form or as an attachment. To meet accessibility standards, all attachments must be uploaded in either the Adobe Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The name of the submitter and organization (if any) should appear on both the form and the face of any attachments.

Nonparticipants who wish to attend and observe the discussion should note that seating is limited and, for nonparticipants, will be available on a first come, first served basis.

Dated: May 4, 2011.

Maria A. Pallante,

Acting Register of Copyrights.

[FR Doc. 2011–11224 Filed 5–6–11; 8:45 am]

BILLING CODE 1410–30–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (11–045)]

NASA Advisory Council; Task Group of the Science Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Task Group of the NASA Advisory Council (NAC) Science Committee. This Task Group reports to the Science Committee of the NAC. The Meeting will be held for the purpose of soliciting from the scientific community and other persons scientific and technical information relevant to program planning.

DATES: Wednesday, May 25, 2 p.m. to 4 p.m., Local Time.

ADDRESSES: This meeting will take place telephonically and by WebEx. Any interested person may call the USA toll free conference call number 800–369–3194, pass code TAGAGMAY25, to participate in this meeting by telephone. The WebEx link is *https://nasa.webex.com/,* meeting number 993 198 285, and password tagag_May25.

FOR FURTHER INFORMATION CONTACT: Ms. Marian Norris, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–4452, fax (202) 358–4118, or *mnorris@nasa.gov.*

SUPPLEMENTARY INFORMATION: The agenda for the meeting includes the following topic:

—Organizing Analysis Groups to Serve the Needs of More than One NASA Mission Directorate.

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants.

Dated: May 2, 2011.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2011–11163 Filed 5–6–11; 8:45 am]

BILLING CODE 7510–13–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–250 and 50–251; NRC–2011–0094]

Florida Power & Light Company; Turkey Point, Units 3 and 4; Notice of Consideration of Issuance of Amendment to Facility Operating License, and Opportunity for a Hearing and Order Imposing Procedures for Document Access to Sensitive Unclassified Non-Safeguards Information

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of license amendment request, opportunity to comment, opportunity to request a hearing, and Commission order.

DATES: A request for a hearing must be filed by July 8, 2011. Any potential party as defined in Title 10 of the Code of Federal Regulations (10 CFR) 2.4 who believes access to Sensitive Unclassified Non-Safeguards Information (SUNSI) is necessary to respond to this notice must request document access by May 19, 2011.

ADDRESSES: Please include Docket ID NRC–2011–0094 in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site *http://www.regulations.gov.* Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

You may submit comments by any of the following methods:

• *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2011–0094. Address questions about NRC dockets to Carol Gallagher 301–492–3668; e-mail *Carol.Gallagher@nrc.gov.*

You can access publicly available documents related to this notice using the following methods:

• *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, *Mail Stop:* TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

• *NRC's Public Document Room (PDR):* The public may examine, and have copied for a fee, publicly available documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available online in the NRC's Library at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.* The application for amendment, dated October 21, 2010, contains proprietary information and, accordingly, those portions are being withheld from public disclosure. A redacted version of the application for amendment, dated December 14, 2010, is available electronically under ADAMS Accession No. ML103560167.

• *Federal Rulemaking Web site:* Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID: NRC–2011–0094.

FOR FURTHER INFORMATION CONTACT: Jason C. Paige, Project Manager, Plant Licensing Branch II–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555. *Telephone:* 301–415–5888; *fax number:* 301–415–2102; *e-mail: Jason.Paige@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC or the Commission)

APPENDIX D List of Parties Submitting Initial Comments

APPENDIX D: INITIAL COMMENTS

Document	Organization / Comment
1	Michael Fitzgerald
2	Bill Hebden
3	Courtney Chartier
4	Phil Gries
5	R. Fay
6	Susan Hoffius
7a	Starr Gennett Foundation
7b	David J. Fulton, Starr-Gennett Foundation
8	Aaron A. Fox
9	Al Schlachtmeyer
10	Alison Stankrauff
11	Tanya Merchant
12	Benjamin Irwin
13	Darren Walters
14	Jean Dickson
15	Zoe Waldron
16	Deborah Campana
17	Dale Cockrell
18	Jodi Allison-Bunnell
19	Michael Burch
20	Lynn Hooker
21	Cristobal Diaz Ayala
22	Cynthia Varady
23	Henry Sapoznik
24	Peggy Davis
25	Sherry L. Mayrent
26	Abigail O. Garnett
27	Brian Lee Corber
28	Doug Pomeroy

29	Mark Slobin
30	Demetrio Wazar
31	Geoff Canyon
32	Louis Zell
33	Julie King
34	Max Cantor
35	Nathan Lambson
36	Maurice Saylor
37	Robert C. Lancefield
38	Nicola Battista
39	Helen R. Tibbo, Society of American Archivists
40	Rachel Evangeline Barham
41	Thad E. Garrett
42	Tim Brooks, Association of Recorded Sound Collections
43	Winston Barham
44	Eric Harbeson, Music Library Association
45	K. Matthew Dames, Syracuse University
46	Kenneth Crews
47	Lizabeth A. Wilson, University of Washington Libraries
48	Patrick Feaster
49	Patrick Loughney, Library of Congress
50	Randy Silverman & Alison Mower, University of Utah
51	Recording Industry Association of America and American Association of Independent Music
52	Stephanie M. Roach
53	Steven R. Englund, Sound Exchange, Inc.
54	Abigail Phillips, Electronic Freedom Foundation
55	Joel Brian Kellum - Comment 1 and Comment 2
56	Alex Cummings
57	Grooveshark form letter
58	Steven Smolian

APPENDIX E List of Parties Submitting Reply Comments

APPENDIX E: REPLY COMMENTS

Document	Organization / Comment
1	James A. Armstrong
2	Ivan Hoffman
3	Ryland Hawkins, Author Services, Inc.
4	Eric N. Burns, Conversation in Black
5	Eric D. Leaner, VAPAC Music Publishing, Inc.
6	Helen R. Tibbo, Society of American Archivists
7	The Association of Research Libraries and the American Library Association
8	Eric Harbeson, The Music Library Association (MLA)
9	Tim Brooks, Association for Recorded Sound Collections
10	Patrick Loughney, The Library of Congress
11	Future of Music Coalition
12	David Oxenford & Jane Mago, National Association of Broadcasters
13	Elizabeth Townsend Gard & the 2011 Copyright Class at Tulane University Law School
14	Recording Industry Association of America and American Association of Independent Music
15	Bruce Rich & Cynthia Greer, Sirius XM Radio, Inc.
16	J. Gregg Gautereaux, Artist's Reprieve LLC
17	Joel Kellum

APPENDIX F List of Meeting Participants

APPENDIX F: PUBLIC MEETING PARTICIPANTS

Gil Aronow, Sony Music Entertainment

Richard Bengloff, American Association of Independent Music

Tim Brooks, Association for Recorded Sound Collections

Sam Brylawski, Society for American Music

Peggy Bulger, American Folklife Center, Library of Congress

Brandon Butler, Association of Research Libraries

Dwayne Buttler, University Libraries, University of Louisville

Susan Chertkof, Recording Industry Assn of America

Michael DeSanctis, SoundExchange, Inc.

Elizabeth Townsend Gard, Tulane University Law School

Eric Harbeson, Music Library Association

Ivan Hoffman, attorney

Adam Holofcener, Future of Music Coalition

Tomas Lipinski, School of Library & Information Science, Indiana University

Patrick Loughney, Library of Congress

Steve Marks, Recording Industry Association of America

David Oxenford, National Association of Broadcasters

Jennifer Pariser, Recording Industry Association of America

Jay Rosenthal, National Music Publishers Association

Charles Sanders, Songwriters Guild of America

Eric Schwartz, Recording Industry Association of America

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2014

(Argued: December 11, 2014 Decided: October 8, 2015)

No. 14-182-cv

GLORIA COOTS BALDWIN, PATRICIA BERGDAHL, CHRISTINE PALMITESSA,

Plaintiffs-Appellants,

-v.-

EMI FEIST CATALOG, INC.,

Defendant-Appellee.

Before: POOLER, LIVINGSTON, and DRONEY, *Circuit Judges*.

Plaintiffs appeal from a December 17, 2013 judgment of the United States District Court for the Southern District of New York (Scheindlin, *J.*) in favor of defendant EMI Feist Catalog, Inc. ("EMI"). The district court granted summary judgment to EMI on plaintiffs' claim seeking a declaration that either of two copyright termination notices served on EMI in 2007 and 2012 will terminate EMI's rights in the musical composition "Santa Claus Is Comin' to Town." On appeal, plaintiffs argue that the district court erred in holding that EMI owns its rights under a 1951 grant that plaintiffs are powerless to terminate, and argue instead that EMI owns its rights under a 1981 grant that will be terminated by either the 2007 or 2012 termination notice. We agree with plaintiffs that EMI owns its rights under the 1981 grant, and conclude that the 2007 termination notice will terminate the 1981 grant in 2016. We therefore reverse the district court's judgment and remand for the entry of a declaratory judgment in plaintiffs' favor.

REVERSED AND REMANDED.

THOMAS K. LANDRY, Carey Rodriguez O'Keefe Milian Gonya, LLP, Washington, DC, *for Plaintiffs-Appellants*.

DONALD S. ZAKARIN (Frank P. Scibilia, Ross M. Bagley, *on the brief*), Pryor Cashman LLP, New York, NY, *for Defendant-Appellee*.

DEBRA ANN LIVINGSTON, *Circuit Judge*:

This appeal involves a dispute over the copyright in the musical composition "Santa Claus is Comin' to Town" (the "Song"), a classic Christmas song written by J. Fred Coots and Haven Gillespie in the 1930s. In 1976, Congress enacted a complex statutory regime that—as we explain later in this opinion—gave authors and their statutory heirs the right to terminate previously made grants of copyright under certain circumstances, and thereby to recapture some of the value associated with the authors' works. *See* 17 U.S.C. §§ 203, 304(c). Plaintiffs-appellants Gloria Coots Baldwin, Patricia Bergdahl, and Christine Palmitessa ("Plaintiffs") represent Coots's statutory heirs; since 2004, they have attempted to navigate this legal thicket and terminate rights in the Song held by defendant-appellee EMI Feist Catalog, Inc. ("EMI") under the terms of certain grants made by Coots to EMI's predecessors. Plaintiffs brought this lawsuit in the United States District Court for the Southern District of New York, seeking a declaration that either a notice of termination served on EMI in 2007 (the "2007 Termination Notice") or another such notice served in 2012 (the "2012 Termination Notice") will, upon becoming effective, terminate EMI's rights in the Song.

The district court (Scheindlin, *J.*) granted summary judgment to EMI, holding that its rights in the Song will subsist through the entire remaining copyright term—which, under current law, is scheduled to expire in 2029—pursuant to a 1951 agreement (the "1951 Agreement") that Plaintiffs are powerless to terminate. We reverse. For the reasons set forth below, we conclude (1) that EMI owns its rights in the Song not under the 1951 Agreement but instead under a subsequent contract executed in 1981 (the "1981 Agreement"), and (2) that the 2007 Termination Notice will terminate the 1981 Agreement in 2016. Plaintiffs are, accordingly, entitled to a declaratory judgment in their favor.

BACKGROUND

Coots and Gillespie sold the Song and "the right to secure copyright therein" to EMI's predecessor Leo Feist, Inc. ("Feist") in an agreement dated September 5, 1934 (the "1934 Agreement"). J.A. 40. In the 1934 Agreement, Feist agreed to "publish [the Song] in saleable form . . . within one (1) year," and to pay Coots and Gillespie certain royalties generated by the Song. J.A. 41. On September 27, 1934, Feist registered its copyright in the Song with the Copyright Office.

At the time, the Copyright Act of 1909 (the "1909 Act"), Pub. L. No. 60-349, 35 Stat. 1075, was in effect. Under the 1909 Act, authors were entitled to copyright in their work for an initial twenty-eight-year period beginning on the date the work was published. They then had the right to renew their copyright for an additional twenty-eight-year "renewal term," a right that they could exercise even if they had granted their rights in the initial copyright term to a publisher. Thus, "[t]he renewal term permit[ted] the author, originally in a poor bargaining position, to renegotiate the terms of the grant once the value of the work ha[d] been tested." *Stewart v. Abend*, 495 U.S. 207, 218-19 (1990); *see also Penguin Grp. (USA) Inc. v. Steinbeck*, 537 F.3d 193, 197 (2d Cir. 2008). But authors could (and often did) grant their rights in the renewal term to publishers before the initial copyright term expired, and in *Fred Fisher Music Co. v. M. Witmark & Sons*, the Supreme Court held that these grants were enforceable. 318 U.S. 643, 657 (1943). Unless the author died before the renewal term began—in which case his renewal rights vested in his statutory heirs, notwithstanding his assignment of an expectancy in those rights, *see Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 376 (1960)—a grant of renewal rights ensured that the publisher would own the copyright for the entire fifty-six-year period provided by the 1909 Act. *See Steinbeck*, 537 F.3d at 197; *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 284 (2d Cir. 2002).

While many authors sold their rights in the initial term and the renewal term simultaneously, Coots granted his renewal rights separately, in the 1951 Agreement. The 1951 Agreement assigned to Feist a number of "musical compositions" by Coots, including the Song, "and all renewals and extensions of all copyrights therein," in exchange for certain royalties to be paid "during all renewal periods of the United States copyright in each of said compositions." J.A. 46. Feist renewed its copyright in the Song on September 27, 1961, at which point its rights were set to expire fifty-six years after copyright was originally registered—i.e., on September 27, 1990.

In 1976, Congress enacted a major overhaul of U.S. copyright law (the "1976 Act"), Pub. L. No. 94-553, 90 Stat. 2541, several aspects of which are central to this appeal. For works created on or after January 1, 1978, the 1976 Act did away with the 1909 Act's dual-term structure, replacing it with a single copyright term lasting for the life of the author plus fifty years. *See id.* § 302(a). By contrast, for works created before January 1, 1978, the 1976 Act retained the 1909 Act's dual-term structure, *see id.* § 304(a), (b), and for works (like the Song) already in their renewal term, it extended the renewal term to "seventy-five years from the date copyright was originally secured." *Id.* § 304(b). After the passage of the 1976 Act, the rights in the Song that Coots had granted to Feist were scheduled to expire in 2009.[1]

Although the 1976 Act extended copyright protection for works already in their renewal term, it contained a mechanism for giving authors and their families, as opposed to publishers who had come to own the renewal term rights,

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[1] Section 305 of the 1976 Act also provided that rights would expire on December 31 of the year they were otherwise scheduled to expire. Thus, the copyright in the Song was specifically scheduled to expire on December 31, 2009.

an opportunity to benefit from the extended term. S*ee* 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 11.05[B][1] (2013) [hereinafter "Nimmer"]. To this end, § 304(c) of the statute permitted authors—or, if the author had died, certain statutory heirs designated in § 304(c)(2)—to terminate "the exclusive or nonexclusive grant of a transfer or license of the renewal copyright . . . executed before January 1, 1978." 17 U.S.C. § 304(c). Because the parties' dispute implicates the intricacies of this section, we quote the relevant portions at length:

> (3) Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later.
>
> (4) The termination shall be effected by serving an advance notice in writing upon the grantee or the grantee's successor in title. . . .
>
>> (A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, . . . and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.
>>
>> (B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.
>
> (5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

> (6) . . . In the case of a grant executed by one or more of the authors of the work, all of a particular author's rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to that author or, if that author is dead, to [his statutory heirs]. In all cases the reversion of rights is subject to the following limitations:
>
> . . .
>
>> (B) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of this subsection.
>>
>> . . .
>>
>> (D) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the author . . . and the original grantee or such grantee's successor in title, after the notice of termination has been served as provided by clause (4) of this subsection.
>>
>> . . .
>>
>> (F) Unless and until termination is effected under this subsection, the grant, if it does not provide otherwise, continues in effect for the remainder of the extended renewal term.

17 U.S.C. § 304(c).

In addition to this § 304(c) termination right for pre-1978 grants, the 1976 Act granted authors (or their statutory heirs) the right to terminate grants "executed by the author on or after January 1, 1978." 17 U.S.C. § 203. This § 203 termination right can be exercised during a five-year period "beginning at the end of thirty-five years from the date of execution of the grant," but if the grant "covers the right of publication of the work," that five-year period begins at the earlier of (1) thirty-five years from the work's publication or (2) forty years from the execution of the grant. *Id.* § 203(a)(3). As with termination under § 304(c), termination under § 203 "may be effected notwithstanding any agreement to the contrary." *Id.* § 203(a)(5).

Under the first of the termination provisions just described, § 304(c), the 1951 Agreement was, as a pre-1978 grant, subject to termination starting on September 27, 1990, so Coots could serve a termination notice as early as ten years before that date. 17 U.S.C. § 304(c)(3), (4). Between service of the notice and the date of termination, he could reach an agreement for a further grant of the terminated rights with Feist or its successor in title, but no one else. *Id.* § 304(c)(6)(D). In fact, on September 24, 1981, Coots served on Feist's successor, Robbins Music Corporation ("Robbins"), a termination notice naming October 23, 1990, as the termination date for the 1951 Agreement (the "1981 Termination Notice"). Coots's attorney, William Krasilovsky, sent a copy of the 1981 Termination Notice to the Register of Copyrights on November 25, 1981. He then set about negotiating with Robbins on Coots's behalf, culminating in the 1981 Agreement, which was signed on December 15, 1981.

The 1981 Agreement recited that Coots (the "Grantor") had transferred his rights in the Song's renewal term to Feist in the 1951 Agreement; that Feist had renewed the copyright; that Congress had extended the renewal term in the 1976 Act; and that "the parties hereto desire to insure that [Robbins (the "Grantee")] shall, for the balance of the period of copyright [in the Song], be possessed of all United States copyright interest therein." J.A. 59. Coots agreed as follows:

> Grantor hereby sells, assigns, grants, transfers and sets over to Grantee . . . all rights and interests whatsoever now or hereafter known or existing, heretofore or at any time or times hereafter acquired or possessed by Grantor in and to [the Song and various derivative works], under any and all renewals and extensions of all copyrights therein and all United States reversionary and termination interests in copyright now in existence or expectant, including all rights reverted, reverting or to revert to Grantor[,] his heirs, executors, administrators or next of kin by reason of the termination of any transfers or licenses covering any extended renewal term of copyright pursuant to Section 304 of the Copyright Act of 1976, together with all renewals and extensions thereof.

J.A. 59–60. Further, he made a series of representations, including that he had served on Robbins "and recorded in the Copyright Office" a termination notice, which, the parties agreed:

> shall for the purposes of this agreement and Section 304(c)(6)(D) of the Copyright Act of 1976 be deemed to have been served upon

> Grantee, in advance of any further grant of rights hereunder, and shall be deemed to take effect at the earliest date possible under the Copyright Act of 1976 and the regulations prescribed by the Register of Copyrights.

J.A. 60.

Robbins agreed to pay both a $100,000 "non-recoupable bonus" to Coots's children in annual installments from 1981 to 1995, and royalties "as specified in the [1951 Agreement]" for "the period of the Extended Renewal Term of Copyright," a phrase that the 1981 Agreement did not define. J.A. 62. Coots's four children—Clayton Coots, Gloria Coots Baldwin, Patricia Coots Chester, and John Coots, Jr.—also signed the 1981 Agreement. "As an inducement to [Robbins] to enter into the . . . agreement," they assigned to Robbins all of their rights and interests in the Song "for the extended renewal term thereof." J.A. 63.

On May 26, 1982, Krasilovsky received a letter from the Copyright Office stating: "Pursuant to our telephone conversation of March 1, 1982, we are returning" the 1981 Termination Notice "to you unrecorded." J.A. 69. There is no explanation for this decision either in the letter or elsewhere in the record. At his deposition in this case, Krasilovsky could not recall why the notice was returned or what had transpired in the "telephone conversation" mentioned in the letter. **[A455.]** The parties agree that the 1981 Termination Notice was never actually recorded, although EMI claims it was not aware of the non-recordation of the notice until 2011.

As noted, when the 1981 Agreement was signed, the copyright in the Song was scheduled to subsist until December 31, 2009, the end of the year seventy-five years after copyright was initially secured. *See supra* note 1. The parties therefore did not anticipate that § 203 termination—which is available only against grants executed after January 1, 1978 and lasting longer than thirty-five years—would be available against the 1981 Agreement, which they thought would come to an end in 2009, less than thirty-five years later. Things changed in 1998, however, when Congress passed the Sonny Bono Copyright Term Extension Act (the "1998 Act"), Pub. L. No. 105-298, 112 Stat. 2827. For copyrights still in their renewal term at that time, the 1998 Act extended the renewal term to last "95 years from the date copyright was originally secured." 17 U.S.C. § 304(b). Because the Song's copyright was secured in 1934, its copyright was now set to expire on December 31, 2029.

The 1998 Act also added a new termination right to allow authors and their heirs to extract value from the new twenty-year extension of the renewal term. For copyrights still in their renewal term, authors (or their statutory heirs) could effect termination in the same general way as under § 304(c) if "the termination right provided in [§ 304(c)] has expired by such date" and "the author or owner of the termination right has not previously exercised such termination right." 17 U.S.C. § 304(d). Termination pursuant to § 304(d) can "be effected at any time during a period of 5 years beginning at the end of 75 years from the date copyright was originally secured," *id.* § 304(d)(2)—in the Song's case, starting on September 27, 2009.

The possibilities created by the 1998 Act led to a flurry of activity by Coots's statutory heirs,[2] who sought to take advantage of the termination rights that Congress had afforded, but were forced to contend with uncertainty stemming from the fact that the 1981 Termination Notice was never recorded. In 2004, Coots's heirs served on EMI (Robbins's successor) and recorded in the Copyright Office a § 304(d) termination notice with an effective date of September 27, 2009 (the "2004 Termination Notice"). Evidently, the 2004

[2] Coots passed away in 1985. EMI does not argue that any of the termination notices mentioned in the text fails for the reason that the individuals who served it did not together own a sufficient percentage of Coots's termination interest. *See generally* 17 U.S.C. §§ 203(a)(2), 304(c)(2) (specifying the statutory heirs who own an author's termination interest upon his death). For brevity's sake, therefore, we will avoid explaining who served each termination notice and why they owned a sufficient percentage of Coots's termination interest.

Termination Notice was based on the related premises that EMI still owned its rights under the 1951 Agreement (a pre-1978 grant), and that Coots had not already exercised his § 304(c) termination rights. Under the impression that the 1981 Agreement was operative, EMI personnel were confused by the 2004 Termination Notice; they ran a search for a prior § 304(c) termination notice, which came up empty. EMI prepared a draft affidavit to "refute" the 2004 Termination Notice, but this was never sent. Instead, in 2006, EMI began negotiating with Krasilovsky, who was now representing Coots's heirs.

EMI and Krasilovsky agreed that in light of the 1981 Agreement, EMI's rights in the Song were more appropriately terminated under § 203. Accordingly, in early 2007, Coots's statutory heirs served and recorded the 2007 Termination Notice, which indicated that the 1981 Agreement would terminate pursuant to § 203 on December 15, 2016. Krasilovsky then began negotiating to sell the to-be-terminated rights back to EMI. EMI offered Coots's statutory heirs $2.75 million for those rights, an offer that was rejected as insufficient. At that point, EMI's efforts to acquire the rights appear to have stalled.

Two years later, in 2009, Warner-Chappell Music, which had been acting as copyright administrator for a Coots family venture called Toy Town Toons, wrote to EMI claiming the copyright in the Song under the 2004 Termination Notice—apparently having returned to the position that termination of the 1951 Agreement had never taken place. EMI responded to this letter through outside counsel, asserting that its copyright "has not been and cannot be terminated" and would expire in 2029. J.A. 84. EMI claimed that § 304(d) termination was unavailable because Coots had already exercised his § 304(c) termination right in the 1981 Agreement, and that § 304(d) "does not provide a second right to terminate where the right of termination has already been exercised." J.A. 85.

In 2012, Coots's statutory heirs served and recorded the 2012 Termination Notice. **[A88–89.]** Like the 2007 Termination Notice, the 2012 Termination Notice cited § 203, not § 304(d), as the source of the heirs' right to terminate the 1981 Agreement. But "in an abundance of caution," Appellants' Br. at 23, the 2012 Termination Notice assumed that the 2007 Termination Notice was premature, on the theory (which Coots's statutory heirs anticipated EMI might advance) that the 1981 Agreement was a grant "cover[ing] the right of publication of the work," 17 U.S.C. § 203(a)(3), and that the "publication" of the Song under the 1981 Agreement, which resulted in EMI's owning the nineteen years' worth of rights spanning from 1990 to 2009, took place in 1990. On that potentially available theory, the 1981 Agreement could not be terminated until December 15, 2021—i.e., forty years after the agreement's execution. *See id.* ("[I]f the grant covers the right of publication of the work, the [five-year] period [during which termination is available] begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.").

On December 16, 2011, Plaintiffs sued EMI in the United States District Court for the Southern District of Florida, seeking a declaration that the 2004 Termination Notice had terminated EMI's rights in the Song on December 31, 2009, or, alternatively, that the 2007 Termination Notice would terminate EMI's rights on December 15, 2016. The Florida court granted EMI's motion to dismiss for lack of personal jurisdiction, and Plaintiffs brought this action in the Southern District of New York on December 21, 2012. Plaintiffs now seek a declaration that the 2007 Termination Notice will terminate EMI's rights on December 15, 2016, or, alternatively, that the 2012 Termination Notice will terminate EMI's rights on December 16, 2021.

Following discovery, the parties cross-moved for summary judgment. On December 16, 2013, the district court granted EMI's motion and denied Plaintiffs', holding that since the 1981 Termination Notice was never recorded, EMI owns its rights in the Song under the 1951 Agreement—which, as a pre-1978 grant, is not terminable under § 203. *Baldwin v. EMI Feist Catalog, Inc.*, 989 F. Supp. 2d 344, 352–55 (S.D.N.Y. 2013). Although Plaintiffs had not specifically argued that the 2004 Termination Notice terminated the 1951 Agreement in 2009 under § 304(d), the district court rejected any such argument, concluding that § 304(d) was unavailable because "Plaintiffs exercised their Section 304(c) termination rights when they served the 1981 Notice on EMI and secured a substantial $100,000 bonus payment." *Id.* at 355. Accordingly, the district court concluded that EMI's rights would survive until 2029. Judgment was entered on December 17, 2013, and Plaintiffs timely appealed.

DISCUSSION

We review a district court's grant of summary judgment de novo. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 122 (2d Cir. 2004). Summary judgment is appropriate when, viewing the evidence in the light most favorable to the non-moving party, *see Nabisco, Inc. v. Warner-Lambert Co.*, 220 F.3d 43, 45 (2d Cir. 2000), "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a). A fact is material if it "might affect the outcome of the suit under the governing law," and a dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

I.

The first question we must address is whether EMI owns its rights in the Song under the 1951 Agreement or, instead, under the 1981 Agreement.[3] The 2007 Termination Notice and the 2012 Termination Notice purported to terminate EMI's rights pursuant to 17 U.S.C. § 203, but § 203 termination rights are not available against pre-1978 grants. *See* 17 U.S.C. § 203(a). Accordingly, if the 1951 Agreement is the source of EMI's rights, Plaintiffs cannot terminate those rights under § 203. Plaintiffs argue that the 1981 Agreement superseded the 1951 Agreement and, upon doing so, became the operative source of EMI's rights. EMI responds that the 1981 Agreement did not supersede the 1951 Agreement, and that Coots's failure to record the 1981 Termination Notice means that the 1951 Agreement was never terminated and therefore remains in effect.

[3] For simplicity's sake, we refer to EMI, Feist, and Robbins collectively as "EMI" throughout the remainder of the opinion.

A.

Some preliminary discussion is necessary to understand the parties' dispute fully. As noted, § 304(c)(6)(D) provides that "[a] further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the author [or his statutory heirs] and the original grantee . . . after the notice of termination has been served as provided by" § 304(c)(4). We will refer to the exception permitting pre-termination, post-notice agreements with the original grantee as the "existing-grantee exception." This existing-grantee exception was included in the 1976 Act to give the grantee "some advantage over others in obtaining the terminated rights." 3 Nimmer § 11.08[A]; *see Milne ex rel. Coyne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1047–48 (9th Cir. 2005); *Bourne Co. v. MPL Commc'ns, Inc.*, 675 F. Supp. 859, 864–67 (S.D.N.Y. 1987).

When an author or his statutory heirs serves a termination notice, the grantee's previously undivided copyright interest is effectively split into three pieces, one owned by the author or his statutory heirs and two owned by the grantee. The author (or his statutory heirs) holds a future interest in the copyright. *See* 17 U.S.C. § 304(c)(6) (providing that the "rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to th[e] author" or his statutory heirs); *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 162 (1985) (labeling the post-termination interest a "reversion"). *See generally* Restatement (Third) of Prop.: Wills & Donative Transfers § 25.1 (Am. Law Inst. 2011) ("A future interest is an ownership interest in property that does not currently entitle the owner to possession or enjoyment of the property."). This future interest, however (unlike an author's renewal right under the 1909 Act), "become[s] vested on the date the notice of termination has been served," 17 U.S.C. § 304(c)(6); *see Range Road Music, Inc. v. Music Sales Corp.*, 76 F. Supp. 2d 375, 381 (S.D.N.Y. 1999), which gives the grantee confidence, in negotiations under the existing-grantee exception, that the grantor actually has something to convey. *Compare* 3 Nimmer § 11.08[A] (if the grantor dies after signing a new agreement but before the termination date, "the original grantee is entitled to claim the benefit of the further grant of the terminated rights" because "the termination interest vested upon service"), *with Miller Music*, 362 U.S. at 378 (noting that under the 1909 Act, "assignees of renewal rights [took] the risk that the rights acquired [would] never vest in their assignors").

Although an author's (or his statutory heirs') interest vests immediately upon service of a termination notice, it becomes possessory—i.e., it entitles the author (or his statutory heirs) to ownership of the copyright—only if the notice is recorded before the termination date. *See* 17 U.S.C. § 304(c)(4)(A) ("A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect."). In other words, even after a notice is served, the interest that vests upon service may be *di*vested if the notice is not recorded, and the grantee will continue to own the copyright through the end of the extended renewal term. *See id.* § 304(c)(6)(F) ("Unless and until termination is effected under this subsection, the grant, if it does not provide otherwise, continues in effect for the remainder of the extended renewal term."); 3 Nimmer § 11.06[B] ("Recordation . . . is not a condition precedent to vesting, but a failure to record prior to the effective date of termination constitutes failure to satisfy a condition subsequent, and therefore results in invalidation."). So upon being served with a termination notice, the grantee—by virtue of the existing grant—holds both a present interest scheduled to terminate on the notice's effective date and a contingent future interest that will vest on that date and entitle the grantee to possession if the notice goes unrecorded. (In common law property terms, these two interests are analogous to a term of years and a contingent remainder, respectively. *See, e.g.*, Jesse Dukeminier et al., *Property* 274 (7th ed. 2010)).

With this background in mind, in the prototypical agreement contemplated by the existing-grantee exception, the author or his statutory heirs convey only the future interest that vested in them upon service of the termination notice—that is, the only interest they hold at the time the notice is served. In effect, EMI claims that the 1981 Agreement is such a prototypical agreement, and that Coots conveyed to EMI *only* the vested future interest scheduled to revert to him upon termination. From this premise, EMI argues that the 1951 Agreement remained in place as the source of EMI's *other* two interests in the Song—i.e., the present interest that would have terminated in 1990 had the notice been recorded and the future interest contingent on the non-recordation of the 1981 Termination Notice. When the notice's effective date passed without its being recorded, EMI urges, EMI's contingent future interest vested and entitled it to ownership of the Song's copyright. Accordingly, on EMI's view that that contingent interest arises from the 1951 Agreement, which remains in place, it claims that it currently owns the Song's copyright under the 1951 Agreement. We disagree.

B.

The 1981 Agreement not only granted EMI the future interest scheduled to revert to Coots upon termination, it also replaced the 1951 Agreement as the source of EMI's existing rights in the Song. "[W]here the parties have clearly expressed or manifested their intention that a subsequent agreement supersede or substitute for an old agreement, the subsequent agreement extinguishes the old one." *Northville Indus. Corp. v. Fort Neck Oil Terminals Corp.*, 474 N.Y.S.2d 122, 125 (App. Div. 1984).[4] The question is simply whether the parties intended for the new contract to substitute for the old one, and that intention, if otherwise clear, need not be articulated explicitly in the new agreement. *See Moers v. Moers*, 128 N.E. 202, 203 (N.Y. 1920) (indicating that a new contract may discharge prior obligations "expressly or through implication"); *Sheehy v. Andreotti*, 605 N.Y.S.2d 257, 259 (App. Div. 1993) (asking whether the new contract, "as a matter of intention, expressed or implied, was a substitution for the prior agreement"); 29 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 73:36 (4th

[4] The 1981 Agreement contains a New York choice-of-law clause **[A63]**, and the parties do not dispute that New York law applies. *See Steinbeck*, 537 F.3d at 200 n.4.

ed. 1993) ("[T]he intent of the parties that the new agreement is to abrogate the former contract" can be "determined either expressly or by implication from the new contract's provisions . . . ."); 13 Margaret N. Kniffin, *Corbin on Contracts* § 71.1 (Joseph M. Perillo ed., rev. ed. 1998) ("The question is wholly one of intention, to be determined by the usual process of interpretation, implication, and construction, gleaned from the expression of the parties.").

The parties to the 1981 Agreement "clearly . . . manifested" an intention to replace the 1951 Agreement and not merely to convey to EMI Coots's future interest in the nineteen-year statutory renewal term extension. The relevant language is contained in § 1 of the 1981 Agreement, which reads as follows:

> *Grantor hereby sells, assigns, grants, transfers and sets over to Grantee . . .* [1] *all rights and interests* whatsoever now or hereafter known or existing, *heretofore* or at any time or times hereafter *acquired or possessed by Grantor in and to [the Song] . . . under any and all renewals and extensions of all copyrights therein and* [2] all United States reversionary and termination interests in copyright now in existence or expectant, including all rights reverted, reverting or to revert to Grantor . . . by reason of the termination of any transfers or licenses covering any extended renewal term of copyright pursuant to Section 304 of the Copyright Act of 1976, together with all renewals and extensions thereof.

J.A. 59–60 (emphasis added). It is quite clear from the first half of the quoted language that Coots was granting more than the vested future interest scheduled to revert to him or his statutory heirs upon termination; he was also granting "all rights and interests . . . heretofore . . . acquired or possessed by [him] . . . under any and all renewals and extensions." Ignoring the bedrock principle that "[a] contract 'should be read to give effect to all its provisions,'" *God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assocs., LLP*, 845 N.E.2d 1265, 1267 (N.Y. 2006) (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995)), EMI makes no effort to explain why EMI and Coots would have included the first half of § 1 had they not meant for it to have some effect. But to give any effect to this language at all, we must read it as replacing the 1951 Agreement, creating a new conveyance of all of Coots's interest in the copyright at once, and not merely as a piecemeal conveyance of his reversionary interest. Put simply, it would make no sense to have two grants of the same exact rights be operative at the same time; if the first half of § 1 were not meant to replace the 1951 agreement, there would be no reason for the parties to have included it.

EMI's arguments to the contrary do not persuade us to ignore the first half of § 1. Relying on our decision in *Penguin Group (USA) Inc. v. Steinbeck*, 537 F.3d 193, EMI points out that the 1981 Agreement does not explicitly rescind the 1951 Agreement or contain other language indicating a desire to replace that earlier contract. In *Steinbeck*, we observed that "parties to an agreement can mutually agree to terminate it by expressly assenting to its rescission while simultaneously entering into a new agreement dealing with the same subject matter." *Id.* at 200 (quoting *Jones v. Trice*, 608 N.Y.S.2d 688, 688 (App. Div. 1994)). Relying on that principle, we held that an author or his legatee may, under the existing-grantee exception, rescind an earlier grant of copyright and enter into a new contract conveying rights in the same work to the same grantee.[5] *See id.* at 200–04; *accord*

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[5] *Steinbeck* authorized a "[r]escission and [r]e-grant" scenario, 3 Nimmer § 11.07[E][2][b][iv], pursuant to which Elaine Steinbeck, the owner of the copyright in John Steinbeck's books, entered into a 1994 agreement re-granting rights to works originally granted in 1938. This scenario resulted in the author's statutory heirs losing their § 304 termination rights, because a post-1978 grant replaced a pre-1978 grant. *See Steinbeck*, 537 F.3d at 200. While Elaine Steinbeck owned the relevant copyrights, she shared the statutory § 304 termination rights with Steinbeck's sons from another marriage, and these separate parties never formed the majority necessary to terminate the 1934 grant under § 304(c). Thus, in *Steinbeck*, no § 304 termination notice was ever served. *Steinbeck* has been criticized for, in effect, permitting legatees to divest statutory heirs of their § 304 termination rights via contract, notwithstanding § 304(c)(5)'s admonition that termination "may be effected notwithstanding any agreement to the contrary." *See* 3 Nimmer § 11.07[E][2][b][iv] (noting that a rescission and re-grant "extinguishes the children's right to terminate based on conduct of their adversary").

Although we hold that the 1981 Agreement replaced the 1951 Agreement as the source of EMI's rights, this case neither implicates Nimmer's criticism nor conflicts with § 304(c)(5). Coots himself (as opposed to a legatee) executed the 1981 Agreement after serving a termination notice on EMI, and because Coots at that time owned both the statutory right to exercise termination and the post-termination interest that vested upon service of the notice, *see* 17 U.S.C. § 304(c)(1), (6)(B), no one else's termination rights were affected when Coots and EMI replaced the 1951 Agreement with the 1981 Agreement. Because the 1981 Agreement did not cause anyone else to lose termination rights that they otherwise could have exercised, it cannot be a forbidden "agreement to the contrary." *See* 3 Nimmer § 11.07[E][1] (defining an "agreement to the contrary" as any agreement that "results in the practical inability to terminate the grant of copyright

Milne, 430 F.3d at 1042–48. As we have already explained, however, an intention to enter into a substitute contract may be express or implied. *See DC Comics v. Pac. Pictures Corp.*, 545 F. App'x 678, 680 (9th Cir. 2013) (unpublished) (holding that under New York law, a 1992 copyright grant superseded a 1938 grant to the same grantee even though the latter agreement "d[id] not, in express terms, cancel the 1938 agreement"); 17B C.J.S. *Contracts* § 597 (noting that a contract replaces a previous one concerning the same subject matter if the "subsequent contract either explicitly rescinds the earlier instrument[] *or* deals with the subject matter . . . so comprehensively as to be complete within itself.") (emphasis added). By granting EMI the same rights that it already owned under the 1951 Agreement *in addition* to the new interest that vested in Coots upon service of the 1981 Termination Notice, the 1981 Agreement made it sufficiently clear that the parties intended to replace the earlier contract.

EMI cites the Ninth Circuit's decision in *Classic Media, Inc. v. Mewborn*, 532 F.3d 978 (9th Cir. 2008), for the proposition that a grant of already-granted rights does not replace the prior grant. *Mewborn*, however, is readily distinguishable. There, the defendant argued that a 1978 grant from the plaintiff—the daughter of

interest in a given work . . . under circumstances in which, but for the agreement, the ability to terminate would otherwise exist").

Eric Knight, who wrote "Lassie Come Home"—superseded a 1976 grant between the same parties, so that the plaintiff could not exercise § 304(c) termination rights against the earlier grant. The court disagreed, holding that although the 1978 grant purported to convey certain movie, TV, and radio rights to the defendant, the 1976 grant had already conveyed the same exact rights, so the conveyance of those rights in the 1978 grant was "a nullity." *Id.* at 986. In other words, the plaintiff's mere conveyance of the same rights twice did not show that the later grant superseded the earlier one. In *Mewborn*, however, the 1978 grant (1) conveyed ancillary rights that had not been conveyed by the 1976 grant, (2) stated that the plaintiff was conveying all of the rights mentioned in the grant only "to the extent such rights [were] owned by [her]," and (3) expressly provided that those rights were being conveyed "in addition to the rights granted . . . under and pursuant to" the 1976 grant. *Id.* at 981. Those three provisions, read together, unmistakably signaled the parties' intention for the later contract to coexist alongside the earlier one, rather than replace it. No similar intention is evident from the 1981 Agreement's terms.

Next, EMI points to § 3(a) of the 1981 Agreement, in which Coots represented that he had served and recorded the 1981 Termination Notice, and in which the parties agreed that the notice "shall for the purposes of this agreement and Section 304(c)(6)(D) of the Copyright Act of 1976 be deemed to have been served upon Grantee, in advance of any further grant of rights hereunder, and shall be deemed to take effect at the earliest date possible under the Copyright Act of 1976." J.A. 60. Under the 1976 Act, the "earliest date possible" on which the 1981 Termination Notice could have taken effect was in 1990, so EMI argues that § 3(a) reflects the parties' belief that the 1951 Agreement would continue in effect until 1990: if the parties thought that the 1981 Agreement would replace the 1951 Agreement of its own force, why should it matter whether or when the 1981 Termination Notice took effect?

EMI's argument, however, ignores the fact that the 1981 Termination Notice had already been served and (the parties thought at the time) recorded in the Copyright Office. That fact distinguishes this case from others in which an earlier grant was rescinded and replaced without the author's (or his statutory heirs') ever serving a termination notice, *see Steinbeck*, 537 F.3d at 202; *Milne*, 430 F.3d at 1040, and explains why the parties here clarified in § 1 of the 1981 Agreement that Coots's conveyance to EMI included "all United States reversionary and termination interests . . . including all rights reverted, reverting or to revert to Grantor . . . by reason of the termination." J.A. 60. Absent this assignment to EMI of Coots's future interest in the Song, it would not have been the least bit clear that the mere replacement of the 1951 Agreement by the 1981 Agreement would mean that the future interest that had *already vested* in Coots upon serving the 1981 Termination Notice would not, in fact, entitle him to ownership of the Song's copyright on the notice's effective date. *See* Benjamin Melniker & Harvey D. Melniker, *Termination of Transfers and Licenses Under the New Copyright Law*, 22 N.Y.L. Sch. L. Rev. 589, 604–05 (1977) (noting uncertainty regarding whether a termination notice would result in the termination of the grantee's rights if the to-be-terminated grant were replaced between service of the notice and its effective date). Given this uncertainty, it was sensible for the 1981 Agreement to make unmistakably clear that EMI would receive whatever rights would revert to Coots on the 1981 Termination Notice's effective date notwithstanding the replacement of the 1951 Agreement. *See, e.g.*, *In re SRC Holding Corp.*, 545 F.3d 661, 670 (8th Cir. 2008) ("Nothing prevents the parties from using a 'belt and suspenders' approach in drafting . . . in order to be 'doubly sure.'").

EMI points to one more provision of the 1981 Agreement: § 4(b), in which EMI agreed to pay royalties "as specified in the [1951 Agreement]" for "the period of the Extended Renewal Term of Copyright." J.A. 62. The district court reasoned that the "Extended Renewal Term of Copyright" began only in 1990, and thus that if the 1981 Agreement had replaced the 1951 Agreement immediately, Coots would not be entitled to any royalties from 1981 to 1990. *See Baldwin*, 989 F. Supp. 2d at 354. But the 1981 Agreement does not define the phrase "Extended Renewal Term of Copyright." Although often used to refer only to the nineteen-year extension added by the 1976 Act, *see, e.g.*, *Woods v. Bourne Co.*, 60 F.3d 978, 981, 982 (2d Cir. 1995), the phrase can naturally be understood to refer to the entire renewal term *as extended* by the 1976 Act. In fact, the statute itself arguably uses the phrase in this latter sense. *See* 17 U.S.C. § 304(c)(6)(F) ("Unless and until termination is effected under this subsection, the grant . . . continues in effect for the *remainder* of the extended renewal term.") (emphasis added). Accordingly, § 4(b) easily can be read to require EMI to pay royalties for however much of the renewal term—as extended—was still remaining after the contract was signed. In light of this plausible alternative reading, we do not think § 4(b) should move us to ignore the first half of § 1 of the 1981 Agreement, as EMI would have us do.

Finally, the district court relied on extrinsic evidence purportedly showing that the parties intended for EMI to receive only the future interest that vested in Coots upon service of the termination notice.[6] Consideration of extrinsic evidence is only permissible where the contract at issue is ambiguous; because we believe the 1981 Agreement is clear, resort to such evidence was inappropriate here. *See Rainbow v. Swisher*, 527 N.E.2d 258, 259 (N.Y. 1988). In any event, while the record is certainly replete with indications that the parties believed EMI would be receiving only nineteen years' worth of rights, we assign little significance to this evidence for the simple reason that (at the time) EMI *was* only acquiring nineteen years' worth of rights. There is no dispute that before the 1981 Agreement was executed, EMI owned Coots's renewal rights under the 1951 Agreement, and that absent the 1981 Agreement—assuming Coots recorded the 1981 Termination Notice—EMI's rights would terminate in 1990. After the 1981 Agreement was signed, its rights were (until the passage of the 1998 Act) scheduled to survive until 2009. But the undisputed *ends* of the 1981 Agreement

[6] This evidence included Baldwin's deposition testimony, as well as a 1981 letter from Krasilovsky to John Coots, Jr. *See Baldwin*, 989 F. Supp. 2d at 355.

say little about the *means* the parties employed to achieve them. Section 1 of the contract shows that they chose not only to have EMI receive the future interest that vested in Coots upon service of the termination notice, but also to replace the 1951 Agreement as the source of EMI's existing rights in the Song.

* * *

Under the correct understanding of the 1981 Agreement, Coots's failure to record the 1981 Termination Notice is irrelevant to the question whether EMI presently owns the copyright in the Song under the 1951 Agreement or under the 1981 Agreement. Whether EMI owns the Song's copyright by virtue of owning Coots's rights in the renewal term *qua* the renewal term, or instead by virtue of owning the post-termination interest conveyed back to it in the 1981 Agreement, its rights in the renewal term are traceable to the 1981 Agreement—not the 1951 Agreement—either way. And for deciding whether plaintiffs' termination notices pursuant to § 203 are valid, that is all that matters. Accordingly, we need not decide whether an unrecorded termination notice can serve to terminate a prior grant where the parties have reached an agreement under the existing-grantee exception.

II.

Our conclusion that the 1981 Agreement—a post-1978 agreement—is the source of EMI's rights in the Song means that Plaintiffs can terminate the 1981 Agreement under § 203. Because the 1951 Agreement is not operative, we need not address the district court's holding that Plaintiffs could not terminate the 1951 Agreement because Coots had "exercised" his § 304(c) termination rights by serving a termination notice and then "secur[ing] a substantial $100,000 bonus payment." *Baldwin*, 989 F. Supp. 2d at 355. The only remaining question, then, is whether the 1981 Agreement will be terminated by the 2007 Termination Notice or, instead, by the 2012 Termination Notice. We conclude that the 2007 Termination Notice will terminate the 1981 Agreement in 2016.

As noted, termination under § 203 is available for grants "executed by the author on or after January 1, 1978." 17 U.S.C. § 203(a). Where the author is dead, termination may be effected by individuals holding more than half of the author's termination interest as set forth in the statute. *Id.* § 203(a)(1), (2). Ordinarily, these individuals may effect termination "at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant." *Id.* § 203(a)(3). In this case, that period would begin in 2016. But "if the grant covers the right of publication of the work," an alternative calculation method applies: termination may be effected in the five-year period beginning "thirty-five years from the date of publication of the work under the grant or . . . forty years from the date of execution of the grant, whichever term ends earlier." *Id.* A termination notice may be served between two and ten years before the termination date. *Id.* § 203(a)(4)(A). The notice must "state the effective date of the termination," be recorded in the Copyright Office "as a condition to its taking effect," and comply with various other formalities prescribed by regulation. *Id.* § 203(a)(4); *see* 37 C.F.R. § 201.10.

EMI does not dispute that the 1981 Agreement was executed after January 1, 1978, that Plaintiffs own a sufficient percentage of Coots's termination interest, or that the 2007 Termination Notice complies with all of the necessary statutory and regulatory formalities. EMI does, however, advance two arguments in support of its position that the 2007 Termination Notice will not terminate the 1981 Agreement in 2016. Neither argument is persuasive.

First, EMI argues that § 203 termination is unavailable to Plaintiffs because Coots's children signed the 1981 Agreement, which was therefore not "executed by the author." This argument is meritless. As a factual matter, the 1981

Agreement plainly *was* executed by the author—namely, Coots—and specifically identified him alone as the "Grantor," who was "exclusively and solely possessed of any and all termination interests arising under Section 304." J.A. 59, 61. As a legal matter, moreover, the Coots children who signed the 1981 Agreement did not have any interest in the Song that they could have conveyed in 1981, because Coots was still alive; the future interest that vested upon service of the 1981 Termination Notice therefore vested solely in him. *See* 17 U.S.C. § 203(a)(1), (b)(2). Accordingly, while the 1981 Agreement purported to result in the transfer to EMI of all of the Coots children's "rights and interests" in the Song, J.A. 63, the only rights that the Coots children conceivably could have transferred at the time were the termination rights that they were scheduled to inherit by operation of the statute upon Coots's death. *See* 17 U.S.C. § 203(a)(2). Those rights, however, cannot be contracted away. *See id.* § 203(a)(5) ("Termination of the grant may be effected notwithstanding any agreement to the contrary . . . .").

EMI's second argument that the 2007 Termination Notice will not terminate the 1981 Agreement is based on the premise that the 1981 Agreement "covers the right to publication" of the Song. In EMI's view, the publication of the Song under the 1981 Agreement occurred in 1990, since "the 1981 Agreement was intended to provide EMI with the right to publish the song commencing upon the effective date of termination of the 1951 Agreement (in 1990)." Appellee's Br. 56. Under the alternative calculation method for grants that cover the right of publication, EMI argues, the earliest the 1981 Agreement can be terminated is 2021—i.e., forty years after it was executed. We disagree.

At the start, our conclusion that the 1981 Agreement became the operative source of EMI's rights immediately upon its execution suggests that even if EMI's premise that the 1981 Agreement "covers the right to publication" were sound, publication would have occurred under that agreement in 1981. Thus, even the alternative calculation method that EMI prefers would yield an earliest-possible termination date of 2016. Regardless, EMI's premise is incorrect. As relevant here, the statute defines "publication" as "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. § 101. As § 203 itself suggests, the publication of a work is a one-time event. *See id.* § 203(a)(3) (referring to "the date of publication"); *see also Marvel Characters, Inc.*, 310 F.3d at 282–83 (noting that under the 1909 Act, "an author was entitled to a copyright in his work for twenty-eight years from the date of its publication"); 1 Nimmer § 4.01[A] (listing the consequences that still attach to a work's publication date under the 1976 Act). In other words, publication happens when the work is *first* sold or otherwise distributed to the public. EMI does not claim, nor could it, that the Song was not made available to the public until 1990; in the original 1934 Agreement, EMI's predecessor Feist agreed to "publish [the Song] in saleable form" within one year. J.A. 41. As a result, it was the 1934 Agreement, and not the 1981 Agreement, that covered the right to publication of the Song.

The history of the alternative calculation method confirms that it does not apply here. This statutory provision was "added at the behest of book publishers, who argued that a straight period of thirty-five years from execution of the grant could give them a shorter time to exploit a work, insofar as publication contracts are often signed before the work is written, such that years may elapse before it is completed and published." 3 Nimmer § 11.05[A][2]. While EMI is correct that an analogous period will generally elapse between the execution of an agreement under the existing-grantee exception and the start of the renewal term extension that the agreement is meant to cover, the problem EMI identifies arose solely from the 1998 Act's further extension of the renewal term by twenty years. The Congress that passed the 1976 Act would not have expected § 203 termination to be available against new grants made under § 304(c)(6)(D)'s existing-grantee exception—which, at the time, could be executed a maximum of twenty-nine years before their expiration (i.e., the ten-year period between execution of the new grant and termination of the old grant, plus the nineteen-year period covered by the new one), less than the thirty-five years required by § 203. It is clear, then, that the timing issue that allegedly disadvantages EMI in this case is not addressed by the alternative calculation method for grants "cover[ing] the right of publication." We are not at liberty to fill that apparent lacuna by giving the term "publication" in § 203(a)(3) a meaning that it does not bear.

In sum: EMI does not dispute that the 1981 Agreement was executed on December 15, 1981. Because that grant was "executed by the author" and does not "cover the right of publication," it is terminable under § 203 starting on December 15, 2016—which is the effective date of termination stated in the 2007 Termination Notice. Accordingly, we conclude that the 2007 Termination Notice will terminate the 1981 Agreement on that date.

CONCLUSION

We have considered EMI's remaining arguments and find them to be without merit. For the reasons set forth above, the judgment of the district court is **REVERSED**, and this case is **REMANDED** for the entry of a declaratory judgment in Plaintiffs' favor.

UNITED STATES COPYRIGHT OFFICE

Copyright and the Music Marketplace

A REPORT OF THE REGISTER OF COPYRIGHTS

FEBRUARY 2015

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Preface

Few would dispute that music is culturally essential and economically important to the world we live in, but the reality is that both music creators and the innovators that support them are increasingly doing business in legal quicksand. As this report makes clear, this state of affairs neither furthers the copyright law nor befits a nation as creative as the United States.

The Copyright Office has previously highlighted the outmoded rules for the licensing of musical works and sound recordings as an area in significant need of reform.[1] Moreover, the Office has underscored the need for a comprehensive approach to copyright review and revision generally.[2] This is especially true in the case of music licensing—the problems in the music marketplace need to be evaluated as a whole, rather than as isolated or individual concerns of particular stakeholders.

While this view is hardly a surprising one for the U.S. Copyright Office, it is no simple matter to get one's arms around our complex system of music licensing, or to formulate potential avenues for change. For this reason, in early 2014, the Office undertook this study—with all industry participants invited to participate—to broadly consider the existing music marketplace.[3]

This report is the result of that effort. In addition to identifying the shortcomings of the current methods of licensing music in the United States, it offers an in-depth analysis of the law and industry practices, as well as a series of balanced recommendations to improve the music marketplace.

Acknowledgments

This report was prepared by the Office of the General Counsel, U.S. Copyright Office, following an exhaustive analysis of industry practices and considerable dialogue with music creators and the businesses that represent and invest in their interests, as well as music services and distributors and other interested parties. I am indebted to the staff who worked so tirelessly and thoughtfully to see the report to fruition and am confident that it will be a major resource for both Congress and the public.

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[1] *See* Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 334-35 (2013) ("To make a long story short, Congress could make a real difference regarding gridlock in the music marketplace.").

[2] *See The Register's Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intell. Prop. and the Internet of the H. Comm. on the Judiciary,* 113th Cong. 6 (2013) (statement of Maria A. Pallante, Register of Copyrights).

[3] *See* 17 U.S.C. § 701(b)(4) (noting that the Register of Copyrights shall conduct studies regarding copyright and other matters arising under Title 17 or the administration of the Copyright Office).

I doubt the report would have been possible without Jacqueline C. Charlesworth, General Counsel and Associate Register, who oversaw the complex research, public hearings, writing, and recommendations. It is difficult to say with certainty whether it is Jacqueline's outstanding skill set as a lawyer or her extensive background in the music industry that proved most valuable for this project, but either way she has produced a report that is fair, rational, and forward-thinking, a fitting framework for a field as culturally beloved and economically important as music is to the United States.

I am similarly indebted to Sarang (Sy) Damle, Deputy General Counsel, who provided additional leadership and numerous critical contributions, including deft drafting, dispassionate analysis, and deep regard for the intersection of music and technology.

I am very grateful as well for the contributions of Regan Smith, Assistant General Counsel, who oversaw the editing process and the final production of the report. Assistant General Counsel Steve Ruwe helped with the hearings and provided substantial research and analysis, especially in the area of statutory licensing. Likewise, Attorney-Advisors Rick Marshall and John Riley assisted with hearings, research and writing; John also prepared the helpful and impressive charts on the licensing and ratesetting processes that are included in the report. I also wish to recognize Michelle Choe, who is with the Copyright Office as a Barbara A. Ringer Honors Program Fellow, for her substantial research and writing efforts. Donald Stevens, also a Ringer Fellow, assisted with particular questions of international law, and Law Clerks Andrew Moore, Kyle Petersen, Maryna Koberidze, and Megan Hartnett provided valuable research support, for which I am thankful.

As always, the Copyright Office received significant and timely support from colleagues outside of Washington, D.C. I so appreciate Professor Rush Hicks and Luke Gilfeather of the Mike Curb College of Entertainment and Music Business at Belmont University for facilitating the roundtable held in historic Columbia Studio A on Music Row in Nashville. My thanks and appreciation, as well, to Professors David Nimmer and Neil Netanel of the UCLA School of Law for helping to facilitate the Los Angeles roundtable, and Professor Barton Beebe of NYU Law School for his assistance with the New York City roundtable. I would particularly like to acknowledge Representative Jerrold Nadler, who visited the New York roundtable to share his views about the importance of these issues.

Last but not least, I am indebted to the many organizations and individuals who provided written commentary and shared their frustrations, insights, and experiences in the roundtable discussions. I hope this report helps.

Maria A. Pallante
Register of Copyrights and Director
U.S. Copyright Office

TABLE OF CONTENTS

Executive Summary

The United States has the most innovative and influential music culture in the world, but much of the legal framework for licensing of music dates back to the early part of the twentieth century, long before the digital revolution in music. Our licensing system is founded on a view that the music marketplace requires a unique level of government regulation, much of it reflected in statutory licensing provisions of the Copyright Act. The Copyright Office believes that the time is ripe to question the existing paradigm for the licensing of musical works and sound recordings and consider meaningful change.

There is a widespread perception that our licensing system is broken. Songwriters and recording artists are concerned that they cannot make a living under the existing structure, which raises serious and systemic concerns for the future. Music publishers and performance rights organizations are frustrated that so much of their licensing activity is subject to government control, so they are constrained in the marketplace. Record labels and digital services complain that the licensing process is burdensome and inefficient, making it difficult to innovate.

While there is general consensus that the system needs attention, there is less agreement as to what should be done. In this report, after reviewing the existing framework and stakeholders' views, the Copyright Office offers a series of guiding principles and preliminary recommendations for change. The Office's proposals are meant to be contemplated together, rather than individually. With this approach, the Office seeks to present a series of balanced tradeoffs among the interested parties to create a fairer, more efficient, and more rational system for all.

A. Guiding Principles

The Copyright Office's study revealed broad consensus among study participants on four key principles:

- Music creators should be fairly compensated for their contributions.
- The licensing process should be more efficient.
- Market participants should have access to authoritative data to identify and license sound recordings and musical works.
- Usage and payment information should be transparent and accessible to rightsowners.

In addition to the above, based on the record in the proceeding, the Office has identified several additional principles that it believes should also guide any process of reform. These are:

- Government licensing processes should aspire to treat like uses of music alike.
- Government supervision should enable voluntary transactions while still supporting collective solutions.
- Ratesetting and enforcement of antitrust laws should be separately managed and addressed.
- A single, market-oriented ratesetting standard should apply to all music uses under statutory licenses.

The Office was guided by all of the above principles in developing its recommendations, which are summarized below.

B. Licensing Parity and Fair Compensation

Questions of licensing parity and fair compensation are closely tied to the relative treatment of music rights and rightsholders under the law. The Copyright Office believes that any overhaul of our music licensing system should strive to achieve greater consistency in the way it regulates (or does not regulate) analogous platforms and uses. With that goal in mind, the Office recommends the following:

- <u>Regulate musical works and sound recordings in a consistent manner</u>. The Office believes that, at least in the digital realm, sound recordings and the underlying musical works should stand on more equal footing. The Copyright Office's approach would offer a free market alternative to musical work owners, in the form of an opt-out right to withdraw specific categories of rights from government oversight in key areas where sound recording owners enjoy such benefits—namely, interactive streaming uses and downloads.
- <u>Extend the public performance right in sound recordings to terrestrial radio broadcasts</u>. As the Copyright Office has stated repeatedly for many years, the United States should adopt a terrestrial performance right for sound recordings. Apart from being inequitable to rightsholders—including by curtailing the reciprocal flow of royalties into the United States—the exemption of terrestrial radio from royalty obligations harms competing satellite and internet radio providers who must pay for the use of sound recordings. Assuming Congress adopts a terrestrial performance right, it would seem only logical that terrestrial uses should be included under the section 112 and 114 licenses that govern internet and satellite radio.

- Fully federalize pre-1972 sound recordings. As it concluded in its 2011 report on the topic, the Copyright Office believes that pre-1972 recordings—currently protected only under state law—should be brought within the scope of federal copyright law, with the same rights, exceptions, and limitations as more recently created sound recordings. The lack of federal protection for pre-1972 sound recordings impedes a fair marketplace. Record labels and artists are not paid for performances of these works by digital services, which (at least until recent court rulings under state law) were considered free from copyright liability on the sound recording side. At the same time, the owners of the musical works embodied in these sound recordings are paid for the same uses.

- Adopt a uniform market-based ratesetting standard for all government rates. While in some cases the law provides that the ratesetting authority should attempt to emulate a free market, in other cases it imposes a more policy-oriented approach that has led to below-market rates. There is no policy justification for a standard that requires music creators to subsidize those who seek to profit from their works. Accordingly, the Office calls for adoption of a single rate standard—whether denominated "willing buyer/willing seller" or "fair market value"—that is designed to achieve rates that would be negotiated in an unconstrained market.

C. Government's Role in Music Licensing

The government's involvement in the music marketplace is unusual and expansive relative to other kinds of works created and disseminated under the Copyright Act. In many cases, it compels copyright owners to license their works at government-set rates. Regulation of music publishers and songwriters is particularly pervasive: the two most significant areas of their market (mechanical and performance licensing) are subject to mandatory licensing and ratesetting. Antitrust concerns have been the traditional rationale for government intervention. To be sure, where particular actors engage in anticompetitive conduct in violation of antitrust laws, that conduct should be addressed. But compulsory licensing does more than that—it removes choice and control from all copyright owners that seek to protect and maximize the value of their assets.

Regardless of the historical justifications for government intervention, the Copyright Office believes that in today's world, certain aspects of the compulsory licensing processes can and should be relaxed. The below recommendations offer some ideas for how that might be accomplished in the various areas of the market where there is government involvement.

Performing Rights Organizations ("PROs") and the Consent Decrees

Many important issues have been raised in the Department of Justice's ("DOJ's") parallel consideration of the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") consent decrees. The Office endorses that review, and—in light of the significant impact of the decrees in today's performance-driven music market—hopes it will result in a productive reconsideration of the 75-year-old decrees. At the same time, the Copyright Office observes that it is Congress, not the DOJ, that has the ability to address the full range of issues that encumber our music licensing system, which go far beyond the consent decrees. In the area of performance rights, the Office offers the following recommendations:

- <u>Migrate all ratesetting to the Copyright Royalty Board ("CRB")</u>. The Copyright Office believes that allegations of anticompetitive conduct are worthy of evaluation (and, if appropriate, remedial action) separate and apart from the determination of fair rates for musical works. Each of these two critical policy objectives merits government attention in its own right. Accordingly, the Office proposes that the function of establishing rates for the public performance of musical works—currently the province of federal district courts under the consent decrees—be migrated to the CRB. Industry ratesetting is, of course, a primary function of the CRB, and the CRB has the benefit of experience assessing a broader spectrum of rate-related questions than the federal rate courts, as well as specific expertise in copyright law and economics.

- <u>Repeal section 114(i)</u>. Regardless of whether PRO ratesetting is migrated to the CRB, as further discussed below, the Copyright Office endorses the proposal that the prohibition in section 114(i) that currently prevents ratesetting tribunals from considering sound recording performance royalties be eliminated. Originally designed as a protective measure to benefit songwriters and publishers, it appears to be having the opposite effect.

- <u>Streamline interim ratesetting and require immediate payment of royalties</u>. Under the consent decrees, anyone who applies for a license has the right to perform musical works in a PRO's repertoire—without paying the PRO any compensation—pending the completion of negotiations or rate court proceedings resulting in an interim or final fee. The problem is exacerbated by the substantial burden and expense of litigating even an interim rate in federal court. The Copyright Office believes that to the extent a licensing entity is required to grant a license upon request, there should be a streamlined mechanism to set an interim royalty rate, and that the licensee should have to start paying immediately.

- <u>Permit opt-out from PROs for interactive streaming</u>. The Office believes that music publishers should be able to withdraw specific categories of licensing rights from their authorizations to the PROs. At least for now, the Office believes that withdrawal of performance rights should be limited to digital rights equivalent to those that the record labels are free to negotiate outside of sections 112 and 114—essentially, interactive streaming rights for digital services. Publishers that chose to opt out would be required to provide a list of their withdrawn works and other pertinent information to a central source, such as the general music rights organization ("GMRO") discussed below. In addition, the Office believes that songwriters affiliated with that publisher should retain the option of receiving their writer's share of royalties directly through their chosen licensing collective.

- Allow bundled licensing of mechanical and performance rights. Industry participants support increased bundling of rights—*i.e.*, reproduction, distribution, and performance rights—in unified licenses to facilitate greater licensing efficiency. Although bundling of sound recording rights occurs as a matter of course, various legal restrictions have prevented that same development on the musical work side. The Office believes that the government should pursue appropriate changes to the legal framework to encourage bundled licensing, which could eliminate redundant resources on the part of both licensors and licensees. This could include allowing the PROs and other entities to become music rights organizations ("MROs"), which would be authorized to license both performance and mechanical rights.

Mechanical Licensing and Section 115

Study participants highlighted the serious shortcomings of the 106-year old compulsory license for "mechanical" reproductions of musical works (*e.g.*, CDs, vinyl records and downloads) in section 115. On the copyright owner side, parties complained that the mandatory nature of the license does not permit them to control their works or seek higher royalties. On the licensee side, parties criticized section 115's requirement of song-by-song licensing, a daunting task in a world where online providers seek licenses for millions of works. In light of these concerns, the Office offers the following recommendations:

- Permit collective licensing of mechanical rights but with an opt-out right for interactive streaming and download uses. The Office is sympathetic to music publishers' arguments for elimination of the compulsory license in section 115 in favor of free market negotiations. But in light of the diffuse ownership of musical works, it seems clear that some sort of collective system would be necessary even in section 115's absence. The Office thus believes that, rather than eliminating section 115 altogether, section 115 should instead become the basis of a more flexible collective licensing system that will presumptively cover all mechanical uses except to the extent individual music publishers choose to opt out. At least initially, the mechanical opt-out right would extend to interactive streaming rights and downloading activities—uses where sound recording owners operate in the free market (but not physical goods, which have somewhat distinct licensing practices). As envisioned by the Office, the collective system would include MROs (as noted, with the ability to represent both performance and mechanical rights), a GMRO (that would collect for works or shares not represented by an MRO or covered by a direct deal), and individual publishers that choose to opt out. Licensees could thus achieve end-to-end coverage through the combination of MROs, the GMRO, and direct licensors.

- Establish blanket licensing for digital uses under section 115. To further facilitate the rights clearance process and eliminate user concerns about liability to unknown rightsowners, the Office believes that mechanical licensing, like performance licensing, should be offered on a blanket basis by those that administer it. This would mean that a licensee would need only to file a single notice with an MRO to obtain a repertoire-wide performance and mechanical license from that licensing entity. The move to a blanket system would allow marketplace entrants to launch their services—and begin paying royalties—more quickly.

- CRB ratesetting on an "as-needed" basis. The Office believes that the CRB should continue to set rates under the section 115 license, though with an important modification: as is now the case with performance rights, rather than establish rates across the board every five years, the CRB would set rates for particular uses only on an as-needed basis when an MRO and licensee were unsuccessful in reaching agreement. Other interested parties (such as other MROs and other users) could choose to join the relevant proceeding, in which case those parties would be bound by the CRB-determined rate.

- Ensure copyright owners possess audit rights. Publishers have long complained about the lack of an audit right under section 115. In that regard, section 115 is an outlier—such audit rights have been recognized under other statutory licenses. The Office believes that the mechanical licensing system should be amended to provide for an express audit right, with the particular logistics to be implemented through regulation.

- Maintain audiovisual uses in the free market. Record companies proposed extending compulsory blanket licensing to certain consumer audiovisual products—such as music videos, album cover videos, and lyric videos—uses that have traditionally required a synchronization license negotiated in the free market. The Office is sympathetic to the labels' concerns, but cannot at this time recommend that consumer synch uses be incorporated into a government-supervised licensing regime. The Office does not perceive a market failure that justifies creation of a new compulsory license, and the market appears to be responding to licensing needs for consumer audiovisual products.

Section 112 and 114 Licenses

One of the few things that seems to be working reasonably well in our licensing system is the statutory license regime under sections 112 and 114, which permits qualifying digital services to engage in noninteractive streaming activities at a CRB-determined (or otherwise agreed) rate. Although the differing ratesetting standards for these licenses—as well as some of the rates established under those standards—have been a source of controversy, from the record in this study, the licensing framework itself is generally well regarded. Notwithstanding the comparatively positive reviews of the section 112 and 114 licenses, there are a few relatively minor improvements that the Office believes should be considered:

- Consider ratesetting distinction between custom and noncustom radio. In 2009, the Second Circuit ruled that personalized radio services are eligible for the section 112 and 114 licenses. Although the Office has some reservations about that interpretation, there appears to be no overwhelming call to remove custom radio from the statutory regime. Nonetheless, within that regime, it may be appropriate to distinguish between custom and noncustom radio, as the substitutional effect of personalized radio on potentially competing interactive streaming services may be greater than that of services offering a completely noncustomized experience. While the issue could be addressed legislatively, this does not appear to be necessary, as the CRB has the discretion to set different rate tiers today when the record supports such an outcome.

- Allow fine-tuning of technical aspects of the license through the exercise of regulatory authority. Internet services have criticized a number of the detailed limitations that section 114 imposes on compulsory licensees. These include the so-called "sound recording performance complement," a restriction that limits the frequency with which songs from the same album or by the same artist may be played by the service, as well as a prohibition against announcing upcoming selections. But for the fact that they appear in the statute itself, such details would seem to be more appropriately the province of regulation. As suggested more generally below, Congress may wish to commit nuances like these to administrative oversight by the Copyright Office.

- Consider permitting SoundExchange to process record producer payments. Record producers—who make valuable creative contributions to sound recordings—are not among the parties entitled by statute to direct payment by SoundExchange. In some cases, an artist may provide a letter of direction requesting SoundExchange to pay the producer's share of income from the artist royalties collected by SoundExchange, which SoundExchange will honor. It has been suggested that this informal practice be recognized through a statutory amendment. Though it would be beneficial to hear more from artists on this issue, the Office agrees that in many instances producers are integral creators and that the proposal therefore merits consideration.

- Allow SoundExchange to terminate noncompliant licensees. Unlike section 115, sections 112 and 114 do not include a right to terminate a licensee that fails to account for and pay royalties. The Office does not see a justification for continued licensing of a user that is not meeting its obligations, and agrees that the section 112 and 114 statutory licenses should be amended to include a termination provision akin to that in section 115.

Public Broadcaster Statutory License

- Create a unified statutory licensing scheme for public broadcasters. Public broadcasters must engage in a multitude of negotiations and ratesetting proceedings in different fora to clear rights for their over-the-air and online activities. Especially in light of the relatively low royalty rates paid by public broadcasters, Office suggests that the ratesetting processes applicable to public broadcasters be consolidated within a unified license structure under section 118 under the auspices of the CRB, where they would likely be much more efficiently resolved.

D. Licensing Efficiency and Transparency

The Office believes that accurate, comprehensive, and accessible data, and increased transparency, are essential to a better functioning music licensing system. Authoritative data would benefit all participants in the marketplace for sound recordings and musical works, and facilitate a more efficient system. In addition, it is essential to make reliable usage and payment information available to rightsholders. To achieve these twin goals, the Office offers the following recommendations:

- Establish incentives through the statutory licensing scheme for existing market players to create an authoritative public database. The Copyright Office believes that any solution to the music data problem should not be built by the government but should instead leverage existing industry resources. Accordingly, the Office recommends that the government establish incentives through the statutory licensing regime to encourage private actors to coordinate their efforts and contribute to a publicly accessible and authoritative database, including by encouraging the adoption and dissemination of universal data standards. To facilitate this process, the Copyright Office should provide regulatory oversight regarding standards and goals.

- Establish transparency in direct deals. Throughout the study, a paramount concern of songwriters and recording artists has been transparency in the reporting and payment of writer and artist shares of royalties, especially in the context of direct deals negotiated by publishers and labels outside of the PROs and SoundExchange, which may involve substantial advances or equity arrangements. These concerns should be addressed as part of any updated licensing framework, especially one that allows publishers to opt out of the statutory licensing system and pursue direct negotiations. In the case of direct deals for rights covered by an MRO or SoundExchange, the Office recommends allowing songwriters and artists to elect to receive their shares of royalties from the licensee through their chosen licensing entity.

E. An Updated Music Licensing System

To implement the principles and recommendations laid out above, the Copyright Office is proposing an updated framework for the licensing of musical works. The basic components of this proposal are as follows:

- <u>MROs</u>. Under the Office's proposal, except to the extent they chose to opt out of the blanket statutory system, publishers and songwriters would license their public performance and mechanical rights through MROs.
  - An MRO could be any entity representing the musical works of publishers and songwriters with a market share in the mechanical and/or performance market above a certain minimum threshold, for example, 5%. Existing rights organizations, such as ASCAP, BMI, HFA and others, could thus qualify as MROs.
  - Each MRO would enjoy an antitrust exemption to negotiate performance and mechanical licenses collectively on behalf of its members—as would licensee groups negotiating with the MROs—with the CRB available to establish a rate in case of a dispute. But MROs could not coordinate with one another and would be subject to at least routine antitrust oversight.
  - Each MRO would be required to supply a complete list of the publishers, works, percentage shares and rights it represented, as well as the MRO's licensing contact information, to the GMRO, and would be obligated to keep that information current. MROs would not have to share all of their data for purposes of the public database. For example, there would be no need for an MRO to provide contact information for its members (other than those that opted out) since the MRO would be responsible for distributing royalties under the licenses it issued.
  - MROs would also be responsible for notifying the GMRO of any members that had exercised opt-out rights by providing the relevant opt-out information, including where a direct license might be sought, so potential licensees would know where to go for license authority.
- <u>GMRO</u>. Even though most licensing activity would be carried out by the MROs and directly licensing publishers, the hub of the new licensing structure would be the "general" MRO or GMRO. The GMRO would have certain important responsibilities:
  - First, the GMRO would be responsible for maintaining a publicly accessible database of musical works represented by each MRO, which

would incorporate data supplied by the MROs and other authoritative sources. The GMRO would actively gather missing data, reconcile conflicting data, and correct flawed data, and would also provide a process to handle competing ownership claims. In addition to musical work data, the GMRO would also incorporate sound recording data—presumably from SoundExchange—into the public database, and be responsible for developing additional data that matched sound recordings with musical works to facilitate more efficient licensing.

  - Second, the GMRO would also serve as the default licensing and collection agent for musical works (or shares of works) that licensees were unable to associate with an MRO or opt-out publisher. Services with usage-based payment obligations would transmit records of use for unmatched works, along with associated payments and an administrative fee, to the GMRO. The GMRO would then attempt to identify the MRO or individual copyright owners and, if successful, pay the royalties out. If unsuccessful, the GMRO would add the usage record to a public unclaimed royalties list and hold the funds for some period of time—*e.g.*, three years—to see if a claimant came forward. As is the case with SoundExchange, after that period, the GMRO could use any remaining unclaimed funds to help offset the costs of its operations.

- GMRO funding and resources. The Copyright Office believes that both copyright owners and users should provide support for the GMRO, as both groups will benefit from its activities. Under the Office's proposal, every MRO, as well as SoundExchange, would be required to contribute key elements of data to create and maintain a centralized music database. MROs would be responsible for allocating and distributing the vast majority of royalties. In exchange for these contributions on the part of copyright owners, the Office believes that most direct financial support for the GMRO should come from fees charged to users of the section 112, 114 and 115 licenses. Thus, although licensees would be paying royalties to MROs and individual publishers directly—and SoundExchange as well—they would have a separate obligation to pay a licensing surcharge to the GMRO. The surcharge to be paid by statutory licensees could be determined by the CRB based on the GMRO's costs (and without consideration of royalty rates) through a separate administrative process. The surcharge would be offset by administrative fees and other sources of income for the GMRO, including any "black box" funds unclaimed by copyright owners.

- Copyright Royalty Board improvements. Under the Copyright Office's proposal, ratesetting by the CRB would shift from a five-year cycle to a system under which the CRB would step in only as necessary when an MRO or SoundExchange and a licensee could not agree on a rate. The new model would create opportunities for combined ratesetting proceedings for noninteractive services (*e.g.*, internet, terrestrial, and satellite radio) encompassing both sound recordings and musical works. The Office recommends other procedural adjustments to the CRB as well—including adjustments to the statutorily prescribed litigation process and its settlement procedures. It would also be worthwhile to remove unnecessary procedural details in the statute that are better left to regulation by the CRB.

- Regulatory implementation. The Copyright Office recommends that if Congress acts to restructure the music licensing system, it would be most productive for the legislation to set out the essential elements of the updated system but leave the details to be implemented through regulation by the Copyright Office and, in ratesetting matters, the CRB. Such a construct would likely be more realistic to enact than a highly detailed statutory prescription—especially in the case of music licensing, where the particulars can be overwhelming.

- Further evaluation. Should Congress choose to embark upon a series of changes to the licensing system as described above, the Office recommends that the new system be evaluated by the Copyright Office after it has been in operation for a period of several years. Assuming the new licensing framework includes an opt-out mechanism, the efficacy of that process would be of particular interest. Congress could choose to narrow or expand opt-out rights as appropriate.

I. Introduction

The United States has the most innovative and influential music culture in the world, but our system for enabling the paid use of music—and ensuring compensation for its creators—lags far behind. The structures that evolved in the previous century to facilitate the lawful exploitation of musical works and sound recordings, while perhaps adequate for the era of discs and tapes, are under significant stress. From a copyright perspective, we are trying to deliver bits and bytes through a Victrola.

It is a testament to the irresistible power of music that industry and market participants have done their best to adapt the old methods, including pre-digital government policies, to embrace current technologies and consumer expectations. But the costs of failing to update our outmoded licensing methods are escalating. Even when distributors are perfectly willing to pay licensing fees, they may find it difficult to identify the owners of the music they use. Those seeking to launch new delivery platforms are constrained—and sometimes even defeated—by the complexities and expense of convoluted clearance processes. Perhaps most concerning is that many deeply talented songwriters and developing artists now question whether a career in music is realistic under the current regime.

As might be expected, many of the issues raised by the participants in this study of the music marketplace revolved around government mandates, in particular the role of the antitrust consent decrees governing the licensing of performance rights in musical works by performing rights organizations ("PROs"), the section 115 "mechanical" license for the reproduction and distribution of musical works, and the section 112 and 114 licenses for the digital performance of sound recordings.

There is a profound conviction on the part of music publishers and songwriters that government regulation of the rates for the reproduction, distribution, and public performance of musical works has significantly depressed the rates that would otherwise be paid for those uses in an unrestricted marketplace. The standards employed for the section 115 and PRO ratesetting proceedings—section 801(b)(1)'s four-factor test for mechanical uses and the "reasonable fee" standard of the consent decrees (which cannot take into account sound recording performance rates)—are perceived as producing below-market rates, especially when compared to rates paid for analogous uses of sound recordings. On the other side of the fence, licensees urge that government oversight is essential to forestall alleged monopolistic practices on the part of the PROs and large music publishers.

The PROs are viewed as both as a blessing and a threat. Licensees laud the efficiencies of the blanket licenses they offer while at the same time bemoaning the societies' perceived bargaining position as a result of that very breadth. Songwriters, for their part, are deeply concerned about the potential loss of transparency in reporting and payment, should major publishers opt to withdraw from the PROs and license performance rights directly—as some publishers have suggested they may do in a quest for higher rates than those set by the rate courts under the consent decrees.

With respect to the section 112 and 114 licenses for the performance of sound recordings, the debate has centered on the disparate rate standards for differing classes of digital users—the more malleable 801(b)(1) standard that is applied to satellite radio versus the willing buyer/willing seller standard for competing online radio services—as well as the overall burden and expense of the CRB ratesetting process. Internet radio providers complain that the CRB process has yielded rates that have required them to seek congressional intervention.

There are differing opinions as to how to handle pre-1972 sound recordings, which are currently outside of the ambit of federal copyright law but protected in varying degrees under differing state regimes. Some concur with the Copyright Office's 2011 recommendation that pre-1972 recordings should be brought fully within the scope of federal copyright protection, but others argue for a more limited fix or no fix at all. Meanwhile, since the inception of the study, three courts have held that the public performance of pre-1972 recordings is subject to protection under applicable state law, further complicating the licensing landscape.

And last but not least is the longstanding issue of whether terrestrial radio broadcasters should continue to be exempted under the Copyright Act from paying royalties for the performances of sound recordings that drive their multibillion dollar industry—a debate that has been sharpened as online radio services seek to compete with their terrestrial counterparts.

At the same time, stakeholders widely acknowledge that there is a need for universal data standards to facilitate the identification of musical works and sound recordings, and the licensing process generally. In particular, there is broad recognition of the necessity for reliable data to match sound recordings to the musical works they embody. But there is discord as to how to address these problems. Some market participants are willing to share the data they accumulate with the world, while others are reluctant to do so.

Despite the wide range of viewpoints expressed in the course of this study, the Office's review of the issues has confirmed one overarching point: that our music licensing system is in need of repair. The question, then, is how to fix it, in light of the often conflicting objectives of longtime industry participants with vested interests in traditional business models and infrastructure; digital distributors that do not produce or own music and for which music represents merely a cost of doing business; consumers whose appetite for music through varied platforms and devices only continues to grow; and individual creators whose very livelihoods are at stake. This report seeks to chart a path forward.

Given their complexity and significance, many of the issues addressed below would themselves be worthy of a separate report. But instead of focusing on each particular licensing process as an isolated problem, the goal of this study is to illuminate the system as a whole—including interrelated issues and concerns—to see if there may be a balanced set of changes that could provide benefits to all. Rather than present a detailed legislative proposal, then, with all of the intricacy that would entail, the report instead suggests some key principles and modifications that the Copyright Office believes would be useful in framing a better system.

The ideas described below are thus intended to serve as a useful framework for continuing discussion of how we might reinvent our music licensing system, rather than a fully developed answer. As Congress considers a range of potential amendments to our copyright laws, the Office hopes that interested parties will take advantage of this unique opportunity to improve our music licensing process for the digital age.

A. Study History

In April 2013, Congress, led by the House Judiciary Committee, began a comprehensive review of the nation's copyright laws to evaluate "whether the laws are still working in the digital age."[1] The myriad issues affecting the music industry have been a significant focus of that review.[2]

The Office initiated this study to illuminate critical concerns of the music marketplace and to identify potential avenues for change. On March 17, 2014, the Office published an initial Notice of Inquiry in the Federal Register (the "First Notice") requesting public comment on twenty-four subjects affecting the existing music licensing environment.[3]

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[1] Press Release, H. Comm. on the Judiciary, Chairman Goodlatte Announces Comprehensive Review of Copyright Laws (Apr. 24, 2013), http://judiciary.house.gov/index.cfm/2013/4/chairmangoodlatteannouncescomprehensivereviewofcopyrightlaw.

[2] Of the seventeen hearings that have been held so far as part of the congressional review, two were specifically dedicated to music licensing. *Music Licensing Under Title 17 (Part I & II): Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) ("*Music Licensing Hearings*"). Music industry representatives also participated in a number of other hearings. *See, e.g., Moral Rights, Termination Rights, Resale Royalty, and Copyright Term: Hearing Before the Subcomm. on Courts, Intell. Prop. and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014); *Section 512 of Title 17: Hearing Before the Subcomm. on Courts, Intell. Prop. and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014); *The Scope of Fair Use: Hearing Before the Subcomm. on Courts, Intell. Prop. and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014).

[3] Music Licensing Study: Notice and Request for Public Comment, 78 Fed. Reg. 14,739 (Mar. 17, 2014). This Notice of Inquiry, along with the Office's second Notice of Inquiry and Notice of Public Roundtables, are attached as Appendix A. A list of the parties who responded to the

The Office received 84 written comments in response to its notice, spanning a broad spectrum of interested parties, including music industry associations, service providers and technology companies, legal scholars, public interest groups, and individual artists and creators.[4]

In June 2014, the Office conducted three two-day public roundtables in Nashville, Los Angeles, and New York City.[5] The roundtables provided participants with the opportunity to share their views on the topics identified in the First Notice and other issues pertaining to our music licensing system and how it might be improved.

In addition, on July 23, 2014, the Office published a second Notice of Inquiry ("Second Notice") requesting further comments on a number of significant issues raised in earlier comments and discussed at the roundtables.[6] The Office received 51 substantive written comments in response to the Second Notice, again representing a wide variety of viewpoints, on these subjects.[7]

B. Licensing and Ratesetting Charts

The Office has prepared a series of charts to illustrate our current systems for licensing of musical works and sound recordings and the ratesetting procedures under the several statutory licenses, as well as how those processes would be altered as a result of the modifications proposed by the Office. These appear at the back of the study in Appendix D. The Office hopes that these charts will prove helpful to readers as they make their way through this report.

Office's Notices of Inquiry, along with a list of participants in the Office's public roundtables, is attached as Appendix B.

[4] The comments received in response to the First Notice are available on the Copyright Office website at http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/index.html. References to these comments in this document are by party name (abbreviated where appropriate) followed by "First Notice Comments" (*e.g.*, "DiMA First Notice Comments").

[5] *See* Music Licensing Study, 79 Fed. Reg. 25,626 (May 5, 2014). Transcripts of the proceedings at each of the three roundtables are available on the Copyright Office website at http://copyright.gov/docs/musiclicensingstudy/transcripts/.

[6] Music Licensing Study: Second Request for Comments, 79 Fed. Reg. 42,833 (July 23, 2014).

[7] The comments received in response to the Second Notice are available on the Copyright Office website at http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/extension_comments/. References to these comments in this document are by party name (abbreviated where appropriate) followed by "Second Notice Comments" (*e.g.*, "RIAA Second Notice Comments").

II. Music Licensing Landscape

Our rules for music licensing are complex and daunting even for those familiar with the terrain. To begin with, our licensing structures must address two different species of copyright—the sound recording and the musical work—residing in a single product. Each of these separate copyrights, in turn, itself represents several different exclusive rights that may be separately licensed, including the rights of reproduction, distribution, public performance, as well as the right to synchronize works with visual content.

The situation is further complicated by the fact that many licensing transactions are regulated by the government. But the government rules have not been implemented in a unified or systematic fashion. Instead, they represent a series of statutory and judicial mandates that came into effect at various points during the last century to address particular concerns of the day. And still more challenging is that not all licensing is conducted according to these government-mandated protocols. Some licensing is permitted to transpire in the private marketplace without government oversight. In addition, there are voluntary workarounds to the government processes—more efficient alternatives that have grown up like trees around the government rules and are now deeply rooted.

This section provides an introduction to our music licensing system and those who participate in it.[8] Before turning to the challenges we face and how they might be addressed, it is important to understand where we are and how we got here.

A. Copyright Overview

1. Brief History of Copyright Protection for Music

Congress passed the first federal copyright act in 1790.[9] That act did not provide express protection for musical compositions (or "musical works" in the parlance of the current Copyright Act), though such works could be registered as "books."[10] Then, in 1831, Congress amended the law to provide expressly that musical works were subject to federal copyright protection.[11]

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[8] As noted above, the Office has included charts in Appendix D of this report that provide a bird's-eye view of the licensing and ratesetting systems for music. The charts are intended as high-level references and do not capture every nuance or quirk of the system. A list of abbreviations used in the report is included as Appendix C.

[9] Act of May 31, 1790, ch. 15, 1 Stat. 124.

[10] *See Clayton v. Stone*, 5 F. Cas. 999, 1000 (C.C.S.D.N.Y. 1829) (No. 2872); I. Trotter Hardy, *Copyright and New Use Technologies*, 23 NOVA L. REV. 659, 664 (1999).

[11] Act of Feb. 3, 1831, ch. 16, 4 Stat. 436.

The 1831 amendment, however, provided owners of musical works with only the exclusive right to reproduce and distribute their compositions, *i.e.*, to print and sell sheet music, because, "[a]t the time, performances were considered the vehicle by which to spur the sale of sheet music."[12] In 1897, Congress expanded the rights of music owners to include the exclusive right to publicly perform their works.[13] With the 1909 Copyright Act, federal copyright protection for musical works was further extended by adding an exclusive right to make "mechanical" reproductions of songs in "phonorecords"—in those days, piano rolls, but in the modern era, vinyl records and CDs. At the same time, Congress limited the new phonorecord right by enacting a compulsory license for this use, a topic that is addressed in greater depth below.[14] And in 1995, Congress confirmed that an owner's exclusive right to reproduce and distribute phonorecords of musical works extends to digital phonorecord deliveries ("DPDs")—that is, the transmission of digital files embodying musical works.[15]

Over time, new technologies changed the way people consumed music, from buying and playing sheet music, to enjoying player pianos, to listening to sound recordings on a phonograph or stereo system.[16] But it was not until 1971, several decades after the widespread introduction of phonorecords, that Congress recognized artists' sound recordings as a distinct class of copyrighted works that were themselves deserving of federal copyright protection.[17] This federal protection, however, was limited to sound recordings fixed on or after February 15, 1972, and, until more recently, protected only the exclusive rights of reproduction, distribution, and preparation of derivative works. No exclusive right of public performance was granted.[18] Then, in 1995, Congress granted sound recording owners a limited public performance right for digital audio

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[12] *See* Maria A. Pallante, *ASCAP at 100*, 61 J. COPYRIGHT SOC'Y 545, 545-46 (2014).

[13] Act of Mar. 3, 1897, ch. 392, 29 Stat. 694; *see also* Zvi S. Rosen, *The Twilight of the Opera Pirates: A Prehistory of the Exclusive Right of Public Performance for Musical Compositions*, 24 CARDOZO ARTS & ENT. L.J. 1157, 1158-59 (2007).

[14] This report uses both the term "compulsory" and the term "statutory" when describing the section 112, 114, and 115 licenses.

[15] Digital Performance Right in Sound Recordings Act of 1995 ("DPRSRA"), Pub. L. No. 104-39, § 4, 109 Stat. 336, 344-48; *see also* 17 U.S.C. § 115(c)(3)(A).

[16] *See* U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS 7, 11 (2011) ("PRE-1972 SOUND RECORDINGS REPORT"); Michael Erlinger, Jr., *An Analog Solution in a Digital World: Providing Federal Copyright Protection for Pre-1972 Sound Recordings*, 16 UCLA ENT. L. REV. 45, 57-58 (2009).

[17] Pub. L. No. 92-140, 85 Stat. 391 (1971) ("Sound Recording Act of 1971"); *see generally* PRE-1972 SOUND RECORDINGS REPORT at 7-12.

[18] *See* PRE-1972 SOUND RECORDINGS REPORT at 12-14.

transmissions—though, as discussed below, that right was made subject to compulsory licensing under sections 112 and 114 of the Copyright Act.[19]

2. Musical Works Versus Sound Recordings

As the above history indicates, a musical recording encompasses two distinct works of authorship: the musical work, which is the underlying composition created by the songwriter or composer along with any accompanying lyrics, and the sound recording, which is the particular performance of the musical work that has been fixed in a recording medium such as CD or digital file. Because of this overlap, musical works and sound recordings are frequently confused. It is important to keep in mind, however, that these are separately copyrightable works.

A musical work can be in the form of sheet music, *i.e.*, notes and lyrics written on a page, or embodied in a phonorecord, *i.e.*, in a recording of the song.[20] A sound recording comprises the fixed sounds that make up the recording. The musical work and sound recording are separately protected, and can be separately owned, under copyright law.

3. Key Players in the Music Marketplace

Musical works and sound recordings can be—and often are—created, owned, and managed by different entities.

a. Songwriters

The authors of a musical work are composers, lyricists and/or songwriters.[21] A songwriter may contribute music, lyrics, or both.

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[19] DPRSRA §§ 2, 3. The digital performance right is also subject to a number of exceptions, including for transmissions to or within a business for use in the ordinary course of its business, for nonsubscription broadcast transmissions, and for certain geographically limited retransmissions of nonsubscription broadcast transmissions. 17 U.S.C. § 114(d)(1)(A), (B), (C)(ii), (C)(iv).

[20] The Copyright Act sometimes draws a distinction between "dramatic" musical works—that is, musical works that are part of a dramatic show such as an opera, ballet, or musical—and "nondramatic" musical works. For example, the compulsory license under section 115 for the making and distributing of phonorecords applies only to nondramatic works. *See* 17 U.S.C. § 115. In practice, however, the distinction drawn in section 115 does not appear especially consequential except when a licensee is seeking to use the work in the context of the dramatic production; for instance, a show tune that is recorded for release as an individual song is understood to be licensable under section 115.

[21] For ease of reference, this report will collectively refer to these creators of musical works as "songwriters."

The Songwriters Guild of America ("SGA") and Nashville Songwriters Association International ("NSAI") are well-known trade organizations that represent the general interests of songwriters. Another group, the Society of Composers and Lyricists ("SCL"), represents the interests of songwriters working specifically in the motion picture and television industries.

b. Music Publishers

Songwriters often enter into publishing agreements with music publishers. Under such an arrangement, the publisher may pay an advance to the songwriter against future royalty collections to help finance the songwriter's writing efforts. In addition, the publisher promotes and licenses the songwriter's works and collects royalties on the songwriter's behalf. In exchange, the songwriter assigns a portion of the copyright in the compositions he or she writes during the deal term to the publisher—traditionally 50%, but sometimes less—and the publisher is compensated by receiving a royalty share.[22] In some cases, a musical work has a single songwriter and a single publisher, and dividing royalties is relatively straightforward. But many songs have multiple songwriters, each with his or her own publisher and publishing deal. In such cases, it may be challenging to determine royalty shares—or "splits"—among the various parties.[23]

The three "major" music publishers—Sony/ATV Music Publishing ("Sony/ATV"), Warner/Chappell Music, and Universal Music Publishing Group ("UMPG")—together control over 60% of the music publishing market.[24] There are also a handful of mid-sized music publishers, such as Kobalt Music Group and BMG Chrysalis, and thousands of smaller music publishers, among them self-published songwriters. The National Music Publishers Association ("NMPA") and the Association of Independent Music Publishers ("AIMP") are two major trade organizations representing the interests of music publishers.[25] Another group, Interested Parties Advancing Copyright ("IPAC"), was established in Nashville in 2014 and includes independent publishers, administrators, business managers, and entertainment attorneys.[26]

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[22] DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 220 (8th ed. 2013) ("PASSMAN").

[23] *See generally* AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 329-44 (4th ed. 2010) ("KOHN").

[24] *See* Ed Christman, *First-Quarter Music Publishing Rankings: SONGS Surges Again*, BILLBOARD (May 12, 2014), http://www.billboard.com/biz/articles/news/publishing/6084783/first-quarter-music-publishing-rankings-songs-surges-again.

[25] NMPA & HFA First Notice Comments at 1.

[26] Nate Rau, *New Nashville Group to Push for Copyright Reform*, THE TENNESSEAN (May 25, 2014), http://www.tennessean.com/story/money/industries/music/2014/05/25/nashville-copyright-group-emerges/9513731.

c. Performing Rights Organizations ("PROs")

Songwriters and publishers almost always associate themselves with a PRO, which is responsible for licensing their public performance rights. The two largest PROs—the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI")—together represent around over 90% of the songs available for licensing in the United States.[27] ASCAP and BMI operate on a not-for-profit basis and, as discussed below, are subject to antitrust consent decrees that impose constraints on their membership and licensing practices. In ASCAP's case, this includes an express prohibition on licensing any rights other than public performance rights.

In addition to these larger PROs, there are two considerably smaller, for-profit PROs that license performance rights outside of direct government oversight. Nashville-based SESAC, Inc. was founded in the 1930s.[28] SESAC's market share of the performance rights market is unclear, but appears to be at least 5% and possibly higher.[29] Global Music Rights ("GMR"), a newcomer to the scene established in 2013, handles performance rights licensing for a select group of songwriters.[30] While ASCAP and BMI's consent decrees prohibit them from excluding potential members who are able to meet fairly minimal criteria,[31] SESAC and GMR have no such restriction and add new members by invitation only.[32]

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[27] *See* Ben Sisario, *Pandora Suit May Upend Century-Old Royalty Plan*, N.Y. TIMES (Feb. 13, 2014), http://www.nytimes.com/2014/02/14/business/media/pandora-suit-may-upend-century-old-royalty-plan.html.

[28] *About Us*, SESAC, http://www.sesac.com/about/about.aspx (last visited Jan. 26, 2014).

[29] *See* Chris Versace, *The Future of Streaming Music Rests With Congress*, FOX BUSINESS (June 23, 2014), http://www.foxbusiness.com/technology/2014/06/23/future-streaming-music-rests-with-congress (SESAC "controls approximately 5% of the market"); *In re Pandora Media, Inc.* ("*Pandora Ratesetting*"), 6 F. Supp. 3d 317, 351 & n.55 (S.D.N.Y. 2014) (noting that during license negotiations SESAC had used a 10% figure to describe its market share, but that the actual figure "is impossible to know with certainty").

[30] *See* GMR, http://www.globalmusicrights.com (last visited Jan. 30, 2015); *see also* Ed Christman, Gail Mitchell, and Andrew Hampp, *Pharrell to Leave ASCAP for Irving and Grimmet's Global Music Rights*, BILLBOARD (July 25, 2014), www.billboard.com/articles/business/6188942/pharrell-to-leave-ascap-for-irving-and-grimmets-global-music-rights; Ben Sisario, *New Venture Seeks Higher Royalties for Songwriters,* N.Y. TIMES (Oct. 29, 2014), http://www.nytimes.com/2014/10/30/business/media/new-venture-seeks-higher-royalties-for-songwriters.html.

[31] ASCAP must admit anyone who has published a single musical work or is actively engaged in the music publishing business; BMI similarly accepts anyone who has written at least one musical work that is likely to be "performed soon." *See United States v. ASCAP*, No. 41-1395, 2001 WL 1589999, 2001-02 Trade Cas. (CCH) ¶ 73,474, § XI (S.D.N.Y. June 11, 2001) ("ASCAP Consent Decree"); *United States v. BMI*, No. 64-civ-3787, 1966 U.S. Dist. LEXIS 10449, 1966 Trade Cas. (CCH) ¶ 71,941, § V (S.D.N.Y. 1966), *as amended by*, 1994 U.S. Dist. LEXIS 21476, 1996-1 Trade Cas.

d. Mechanical Rights Administrators

As examined in more depth below, the right to make and distribute phonorecords of musical works—*i.e.*, the mechanical right—is subject to compulsory licensing under section 115 of the Act. But in practice, because of the administrative burdens imposed by the license—including service of a notice on the copyright owner and monthly reporting of royalties on a song-by-song basis—mechanical licensing is often handled via third-party administrators.[33] The oldest and largest such organization is the Harry Fox Agency, Inc. ("HFA"), which was established by the NMPA in 1927 and today represents over 48,000 publishers in licensing and collection activities.[34] Mechanical licenses issued by HFA incorporate the terms of section 115, but with certain variations from the statutory provisions.[35] Another entity that assists with mechanical licensing is Music Reports, Inc. ("MRI"), which prepares and serves statutory notices on behalf of its clients and administers monthly royalty payments in keeping with the requirements of section 115.[36] Mechanical licenses are also issued and administered directly by music publishers in many instances.

e. Recording Artists and Producers

The creators of sound recordings typically include recording artists—that is, the singer or members of the band who are featured in the recording. The recording process is often managed by a producer, who supervises and contributes overall artistic vision to the project. Other "nonfeatured" musicians and vocalists may add their talents to the recording as well. Except with respect to digital performance rights falling under the section 114 statutory license,[37] featured artists are typically paid under their record company contracts, while nonfeatured performers are usually compensated at an hourly

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(CCH) ¶ 71,378 (S.D.N.Y. 1994). The most readable version of the current BMI consent decree is the version provided on the Department of Justice's ("DOJ's") website, and is the version cited throughout this report. *See United States v. BMI*, No. 64-civ-3787 (S.D.N.Y. Nov. 18, 1994) (final judgment) ("BMI Consent Decree"), *available at* http://www.justice.gov/atr/cases/f307400/307413.pdf.

[32] *Radio Music License Comm., Inc. v. SESAC*, 29 F. Supp. 3d 487, 498 (E.D. Pa. 2014); *Pandora Ratesetting*, 6 F. Supp. 3d at 351; GMR, http://www.globalmusicrights.com (last visited Jan. 30, 2015).

[33] KOHN at 771-72, 808-10.

[34] HARRY FOX AGENCY, http://www.harryfox.com (last visited Jan. 9, 2015).

[35] KOHN at 803-806. For example, HFA licenses allow licensees to account for royalties on a quarterly basis, as opposed to the monthly reporting required under section 115. *Become an HFA Licensee*, HARRY FOX AGENCY, http://www.harryfox.com/license_music/become_hfa_licensee.html (last visited Jan. 25, 2015).

[36] *See* MRI First Notice Comments at 1-3.

[37] *See* 17 U.S.C. § 114(g) (dividing statutory royalty proceeds among these groups).

rate based on their work on specific projects.[38] Producers may be paid a flat fee for their efforts and/or may be paid a royalty share by the featured artist out of the artist's earnings.[39]

The organization SoundExchange collects and pays royalties to featured and nonfeatured artists (as well as to record companies) for noninteractive streaming uses under the section 112 and 114 statutory licenses, and advocates for their interests in relation to those uses.[40] The Recording Academy, also known as the National Academy of Recording Arts and Sciences ("NARAS")—the organization responsible for the GRAMMY awards—represents musicians, producers, recording engineers, and other recording professionals on a wide range of industry matters.[41] The Future of Music Coalition ("FMC") advocates on behalf of individual music creators.[42] The American Federation of Musicians of the United States and Canada ("AFM") and Screen Actors Guild-American Federation of Television and Radio Artists ("SAG-AFTRA") are labor unions that represent the interests of nonfeatured musicians and vocalists.[43]

f. Record Companies

Most commercially successful sound recordings are the product of contractual relationships between recording artists and record labels.[44] Though levels of responsibility vary according to the specifics of individual recording contracts, a record label's usual role is to finance the production of sound recordings, promote the recordings (and sometimes the recording artists themselves), and arrange to distribute the recordings via physical and digital distribution channels.[45] Except in the case of noninteractive streaming uses that qualify for the section 112 and 114 licenses, record labels typically handle the licensing for the sound recordings they own.

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[38] *See Sound Recordings at a Glance*, SAG-AFTRA, http://www.sagaftra.org/files/sag/documents/soundrecordings_ataglance_2014.pdf (last visited Jan. 25, 2014).

[39] *See* Dan Daley, *Points of Survival: Producers Adapt to a New Economic Landscape in the Music Industry*, GRAMMY.COM (Sept. 1, 2010), http://www.grammy.com/news/points-of-survival; NARAS First Notice Comments at 5-6.

[40] Unlike royalties paid under section 114, royalties under the 112 license are not distributed directly to featured and nonfeatured artists, but instead are paid to the sound recording owner. *See* 17 U.S.C. § 114(g)(2); *see also* 17 U.S.C. § 112(e).

[41] NARAS First Notice Comments at 1.

[42] *About Us*, FUTURE OF MUSIC COALITION, https://www.futureofmusic.org/about (last visited Jan. 25, 2015).

[43] SAG-AFTRA & AFM First Notice Comments at 1-2.

[44] KOHN at 1454.

[45] PASSMAN at 63. Labels may also secure mechanical rights to musical works embodied in sound recordings.

In modern industry parlance, there are two classes of record labels: "major" labels and "independent" labels.[46] There are currently three major record labels: Universal Music Group ("UMG"), Sony Music Entertainment, Inc. ("SME"), and Warner Music Group ("WMG").[47] Independent labels are entities that are not wholly owned by one of the three major record labels. In the United States, there are currently hundreds of independent labels, which account for roughly 35% of domestic recording industry revenues.[48]

One notable feature of the modern music marketplace is the extent of common corporate ownership of major record labels and major music publishers: UMPG is owned by UMG (which in turn is owned by French media conglomerate Vivendi); the Sony Corporation owns SME and half of Sony/ATV; and Warner/Chappell Music is a division of WMG.[49]

The Recording Industry Association of America ("RIAA") and the American Association of Independent Music ("A2IM") are the two primary trade organizations representing the interests of record labels. The International Federation of the Phonographic Industry ("IFPI") represents record labels globally.[50] As noted above, SoundExchange—originally a division of the RIAA and later spun off as an independent entity[51]—represents the interests of the record labels in relation to the section 112 and 114 licenses.

g. Music Providers

There are a number of organizations that represent the interests of the thousands of music broadcasters and distributors—including radio and television stations, digital music companies, and physical and online record stores.

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[46] A2IM, the U.S. trade association that represents the interests of independent record labels, objects to the term "major label." According to A2IM, independent labels, collectively, represent 34.6% of the U.S. music market, making them "the largest music label industry segment." A2IM First Notice Comments at 1, 3.

[47] The three major labels all own and operate smaller labels. For example Atlantic Records and Rhino Entertainment Company are both owned by WMG.

[48] A2IM First Notice Comments at 1, 3.

[49] Sebastian Torrelio, *Jody Gerson Appointed Chairman and CEO of Universal Music Publishing Group*, VARIETY (Aug. 1, 2014), http://variety.com/2014/biz/news/jody-gerson-appointed-chairman-and-ceo-of-universal-music-publishing-group-1201273829; *Profile: Sony Corp*, REUTERS, http://www.reuters.com/finance/stocks/companyProfile?symbol=SNE.N; *About Us*, WARNER/CHAPPELL MUSIC, http://www.warnerchappell.com/about (last visited Jan. 25, 2015).

[50] IFPI, http://www.ifpi.org (last visited Jan. 15, 2015).

[51] Glenn Peoples, *SoundExchange Distributes Record $153 Million in Q3, Celebrates 10-Year Anniversary*, BILLBOARD (Oct. 4, 2014), http://www.billboard.com/biz/articles/news/5748060/soundexchange-distributes-record-153-million-in-q3-celebrates-10-year.

The National Association of Broadcasters ("NAB") is the main trade organization representing terrestrial (AM/FM) radio and television broadcasters.[52] Broadcasters have also established a number of "music license committees" that collectively negotiate licensing arrangements with the PROs. These include the Radio Music License Committee ("RMLC"),[53] the Television Music License Committee ("TMLC"),[54] the National Religious Broadcasters Music License Committee ("NRBMLC") and the National Religious Broadcasters Noncommercial Music License Committee ("NRBNMLC").[55] National Public Radio ("NPR") operates and advocates on behalf of public radio stations.

The Digital Media Association ("DiMA") is a national trade organization that advocates for digital music and media companies, such as Pandora, Rhapsody, Apple, and YouTube.[56]

CTIA–The Wireless Association ("CTIA")[57] represents the wireless communications industry, and the Computer and Communications Industry Association ("CCIA") represents a broad range of technology companies.[58]

Music Business Association ("Music Biz"), formerly the National Association of Recording Merchandisers, includes many physical and digital distributors of music in its membership.[59]

h. Consumers

Last but not least, there are music fans. As digital technologies continue to evolve, individual users interact with music more and more in ways that implicate copyright—they copy it, share it, and remix it with other content.

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52 NAB First Notice Comments at 1.

53 RMLC First Notice Comments at 1.

54 TMLC First Notice Comments at 1.

55 NRBMLC First Notice Comments at 2-3; NRBNMLC First Notice Comments at 1-2. The National Cable & Telecommunications Association ("NCTA"), which represents cable operators, has its own music license committee to negotiate PRO licenses for public performances of music in cable operators' local programming. *See* NCTA, Comments Submitted in Response to the DOJ's Antitrust Consent Decree Review at 1 (Aug. 6, 2014), *available at* http://www.justice.gov/atr/cases/ascapbmi/comments/307982.pdf.

56 DiMA First Notice Comments at 1.

57 CTIA First Notice Comments at 2-4.

58 CCIA Second Notice Comments at 1.

59 *About*, MUSIC BUSINESS ASSOCIATION, http://musicbiz.org/about (last visited Jan. 25, 2015).

A number of groups represent the interests of music consumers in policy matters, including Public Knowledge and the Consumer Federation of America ("CFA").[60]

B. Licensing Musical Works

1. Exclusive Rights in Musical Works

The owner of a musical work possesses exclusive rights under the Copyright Act, including the right to authorize others to exploit the following exclusive rights: the right to make and distribute copies (*e.g.*, sheet music) or phonorecords (*e.g.*, CDs and digital audio files) of the work (the so-called "mechanical" right);[61] the right to create derivative works (*e.g.*, a new work based on an existing composition);[62] the right to display the work publicly (*e.g.*, by posting lyrics on a website);[63] and the right to perform the work publicly (*e.g.*, in a live venue or broadcast).[64] Although it is not specified in section 106 of the Act, as a matter of business practice, the music industry also recognizes the right to synchronize musical works to visual content (*e.g.*, in a music video). The synchronization (or "synch" right) is a species of the reproduction right and may also implicate the derivative work right.[65]

The music industry relies on different entities to license and administer rights in musical works, principally because of a variety of legal restrictions and industry practices that have grown up over time. This balkanized licensing scheme was not overly problematic during the analog age, when determining the boundaries between rights was relatively straightforward. In pre-digital days, radio and record distributors represented distinct commercial channels with different licensing needs. Today, however, digital providers often merge these roles. As a result, the demarcations between traditional licensing categories are no longer as clear—especially with respect to the relation between reproduction and distribution rights, on the one hand, and public performance, on the other. The current complexity of the music licensing marketplace is attributable at least in part to the blurring of the traditional lines of exploitation.

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[60] CFA & Public Knowledge First Notice Comments at 1; *About Us*, PUBLIC KNOWLEDGE, https://www.publicknowledge.org/about-us (last visited Jan. 25, 2015).

[61] 17 U.S.C. § 106(1), (3).

[62] 17 U.S.C. § 106(2).

[63] 17 U.S.C. § 106(5).

[64] 17 U.S.C. § 106(4).

[65] *See Buffalo Broad. Co., Inc., v. ASCAP*, 744 F.2d 917, 920 (2d Cir. 1984) ("The 'synch' right is a form of the reproduction right also created by statute as one of the exclusive rights enjoyed by the copyright owner." (citing 17 U.S.C. § 106(1))); *Agee v. Paramount Commc'ns, Inc.*, 59 F.3d 317, 321 (2d Cir. 1995) (observing that a defendant "might have infringed [plaintiff's] exclusive right to prepare derivative works" by synchronizing music to an audiovisual work, but the court "need not resolve that question" as copying (and a defense to this right) were already proven).

2. Reproduction and Distribution Rights

a. Historical Background

Until the early twentieth century, owners of musical works were compensated primarily through the reproduction and distribution of sheet music. Sales of sheet music were a significant source of revenue for music publishers for a long time.[66] And prices for sheet music were, as they are today, set in the free market.[67]

By the early 1900s, however, technological advances made music available for the first time via "mechanical" renderings of songs captured in player piano rolls and phonograph records.[68] Although music publishers insisted that physical embodiments of their works were copies, the Supreme Court held otherwise in the 1908 case *White-Smith Music Publishing v. Apollo*, reasoning that such reproductions were not in a form that human beings could "see and read."[69]

With the enactment of the 1909 Copyright Act, however, Congress overrode the Court's decision and recognized copyright owners' exclusive right to make and distribute, and authorize the making and distribution, of phonorecords—*i.e.*, mechanical reproductions—of musical works.[70] At the same time, Congress was concerned about a lack of competition in the marketplace—in particular, it was alleged that the Aeolian Company, a manufacturer of player pianos, was seeking to buy up exclusive rights from publishers to create a monopoly for piano rolls.[71] To address that concern, Congress simultaneously created a compulsory license for mechanical reproductions of musical works—the first compulsory license in U.S. copyright law—establishing a statutory rate of 2 cents per copy.[72]

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[66] *See* KOHN at 674. By 1919, a single department store chain—Woolworth's—was selling over 200 million copies of sheet music. *Id.* at 6.

[67] Sheet music was generally sold for 10 cents per copy. *Id.* at 6.

[68] *Id.* at 6-7.

[69] *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 8-9, 17-18 (1908).

[70] H.R. REP. NO. 60-2222, at 6-8 (1909); s*ee also Miller v. Goody*, 139 F. Supp. 176, 182 (S.D.N.Y. 1956).

[71] H.R. REP. NO. 59-7083, pt. 2, at 5 (1907); RUSSELL SANJEK UPDATED BY DAVID SANJEK, PENNIES FROM HEAVEN 22-23 (1996).

[72] H.R. REP. NO. 60-2222, at 7-8; Copyright Act of 1909, Pub. L. No. 60-349, §1(e), 35 Stat. 1075, 1075-76. Adjusted for inflation, the 2 cent rate would be more than 50 cents today. *Music Licensing Hearings* (statement of David M. Israelite, President and Chief Executive Officer, NMPA).

Though it has been amended several times, the 1909 compulsory license, originally set forth in section 1(e) of the Act,[73] continues in force today. In the Copyright Act of 1976, Congress recodified the compulsory license in section 115, and raised the statutory rate to 2.75 cents.[74] At that time, Congress also created the Copyright Royalty Tribunal ("CRT")—with five commissioners appointed by the President—to adjust the royalty rate thereafter.[75] The CRT was replaced in 1993 by the Copyright Arbitration Royalty Panel ("CARP") system; rather than permanent appointees, the CARP arbitrators were convened for specific rate proceedings.[76] The CARP system, in turn, was replaced in 2004 by the current system, the Copyright Royalty Board ("CRB"), which is composed of three administrative judges appointed by the Librarian of Congress.[77]

In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 ("DPRSRA"), which, in addition to granting a digital performance right for sound recordings, amended section 115 to expressly cover the reproduction and distribution of musical works by digital transmission, or DPDs.[78] The 1995 legislation recognized what

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[73] Copyright Act of 1909 § 1(e).

[74] H.R. REP. NO. 94-1476, at 111 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5726. Notably, the Register of Copyrights had proposed elimination of the compulsory license in the process leading up to the adoption of the 1976 Copyright Act, but music publishers and composers ultimately chose to oppose such a change, opting instead for the three-quarter cent rate increase. *See* U.S. COPYRIGHT OFFICE, 88TH CONG., REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 33, 36 (Comm. Print 1961) ("GENERAL REVISION OF COPYRIGHT REPORT"); S. REP. NO. 94-473, at 91-92 (1975); *see also Music Licensing Reform: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 109th Cong. (2005) ("*Music Licensing Reform Hearing*") (statement of Marybeth Peters, Register of Copyrights), *available at* http://copyright.gov/docs/regstat071205.html (stating that publishers and songwriters were concerned that elimination of the statutory license would cause "unnecessary disruptions in the music industry").

[75] Copyright Act of 1976, Pub. L. No. 94-553, §§ 801-802, 90 Stat. 2541, 2594-96.

[76] Copyright Royalty Tribunal Reform Act of 1993, Pub. No. 103-198, § 802, 107 Stat. 2304, 2305 (1993).

[77] 17 U.S.C. §§ 801-805; Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341. The statute calls the ratesetting body the "Copyright Royalty Judges." *See* 17 U.S.C. § 801. But it is more commonly referred to as the "Copyright Royalty Board," including in the regulations, and this report uses that convention. *See* 37 C.F.R. § 301.1 ("The Copyright Royalty Board is the institutional entity in the Library of Congress that will house the Copyright Royalty Judges . . . .").

[78] *See* S. REP. NO. 104-128, at 10 (1995), *reprinted in* 1995 U.S.C.C.A.N. 356, 357 ("The purpose of [this Act] is to ensure that performing artists, record companies and others whose livelihood depends upon effective copyright protection for sound recordings, will be protected as new technologies affect the ways in which their creative works are used. . . . In addition, the bill clarifies the application of the existing reproduction and distribution rights of musical work and

is often referred to as "pass-through" licensing for DPDs, in that it allows a section 115 licensee, such as a record label, to authorize a third-party service to distribute DPDs of the works covered under its license.[79]

Significantly, the express recognition of digital transmissions of musical works as a right covered by section 115 led to a lengthy rulemaking proceeding commenced by the Copyright Office in 2001 to determine the scope and application of the section 115 compulsory license with respect to various uses, which included the question whether interactive streaming services were required to procure mechanical licenses under section 115 in addition to performance licenses.[80] In 2008, recognizing that streaming services make and rely upon server copies and other reproductions of musical works in order to operate, the Office concluded that streaming services could utilize the section 115 compulsory licensing process to cover the reproductions made to facilitate streaming.[81] In 2009, the CRB adopted the first statutory rates and terms for interactive streaming services.[82] As a result of these developments, on-demand streaming services seek both mechanical and PRO licenses for the musical works they use.

b. Mechanical Rights Licensing

Statutory Licensing

Under section 115, those who seek to make and distribute reproductions of a musical work may obtain a license to do so by serving a notice of intent ("NOI") on the copyright owner, no later than thirty days after making, and before distributing, any phonorecords.[83] Once a person has served the NOI, the person must provide statements of account and pay the statutorily prescribed royalties on a monthly basis.[84] If the name and address of the owner of the work cannot be identified from the public records of the

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sound recording copyright owners in the context of certain digital transmissions."); *see also* 17 U.S.C. § 115(c)(3)(A).

[79] 17 U.S.C. § 115(c)(3)(A).

[80] Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 73 Fed. Reg. 40,802, 40,804-05 (July 18, 2008).

[81] Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 73 Fed. Reg. 66,173, 66,174 (Nov. 7, 2008) ("The interim regulation clarifies that (1) whenever there is a transmission that results in a DPD, all reproductions made for the purpose of making the DPD are also included as part of the DPD, and (2) limited downloads qualify as DPDs.").

[82] Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. 4510, 4514-15 (Jan. 26, 2009); 37 C.F.R. §§ 385.1-385.5, 385.10-385.17.

[83] 17 U.S.C. § 115(b)(1).

[84] 17 U.S.C. § 115(c)(5).

Copyright Office, the user may file the NOI with the Office.[85] In that case, the user must pay a filing fee to the Office but does not need to deposit royalties.[86]

The compulsory license under section 115 is available only after a recording has been made and distributed to the public under the authority of the copyright owner.[87] Consequently, the initial recording of a musical work, or "first use," does not fall under the compulsory license, and the copyright owner has the authority to determine whether and how the work is first reproduced and distributed. Once a work is eligible for statutory licensing, section 115 limits the way the work can be exploited. A section 115 license includes the right to make a musical arrangement of the song but does not permit the user to change the basic melody or fundamental character of the work.[88]

As noted above, the CRB is the administrative body responsible for establishing statutory rates and terms under the section 115 license, a process that by statute takes place every five years.[89] While copyright owners and users are free to negotiate voluntary licenses that depart from the statutory rates and terms, in practical effect the CRB-set rate acts as a ceiling for what the owner may charge. Rates for the license are established under a standard set forth in section 801(b)(1) of the Copyright Act, which requires the CRB to weigh several policy-oriented objectives:

> (A) To maximize the availability of creative works to the public.
>
> (B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions.
>
> (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
>
> (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.[90]

The rates currently applicable under section 115 were the result of an industry-wide negotiated agreement that was submitted to the CRB as a settlement of the most recent

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[85] 17 U.S.C. § 115(b)(1).

[86] *See* 17 U.S.C. § 115(c)(1); 37 C.F.R. § 201.18(f)(3).

[87] KOHN at 792-93; *see* 17 U.S.C. § 115(a)(1).

[88] 17 U.S.C. § 115(a)(2).

[89] KOHN at 742; 17 U.S.C. § 804(b)(4).

[90] 17 U.S.C. § 801(b)(1).

ratesetting proceeding.[91] The current rate to make and distribute permanent downloads or physical phonorecords of a musical work is 9.1 cents per copy.[92] For ringtones, the rate is 24 cents per use.[93] The royalty rate to make reproductions of musical works in connection with interactive streaming, limited download services, and certain other services is a percentage of the service's revenue ranging from 10.5% to 12%, subject to certain minimum royalty floors, and after deducting royalties paid by the service for the public performance of those works.[94] It may seem counterintuitive that ringtones—which typically use only short excerpts of musical works—have a significantly higher royalty rate than full-length reproductions. Because ringtones abbreviate the full-length work, it was not immediately clear whether ringtones were eligible for the section 115 license. As a result, many ringtone sellers entered into privately negotiated licensing arrangements with publishers at rates well above the statutory rate for the full use of the song.[95] In 2006, the Copyright Office resolved the section 115 issue, opining that ringtones were subject to compulsory licensing.[96] But in the ensuing ratesetting proceeding before the CRB, music publishers were able to introduce the previously negotiated agreements as marketplace benchmarks, and as a result secured a much higher rate for ringtones than the rate for full songs.[97]

Voluntary Licenses

Section 115 provides that a license that is voluntarily negotiated between a copyright owner and user will be given effect in lieu of the rates and terms set by the CRB.[98] Although the use of the section 115 statutory license has increased in recent years with the advent of digital providers seeking to clear large quantities of licenses, mechanical licensing is still largely accomplished through voluntary licenses that are issued through

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[91] Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords, 78 Fed. Reg. 67,938, 67,939 (Nov. 12, 2013).

[92] For songs over five minutes, the rate is higher—1.75 cents per minute or fraction thereof. 37 C.F.R. § 385.3(a).

[93] 37 C.F.R. § 385.3(b).

[94] 37 C.F.R. §§ 385.12-385.14, 385.23.

[95] Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. 64,303, 64,308-09 (Nov. 1, 2006) (discussing "voluntary license agreements granting the labels the right to create ringtones at specified mutually-negotiated royalty rates").

[96] *Id.* at 64,303.

[97] Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. at 4517-18; *id.* at 4522 (explaining that those licenses constitute "valuable rate evidence from the marketplace for" ringtones but not for "other products at issue in this proceeding (*i.e.*, CDs and permanent downloads)").

[98] 17 U.S.C. § 115(c)(3)(E)(i).

a mechanical licensing agency such as HFA or by the publisher directly.[99] While HFA and other licensors typically incorporate the key elements of section 115 into their direct licenses, they may also vary those terms to some degree, such as by permitting quarterly accountings rather than the monthly statements required under the statute.[100] That said, as observed above, the terms of the statutory license act as a ghost in the attic, effectively establishing the maximum amount a copyright owner can seek under a negotiated mechanical license.[101]

Recent Reform Efforts

The last significant legislative effort to modernize mechanical licensing took place nearly a decade ago. In 2006, Representatives Lamar Smith and Howard Berman introduced the Section 115 Reform Act ("SIRA").[102] SIRA would have created a blanket mechanical license for digital services, while leaving the remainder of section 115 intact for physical reproductions (and also not affecting performance rights).

SIRA included several notable features.[103] It would have established a "general designated agent" with the possibility of additional designated agents provided they represented at least 15% of the music publishing market. Copyright owners would elect to be represented by a designated agent, with the general designated agent representing any copyright owners that failed to make such an election. Each designated agent would have been required to maintain a searchable electronic database of musical works represented by that agent. The cost of establishing such databases would have been shared by designated agents and licensees, with cost-sharing amounts determined by the CRB. The CRB would also have established rates and terms for the license itself, and there would have been an interim ratesetting mechanism for new types of services. There were also provisions addressing distribution of unclaimed funds and audit rights. SIRA enjoyed support from key industry participants, including NMPA, DiMA, SGA, and the PROs.[104] Although the bill was forwarded to the full Judiciary Committee, due to opposition from other parties, it was not reported out.[105]

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[99] W. Jonathan Cardi, *Über-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 841-42 (2007).

[100] KOHN at 771.

[101] *Id.* at 771-72.

[102] SIRA, H.R. 5553, 109th Cong. (2006). SIRA was later incorporated into the Copyright Modernization Act of 2006, H.R. 6052, 109th Cong. (2006).

[103] *See generally* Copyright Modernization Act of 2006, H.R. 6052; Skyla Mitchell, *Reforming Section 115: Escape from the Byzantine World of Mechanical Licensing*, 24 CARDOZO ARTS & ENT. L.J. 1239, 1271 (2007).

[104] Mitchell, *Reforming Section 115: Escape from the Byzantine World of Mechanical Licensing* at 1277. Groups such as Public Knowledge and the Electronic Frontier Foundation opposed SIRA because

SIRA followed—and was perhaps an industry response to—an earlier 2005 proposal from the Copyright Office. Then-Register of Copyrights Marybeth Peters testified before Congress to propose a "21st Century Music Reform Act."[106] Among other things, that proposal would have effectively repealed the section 115 statutory license, and would have authorized the establishment of "music rights organizations" ("MROs") that could license both performance and mechanical rights on a blanket basis. The proposal also conditioned an MRO's recovery of statutory damages on the MRO having made publicly available the list of works it was authorized to license. While industry participants agreed in principle with the basic goals of the Copyright Office's proposal, they expressed concerns about many of its specifics, including the lack of a limit on the number of MROs, antitrust issues, and administrative burdens.[107]

3. Public Performance Rights

a. The PROs

As mentioned above, although musical compositions were expressly made subject to copyright protection starting in 1831, Congress did not grant music creators the exclusive right to publicly perform their compositions until 1897.[108] Though this right represented a new way for copyright owners to derive profit from their musical works, the sheer number and fleeting nature of public performances made it impossible for copyright owners to individually negotiate with each user for every use, or detect every case of infringement.[109] ASCAP was established in 1914, followed by other PROs, to

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of its provisions regarding temporary copies and recognition that interactive streaming involves the making of DPDs. *Id.* at 1277-81.

[105] *See Reforming Section 115 of the Copyright Act for the Digital Age: Hearing Before the Subcomm. on Courts, the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 110th Cong. 4 (2007) ("*Reforming Section 115 Hearing*") (statement of Rep. Howard Coble).

[106] *See generally Copyright Office Views on Music Licensing Reform: Hearing Before the Subcomm. on Courts, the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 109th Cong. 21-36 (2005) ("*Copyright Office Views on Music Licensing Reform Hearing*") (statement of Marybeth Peters, Register of Copyrights).

[107] *Id.* at 56-57 (letter from Jonathan Potter, Executive Director, DiMA); *id.* at 59-60 (letter from Steven M. Marks, RIAA); *id.* at 99 (comments of ASCAP); *id.* at 62-64 (comments of NMPA).

[108] *See* Steve Wilf, *The Making of the Post-War Paradigm in American Intellectual Property Law*, 31 COLUM. J.L. & ARTS 139, 176 (2008); Noel L. Hillman, *Intractable Consent: A Legislative Solution to the Problem of Aging Consent Decrees in United States v. ASCAP and United States v. BMI*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 733, 737 (1998).

[109] *BMI v. CBS*, 441 U.S. 1, 4-5 (1979); *see also Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 891 (S.D.N.Y. 1948).

address the logistical issue of how to license and collect payment for the public performance of musical works in a wide range of settings.[110]

Today, the PROs provide various different types of licenses depending upon the nature of the use. Anyone who publicly performs a musical work may obtain a license from a PRO, including terrestrial, satellite and internet radio stations, broadcast and cable television stations, online services, bars, restaurants, live performance venues, and commercial establishments that play background music.

Most commonly, licensees obtain a blanket license, which allows the licensee to publicly perform any of the musical works in a PRO's repertoire for a flat fee or a percentage of total revenues.[111] Some users opt for a blanket license due to its broad coverage of musical works and relative simplicity as compared to other types of licenses. Large commercial establishments such as bars, restaurants, concert venues, stores, and hotels often enter into blanket licenses to cover their uses, paying either a percentage of gross revenues or an annual flat fee, depending on the establishment and the type and amount of use.[112] Terrestrial radio stations obtain blanket licenses from PROs as well, usually by means of the RMLC.[113] Many television stations, through the TMLC, also obtain blanket licenses.[114]

Less commonly used licenses include the per-program or per-segment license, which allows the licensee to publicly perform any of the musical works in the PRO's repertoire for specified programs or parts of their programming, in exchange for a flat fee or a percentage of that program's advertising revenue.[115] Unlike a blanket license, the per-program or per-segment license requires more detailed reporting information, including program titles, the specific music selections used, and usage dates, making the license more burdensome for the licensee to administer.[116]

Users can also license music directly from music publishers through a direct license or a source license. A direct license is simply a license agreement directly negotiated

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[110] *BMI v. CBS*, 441 U.S. at 4-5*; see also Alden-Rochelle*, 80 F. Supp. at 891.

[111] *Meredith Corp.*, 1 F. Supp. 3d at 190; *BMI v. CBS*, 441 U.S. at 5.

[112] *See* KOHN at 1263, 1275-80. The Copyright Act exempts many small commercial establishments from the need to obtain a public performance license. *See* 17 U.S.C. § 110(5).

[113] David Oxenford, *What is the RMLC, And Why Should a Radio Station Pay Their Bill?*, BROAD. L. BLOG (Aug. 24, 2012), http://www.broadcastlawblog.com/2012/08/articles/what-is-the-rmlc-and-why-should-a-radio-station-pay-their-bill.

[114] *Meredith Corp.*, 1 F. Supp. 3d at 189-90.

[115] *See generally* Lauren M. Bilasz, *Note: Copyrights, Campaigns, and the Collective Administration of Performance Rights: A Call to End Blanket Licensing of Political Events*, 32 CARDOZO L.REV. 305, 323 & nn.111-112 (2010) (descriptions of each license).

[116] *See, e.g.*, KOHN at 1266 (discussing per-program licenses).

between the copyright owner and the user who intends to publicly perform the musical work. Source licenses are commonly used in the motion picture industry, because the PROs are prohibited from licensing public performance rights directly to movie theater owners.[117] Instead, film producers license public performance rights for the music used in films at the same time as the synchronization rights, and pass the performance rights along to the theaters that will be showing their films.[118] In the context of motion pictures, source licenses do not typically encompass non-theatrical performances, such as on television. Thus, television stations, cable companies, and online services such as Netflix and Hulu must obtain public performance licenses from the PROs to cover the public performance of musical works in the shows and movies they transmit to end users.[119]

b. Antitrust Oversight

Basic Antitrust Principles

Unlike the mechanical right, the public performance of musical works is not subject to compulsory licensing under the Copyright Act. But, as described below, ASCAP and BMI are subject to government antitrust regulation through longstanding consent decrees. And while neither SESAC nor GMR is subject to such direct antitrust regulation, each, of course, must abide by generally applicable antitrust law, which is enforceable by the government or through private causes of action. SESAC, for example, has recently been the subject of private antitrust suits, as discussed below. A detailed explanation of the antitrust rationale that underlies the PRO consent decrees is beyond the scope of this study. But a brief discussion of some basic antitrust principles may be helpful in understanding the motivation behind the decrees.

Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several [s]tates."[120] As the Supreme Court has opined, however, "Congress could not have intended a literal interpretation of the word 'every,'" and as a result, courts

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[117] This prohibition was a result of antitrust litigation brought by movie theater owners in the 1940s. *Alden-Rochelle*, 80 F. Supp. 888; s*ee also* Christian Seyfert, *Copyright and Anti-Trust Law: Public Performance Rights Licensing of Musical Works into Audiovisual Media* 6, 20 (Sept. 1, 2005) (unpublished LL.M. thesis, Golden Gate University School of Law), *available at* http://digitalcommons.law.ggu.edu/theses/13 at 19.

[118] *See id.* at 19.

[119] *Id.*; *see also* Netflix First Notice Comments at 1-2; *ASCAP Reports Increased Revenues in 2011*, ASCAP (Mar. 8, 2012), http://www.ascap.com/press/2012/0308_ascap-reports.aspx (reflecting blanket licenses with Netflix and Hulu). Licensing of performance rights from SESAC and GMR occurs without direct antitrust oversight, and those smaller PROs may refuse to license their repertoires to potential licensees.

[120] 15 U.S.C. § 1.

"analyze[] most restraints under the so-called 'rule of reason.'"[121] The rule of reason test requires a court to not only find a restraint of trade, but also determine whether that restraint is unreasonable.[122] The Supreme Court has also recognized, however, that "[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable."[123] Thus, certain arrangements—including price-fixing agreements—are deemed per se violations of section 1.[124]

A "tying" arrangement is another kind of business practice that raises antitrust concerns. A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product."[125] Such arrangements are unlawful "if the seller has 'appreciable economic power' in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market."[126] But as the Federal Trade Commission ("FTC") observes, "[t]he law on tying is changing."[127] While the Supreme Court "has treated some tie-ins as per se illegal in the past, lower courts have started to apply the more flexible 'rule of reason' to assess the competitive effects of tied sales."[128]

Department of Justice Consent Decrees

Since 1941, ASCAP and BMI's licensing practices have been subject to antitrust consent decrees overseen by the Antitrust Division of the DOJ and enforced by federal district courts in New York City.[129] Those consent decrees were implemented in reaction to alleged anticompetitive practices of ASCAP and BMI. Specifically, when originally formed, both PROs acquired the exclusive right to negotiate members' public performance rights, and forbade their members from entering into direct licensing

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[121] *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 342-43 (1982).

[122] *Associated Press v. United States*, 326 U.S. 1, 27 (1945).

[123] *Arizona*, 457 U.S. at 343-44.

[124] *Id.* at 344-45.

[125] *N. Pac Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

[126] *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 4662 (1992).

[127] *Tying the Sale of Two Products*, FTC, http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/tying-sale-two-products (last visited Jan. 26, 2015).

[128] *Id.*

[129] *See generally United States v. BMI*, 275 F.3d 168, 171-72 (2d Cir. 2001) (describing the history); *see also Antitrust Consent Decree Review*, U.S. DOJ, http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html (last visited Jan. 26, 2015).

arrangements. Additionally, both offered only blanket licenses covering all of the music in their respective repertoires.[130]

In the 1930s, the DOJ's Antitrust Division investigated ASCAP for anticompetitive conduct—specifically that ASCAP's licensing arrangements constituted price-fixing and/or unlawful tying.[131] The government subsequently filed federal court actions in 1934 and 1941, arguing that the exclusive blanket license—as the only license offered at the time—was an unlawful restraint of trade and that ASCAP was charging arbitrary prices as a result of an illegal copyright pool.[132] While the first case was never fully litigated after the government was granted a mid-trial continuance, the latter action was settled with the imposition of a consent decree in 1941.[133] That consent decree has been modified twice, first in 1950 and most recently in 2001.[134] The United States also pursued antitrust claims against BMI, resulting in a similar consent decree in 1941.[135] The 1941 BMI consent decree was superseded by a new decree in 1966, which was last amended in 1994.[136]

Although the ASCAP and BMI consent decrees are not identical, they share many of the same features. As most relevant here, the PROs may only acquire nonexclusive rights to license members' public performance rights; must grant a license to any user that applies, on terms that do not discriminate against similarly situated licensees; and must accept any songwriter or music publisher that applies to be a member, as long as the writer or publisher meets certain minimum standards.[137]

ASCAP and BMI are also required to offer alternative licenses to the blanket license. One option is the adjustable fee blanket license, a blanket license with a carve-out that reduces the flat fee to account for music directly licensed from PRO members. Under the consent decrees, ASCAP and BMI must also provide, when requested, "through-to-the-audience" licenses to broadcast networks that cover performances not only by the networks themselves, but also by affiliated stations that further transmit those

[130] Christian Seyfert, *Copyright and Anti-Trust Law: Public Performance Rights Licensing of Musical Works into Audiovisual Media* at 6, 20*; see also* Wilf at 177.

[131] Seyfert, *Copyright and Anti-Trust Law: Public Performance Rights Licensing of Musical Works into Audiovisual Media* at 20-21.

[132] *BMI v. CBS*, 441 U.S. at 10.

[133] Seyfert, *Copyright and Anti-Trust Law: Public Performance Rights Licensing of Musical Works into Audiovisual Media* at 20-21.

[134] *BMI v. CBS*, 441 U.S. at 11.

[135] *BMI v. CBS*, 441 U.S. at 12 n.20.

[136] Seyfert, *Copyright and Anti-Trust Law: Public Performance Rights Licensing of Musical Works into Audiovisual Media* at 22; *see also* BMI Consent Decree.

[137] ASCAP Consent Decree §§ IV.B-C, VI, VIII, XI; BMI Consent Decree §§ IV.A, V, VIII.

performances downstream.[138] ASCAP and BMI are also required to provide per-program and per-segment licenses, as are described above.[139]

ASCAP is expressly barred from licensing any rights other than its members' public performance rights (*i.e.*, ASCAP may not license mechanical or synchronization rights).[140] Although BMI's consent decree lacks a similar prohibition, in practice BMI does not license any rights other than public performance rights.[141]

Finally, and perhaps most significantly, prospective licensees that are unable to agree to a royalty rate with ASCAP or BMI may seek a determination of a reasonable license fee from one of two federal district court judges in the Southern District of New York.[142] The rate court procedures are discussed in greater detail below.

In response to requests by ASCAP and BMI to modify certain provisions of their decrees, the DOJ's Antitrust Division announced in June 2014 that it would be evaluating the consent decrees, and has solicited and received extensive public comments on whether and how the decrees might be amended.[143] Specifically, both ASCAP and BMI seek to modify the consent decrees to permit partial grants of rights, to replace the current ratesetting process with expedited arbitration, and to allow ASCAP and BMI to provide bundled licenses that include multiple rights in musical works.[144] The DOJ has expressed its intent to "examine the operation and effectiveness of the Consent Decrees," particularly in light of the changes in the way music has been delivered and consumed since the most recent amendments to those decrees.[145] At the same time, the DOJ is

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[138] ASCAP Consent Decree § V; BMI Consent Decree § IX.

[139] ASCAP Consent Decree §§ II.J-K, VII; BMI Consent Decree § VIII.B. Note that under the ASCAP consent decree, the per-segment license has a number of conditions that must be met before it can be used. ASCAP Consent Decree § VII.

[140] ASCAP Consent Decree § IV.A.

[141] *See* BMI, Comments on Department of Commerce Green Paper at 4-5 (Nov. 13, 2013), *available at* http://www.ntia.doc.gov/files/ntia/bmi_comments.pdf.

[142] ASCAP Consent Decree § IX; BMI Consent Decree § XIV.

[143] *Antitrust Consent Decree Review*, U.S. DOJ, http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html (last visited Jan. 26, 2015).

[144] ASCAP, Comments Submitted in Response to the DOJ's Antitrust Consent Decree Review at 18, 22, 31 (Aug. 6, 2014), *available at* http://www.justice.gov/atr/cases/ascapbmi/comments/307803.pdf ("ASCAP Antitrust Consent Decree Review Comments"); BMI, Comments Submitted in Response to the DOJ's Antitrust Consent Decree Review at 2 (Aug. 6, 2014), *available at* http://www.justice.gov/atr/cases/ascapbmi/comments/307859.pdf ("BMI Antitrust Consent Decree Review Comments").

[145] *Antitrust Consent Decree Review*, U.S. DOJ, http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html (last visited Jan. 26, 2015).

conducting a related investigation to determine whether there has been a coordinated effort among music publishers and PROs to raise royalty rates.[146]

Key Antitrust Cases

In addition to the DOJ actions that led to the adoption of the consent decrees, PRO practices have been the subject of private antitrust actions, including a number related to the consent decrees. The decisions in these cases serve to highlight courts' approach to the collective licensing of public performance rights and administration of the consent decrees.

In the 1979 Supreme Court case of *BMI v. CBS*, CBS had sued ASCAP and BMI, alleging that the blanket license violated antitrust laws by constituting "illegal price fixing, an unlawful tying arrangement, a concerted refusal to deal, and a misuse of copyrights."[147] Rather than declaring the blanket licenses per se unlawful, the Court held that they should be evaluated under a "rule of reason" test, observing that a blanket license could be useful to address the problem of negotiating thousands of individual licenses. The Court also noted as relevant the fact that there were no "legal, practical, or conspiratorial impediment[s]" to obtaining direct licenses, indicating licensees have a real choice in the direct license as an alternative to the blanket license.[148] On remand, the court of appeals upheld the blanket license under the rule of reason, explaining that it did not unreasonably restrain competition because CBS could feasibly obtain direct licenses from copyright owners.[149]

After the *BMI v. CBS* litigation, a number of other courts examined the blanket license, and sustained it against antitrust challenges under rule-of-reason analysis. In *Buffalo Broadcasting v. ASCAP*, the Second Circuit concluded that, in the context of local television stations, the blanket license did not violate the Sherman Act because per-program licenses, direct licenses, and source licenses were realistic alternatives to the blanket license.[150] A federal district court in the District of Columbia reached a similar conclusion with respect to cable stations.[151]

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[146] Ed Christman, *Dept. of Justice Sends Doc Requests, Investigating UMPG, Sony/ATV, BMI and ASCAP Over Possible "Coordination,"* BILLBOARD (July 13, 2014), http://www.billboard.com/biz/articles/news/publishing/6157513/dept-of-justice-sends-doc-requests-investigating-umpg-sonyatv. Members of the DOJ Antitrust Division attended and observed the Office's roundtables for this study in Nashville and New York.

[147] *BMI v. CBS*, 441 U.S. at 6.

[148] *Id.* at 24.

[149] *CBS v. ASCAP*, 620 F.2d 930, 938-39 (2d Cir. 1980).

[150] *Buffalo Broad. v. ASCAP*, 744 F.2d at 926-32; *see also id.* at 934 (Winter, J., concurring) ("[S]o long as composers or [publishers] have no horizontal agreement among themselves to refrain from

More recent litigation has involved royalty rate disputes. In 2012, the Second Circuit addressed rate disputes involving ASCAP and BMI, on the one hand, and DMX, a background music service, on the other, regarding the rate to be paid for an adjustable-fee blanket license.[152] In arguing for a lower rate, DMX pointed to direct licenses it had entered into with a number of copyright owners, most of them smaller publishers, on relatively favorable terms for DMX.[153] DMX, however, also relied on a direct license from Sony/ATV, a major music publisher. That deal gave Sony/ATV a pro rata share of the same annual rate as other smaller publishers, but also provided Sony a $2.4 million advance and a $300,000 administrative fee.[154] The court found this and the other direct deals entered into by DMX to be persuasive benchmarks and that the rate courts reasonably considered DMX's direct licenses in their rate determinations. Although the PROs argued that the substantial advance paid to Sony/ATV rendered that license an inadequate basis to set rates for the remainder of publishers covered by PRO licenses, the court of appeals affirmed the rates adopted by the rate courts.[155]

There has also been recent litigation between the PROs and Pandora, the internet radio service. In 2011 and 2013, respectively, in response to demands by their major publisher members, ASCAP and BMI both amended their rules to allow music publishers to withdraw from PRO representation the right to license their public performance rights for "new media" uses—*i.e.*, digital streaming services—while still allowing the PROs to license to other outlets on their behalf.[156] As a result, Pandora—faced with a potential loss of PRO licensing authority for the major publishers' catalogs—proceeded to negotiate licenses directly with EMI Music Publishing Ltd. ("EMI"),[157] Sony/ATV and UMPG at varying rates that brought the publishers higher fees than those they were receiving under the PRO system. Pandora, however, challenged the publisher's partial withdrawal of rights before both the ASCAP and BMI rate courts. In each case—though applying slightly differing logic—the court ruled that under the terms of the consent

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source or direct licensing and there is no other artificial barrier, such as a statute, to their use, a non-exclusive blanket license cannot restrain competition.").

151 *Nat'l Cable Television Ass'n, Inc. v. BMI*, 772 F. Supp. 614, 628 (D.D.C. 1991).

152 *BMI v. DMX*, 683 F.3d at 35, 43.

153 *Id.* at 38.

154 *Id.*

155 *Id.* at 47-49.

156 *In re Pandora Media, Inc*., Nos. 12-cv-8035, 41-cv-1395, 2013 WL 5211927, at *2 (S.D.N.Y. Sept. 17, 2013); *BMI v. Pandora Media, Inc.*, Nos. 13-cv-4037, 64-cv-3787, 2013 WL 6697788, at *2-3 (S.D.N.Y. Dec. 19, 2013).

157 Not long afterward, EMI's music catalog was bought by Sony/ATV. *In re Pandora*, 2013 WL 5211927, at *3.

decrees, music publishers could not withdraw selected rights; rather, a publisher's song catalog must be either "all in" or "all out" of the PRO.[158]

Following these rulings, the district court held a bench trial and issued a decision on the merits of the rate dispute between ASCAP and Pandora.[159] Relying on Pandora's negotiated agreements with the major publishers as benchmarks, ASCAP sought a rate of 1.85% of revenues for 2011-2012, 2.50% for 2013, and 3.00% for 2014-2015.[160] The court determined that a rate of 1.85% of revenues with no increase was appropriate for the entire period. In so concluding, the court rejected ASCAP's reliance on the higher-priced licensing agreements with the major publishers, concluding that Sony/ATV and UMPG had engaged in improper negotiation tactics, such as declining to provide lists of the works the publishers represented so that Pandora could remove those works from its service in the event of a failure to reach agreement.[161] The *Pandora* decision is addressed in greater depth in Part IV.

SESAC has also recently been the target of antitrust suits by local television stations and the RMLC, both of which have accused SESAC of engaging in anticompetitive conduct by taking steps to make its blanket license the only viable option for these users, such as by unreasonably and steeply raising the cost of the per-program license and imposing penalties on publishers that engage in direct licensing.[162] In October 2014, the local television stations and SESAC agreed to a settlement in which SESAC agreed to pay $58.5 million to the television stations and to provide a per-program license in addition to a blanket license beginning January 1, 2016.[163] The RMLC suit against SESAC remains pending.

c. Consent Decree Procedures

As noted, ASCAP and BMI are required by their consent decrees to grant a nonexclusive license to publicly perform all of the works in their repertoires to any potential licensee who makes a written application.[164] An entity that seeks a public performance license begins the process by submitting such a request to the PRO. In the absence of an established rate for the applicant's use, the PRO and the applicant may then engage in

[158] *In re Pandora*, 2013 WL 5211927, at *5-7; *BMI, v. Pandora*, 2013 WL 6697788, at *3-4.

[159] *Pandora Ratesetting*, 6 F. Supp. 3d at 321-22.

[160] *Id.* at 354.

[161] *Id.* at 357-61.

[162] *Meredith Corp.*, 1 F. Supp. 3d at 192-93; *RMLC v. SESAC*, 29 F. Supp. 3d at 492-94.

[163] Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement at 1-2, 5, *Meredith Corp.*, 1 F. Supp. 3d 180 (No. 09-cv-9177). TMLC, which was not a party to the litigation, was also a signatory to the settlement. *Id.* at 1 n.2.

[164] ASCAP Consent Decree § VI; BMI Consent Decree § IV.A.

negotiations regarding the appropriate rate.[165] Significantly, however, under both consent decrees, the mere submission of the application gives the applicant the right immediately to being using the musical works in the PROs' repertoires without payment of any fee or compensation during the pendency of negotiations or a ratesetting proceeding.[166]

If the PRO and licensee are unable to agree on a fee, either party may apply for a determination of a reasonable fee by the applicable rate court.[167] The term "rate court" is a bit of a misnomer, however; as noted above, rate disputes are handled by the federal district judge in the Southern District of New York who has been assigned ongoing responsibility for administration of the relevant consent decree.[168] Currently, the ASCAP decree and ratesetting cases are overseen by Judge Denise Cote, and Judge Louis L. Stanton oversees these matters with respect to BMI.

In a rate court proceeding, the PRO has the burden of proving that the royalty rate it seeks is "reasonable," and if the court determines that the proposed rate is not reasonable, it will determine a reasonable rate itself.[169] In determining a reasonable fee, the rate court is tasked with assessing the fair market value of the license, *i.e.*, "what a license applicant would pay in an arm's length transaction."[170] But antitrust concerns also play a direct role: according to the Second Circuit, the rate courts are also obligated to "tak[e] into account the fact that the PRO, as a monopolist, exercises disproportionate power over the market for music rights."[171]

Since negotiations between PROs and potential licensees—as well as rate court proceedings—can be lengthy, an applicant or a PRO may apply to the rate court to fix an interim rate, pending final determination of the applicable rate. Under the two decrees, such interim fees are supposed to be set by the court within three to four months.[172] Once the rate court fixes the interim rate, the licensee must pay the interim fee

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165 ASCAP Consent Decree § IX.F; BMI Consent Decree § XIV.A.

166 ASCAP Consent Decree § IX.E; BMI Consent Decree § XIV.A.

167 ASCAP Consent Decree § IX.A; BMI Consent Decree § XIV.A.

168 Paul Fakler, *Music Copyright Royalty Rate-Setting Litigation: Practice Before the Copyright Royalty Board and How It Differs from ASCAP and BMI Rate Court Litigation*, 33 THE LICENSING J. 1, 5 (2013), *available* at http://www.arentfox.com/sites/default/files/FaklerLicensingJournalArticle.pdf.

169 ASCAP Consent Decree § IX.B-D; BMI Consent Decree § XIV.A.

170 *Pandora Ratesetting*, 6 F. Supp. 3d at 353 (citation omitted).

171 *BMI v. DMX*, 683 F.3d at 45 (internal quotation marks, citations, and alterations omitted).

172 The interim fee proceedings are to be completed within 90 days in ASCAP's case and 120 days in BMI's case. *See* ASCAP Consent Decree § IX(F); BMI Consent Decree § XIV.B.

retroactively to the date of its license application.[173] Final royalty rates are also applied retroactively.[174]

Significantly, section 114(i) of the Copyright Act prohibits the rate court from considering the licensing fees paid for digital performances of sound recordings in its ratesetting proceedings for the public performance of musical works.[175] This provision was included when Congress created a public performance right for sound recordings with the 1995 enactment of the DPRSRA.[176] In theory, it was intended to protect royalties for the public performance of musical works from being diminished as a result of the grant of a public performance right for sound recordings in digital contexts.[177]

4. Statutory License for Public and Noncommercial Broadcasting

The activities of public and noncommercial educational broadcasters are subject to a hodgepodge of music licensing protocols. Section 118 provides a statutory license that covers such entities' public performances of musical works and reproductions and distributions that enable such performances.[178] The section 118 license, however, applies only to over-the-air broadcasts.[179] Noncommercial broadcasters must clear digital performance rights for musical works (*e.g.*, for internet radio) with the PROs under the provisions of the consent decrees as applicable.[180]

In addition, the section 118 license does not extend to the use of sound recordings by noncommercial broadcasters. For certain reproduction, distribution, and derivative rights for sound recordings, noncommercial broadcasters rely on the exemption in section 114(b), which applies to music "included in educational television and radio programs . . . distributed or transmitted through public broadcasting entities."[181] The

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173 *See* ASCAP Consent Decree § IX(F); BMI Consent Decree § XIV.B.

174 *See* ASCAP Consent Decree § IX(F); BMI Consent Decree § XIV.B.

175 17 U.S.C. § 114(i).

176 DPRSRA § 3.

177 BMI First Notice Comments at 11.

178 17 U.S.C. § 118(c).

179 17 U.S.C. § 118(c)(1), (f) (limiting performance license to "noncommercial educational broadcast station[s]" as defined in 47 U.S.C. § 397); 47 U.S.C. § 397 (defining "noncommercial educational broadcast station" as a "television or radio broadcast station"); *see also* NRBMLC First Notice Comments at 14 (describing section 118 license as being "confined to over-the-air transmissions").

180 *See id.* at 14-15 (explaining that for "digital transmission of musical works . . . noncommercial broadcasters are required to negotiate with ASCAP, BMI, and SESAC").

181 17 U.S.C. § 114(b).

114(b) exemption does not apply to digital performances and related reproductions, however.[182] For those uses, noncommercial broadcasters must obtain section 112 and 114 statutory licenses (discussed below).[183]

C. Licensing Sound Recordings

1. Exclusive Rights in Sound Recordings

The owner of a sound recording fixed after February 15, 1972 possesses a number of exclusive rights under the Copyright Act, including the right to make and distribute copies or phonorecords (*e.g.*, CDs and DPDs) of the work;[184] the right to create derivative works (*e.g.*, a new work based on an existing recording);[185] and the right to perform the work publicly by means of a digital audio transmission (*e.g.*, via internet or satellite radio).[186] The Act exempts public performances of sound recordings by terrestrial radio stations.[187]

2. Reproduction and Distribution Rights

Except in the limited case of noninteractive streaming services that qualify for compulsory licensing under sections 112 and 114, licenses to reproduce and distribute sound recordings—such as those necessary to make and distribute CDs, transmit DPDs and ringtones, or operate an interactive music service—are obtained through direct negotiation between a licensee and the sound recording owner (usually a record label) in the open market.[188]

3. Public Performance Rights

a. Lack of Terrestrial Performance Right

In the 1995 DPRSRA, Congress gave sound recording owners an exclusive public performance right, but one limited to digital audio transmissions, and created the

[182] NPR First Notice Comments at 4-5. Section 114(b) extends to "educational television and radio programs." 17 U.S.C. § 114(b). (Note that section 114(b) defines "educational television and radio programs" by referencing 47 U.S.C. § 397, but Congress deleted that definition from section 397 in 1978 without changing section 114(b). *See* 47 U.S.C. § 397 note. At the time of § 114(b)'s enactment in 1976, the term was defined in section 397 as "programs which are primarily designed for educational or cultural purposes.").

[183] NRBMLC First Notice Comments at 2-3; NPR First Notice Comments at 3-4.

[184] 17 U.S.C. § 106(1), (3).

[185] 17 U.S.C. § 106(2).

[186] 17 U.S.C. § 106(6).

[187] 17 U.S.C. § 114(d)(1).

[188] *See* DiMA First Notice Comments at 8.

section 112 and 114 statutory licenses to cover satellite radio and noninteractive subscription providers engaged in digital performances.[189] In 1998, Congress extended the compulsory license provisions to include subscription internet radio services.[190] It also expanded the exemption for ephemeral copies for over-the-air broadcasts and created the section 112(e) statutory license.[191] Traditional over-the-air broadcasts, however, are expressly exempted from the sound recording performance right.[192]

Congress drew this legal distinction based on perceived differences between digital and traditional services, believing at the time that traditional broadcasters posed "no threat" to the recording industry, in contrast to digital transmission services.[193] A longstanding justification for the lack of a sound recording performance right has been the promotional effect that traditional airplay is said to have on the sale of sound recordings.[194] In the traditional view of the market, broadcasters and labels representing copyright owners enjoy a mutually beneficial relationship whereby terrestrial radio stations exploit sound recordings to attract the listener pools that generate advertising dollars, and, in return, sound recording owners receive exposure that promotes record and other sales.[195]

As discussed in Section III, apart from the fact that sound recordings help generate billions of dollars annually for terrestrial radio stations, there are significant questions as to whether the traditional view of the market—even if persuasive in earlier times—remains credible today. Notably, in 2014, with 298 million active listeners, terrestrial radio had "more than double the total of Pandora (79 million), Sirius XM (27 million) and Spotify (14 million) combined."[196]

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[189] *See generally* DPRSRA.

[190] Digital Millennium Copyright Act ("DMCA"), Pub. L. No. 105-304, § 405(a), 112 Stat. 2860, 2890-2899 (1998).

[191] *Id.* §§ 402, 405(b).

[192] *See* 17 U.S.C. § 114(d)(1).

[193] *See* S. REP. NO. 104-128, at 14-15 ("It is the Committee's intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.").

[194] *Id.*

[195] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-862, TELECOMMUNICATIONS: THE PROPOSED PERFORMANCE RIGHTS ACT WOULD RESULT IN ADDITIONAL COSTS FOR BROADCAST RADIO STATIONS AND ADDITIONAL REVENUE FOR RECORD COMPANIES, MUSICIANS, AND PERFORMERS 13-21 (2010), *available at* http://www.gao.gov/assets/310/308569.pdf ("GAO REPORT").

[196] Zach O'Malley, *Truth in Numbers: Six Music Industry Takeaways From Year-End Data*, FORBES (Jan. 22, 2015), *available at* http://www.forbes.com/sites/zackomalleygreenburg/2015/01/22/truth-

Internationally, the United States is an outlier. Virtually all industrialized nations recognize a more complete public performance right for sound recordings than does the United States.[197] The failure of U.S. law to do the same causes U.S. record companies and artists to forgo an estimated $70-100 million in royalties for foreign exploitations of their works due to the lack of reciprocity.[198]

Significantly, however, in recent years, the nation's largest broadcast company, iHeartMedia (formerly Clear Channel), has entered into licensing agreements with WMG and a number of independent record labels (including Big Machine Records, the record label of Taylor Swift, Rascal Flats, and Tim McGraw) covering both terrestrial and internet radio.[199] While the current CRB rate for streamed radio is a per-play rate, these arrangements apparently feature a percentage-based or other alternative rate structure for both digital and terrestrial uses.[200] Although the terms of these deals remain private, reports indicate that iHeartMedia agreed to pay the smaller labels based on an industry rate of 1% of advertising revenues for terrestrial uses, and perhaps a larger sum to WMG.[201]

In recent years there have also been various legislative efforts to provide for a more complete public performance right,[202] as well as numerous congressional hearings focused on expanding the right to cover traditional broadcast transmissions.[203] The

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in-numbers-six-music-industry-takeaways-from-year-end-data/ (noting live music comprises 26% and satellite radio subscription 10%).

[197] Only a handful of countries countries—including Iran and North Korea—lack such a right, in addition to the United States. *See, e.g,* A2IM First Notice Comments at 8; SoundExchange First Notice Comments at 17.

[198] GAO REPORT at 30 (estimates based on language of the Performance Rights Act, S. 379, 111th Cong. (2009)). The NAB disputes these figures. NAB First Notice comments at 29-30 & n.15.

[199] *See* Ed Christman, *Here's Why Warner Music's Deal with Clear Channel Could be Groundbreaking for the Future of the U.S. Music Biz (Analysis),* BILLBOARD (Sept. 12, 2013), http://www.billboard.com/biz/articles/news/5694973/heres-why-warner-musics-deal-with-clear-channel-could-be-groundbreaking.

[200] *Id.*

[201] *Id.*; *see also* Ben Sisario, *Clear Channel-Warner Music Deal Rewrites the Rules on Royalties*, N.Y. TIMES (Sept. 12, 2013), http://www.nytimes.com/2013/09/13/business/media/clear-channel-warner-music-deal-rewrites-the-rules-on-royalties.html.

[202] *See, e.g.*, Performance Rights Act, H.R. 848, S. 379, 111th Cong. (2009); Performance Rights Act, H.R. 4789, S. 2500, 110th Cong. (2010); Free Market Royalty Act, H.R. 3219, 113th Cong. (2013).

[203] *See, e.g.*, *Internet Streaming of Radio Broadcasts: Balancing the Interests of Sound Recording Copyright Owners with Those of Broadcasters: Hearing Before the Subcomm. on Courts, the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 108th Cong. (2004) ("*Internet Streaming of Radio Hearing*"); *Music Licensing Hearings*.

Copyright Office has long supported, and continues to support, the creation of a more complete sound recording performance right.[204]

b. Section 112 and 114 Licenses

The section 114 statutory license allows different types of noninteractive digital music services—free and paid internet radio services,[205] "preexisting" satellite radio services,[206] and "preexisting" music subscription services[207]—to perform sound recordings upon compliance with the statutory license requirements, including the payment of royalties as determined by the CRB.[208] In addition, recognizing that such digital services must make server reproductions of sound recordings—sometimes called "ephemeral" copies—to facilitate their digital transmissions, Congress established a related statutory license under section 112 to authorize the creation of these copies.[209] Rates and terms for the section 112 license are also established by the CRB.

The section 112 and 114 licenses for sound recordings are subject to a number of technical limitations. For instance, services relying on the section 114 statutory license are prohibited from publishing an advance program schedule or otherwise announcing

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[204] *See, e.g.*, *The Performance Rights Act and Parity Among Music Delivery Platforms: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 117-18 (2009) ("*Performance Rights Act Hearing*") (statement of Marybeth Peters, Register of Copyrights); *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the H. Comm. on the Judiciary*, 111th Cong. 13-30 (2007) ("*Ensuring Artists Fair Compensation Hearing*") (statement of Marybeth Peters, Register of Copyrights); *Internet Streaming of Radio Hearing* at 8-22 (statement of David O. Carson, General Counsel, U.S. Copyright Office); U.S. COPYRIGHT OFFICE, PERFORMANCE RIGHTS IN SOUND RECORDINGS (Comm. Print 1978), *available at* http://copyright.gov/reports/performance-rights-sound-recordings.pdf ("PERFORMANCE RIGHTS REPORT").

[205] Free noninteractive internet radio services not exempt under 17 U.S.C. § 114(d)(1) qualify as "eligible nonsubscription services" and paid noninteractive internet radio services qualify as "new subscription services" in the parlance of section 112 and 114. *See* 17 U.S.C. § 114(j)(6), (8).

[206] A preexisting satellite digital audio radio service is a subscription satellite audio radio service provided pursuant to a satellite digital audio radio service license issued by the FCC on or before July 31, 1998. 17 U.S.C. § 114(j)(10). Currently, there is only one satellite service, Sirius XM. *See* Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23,054, 23,055 (Apr. 17, 2013) ("PSS/Satellite II").

[207] A preexisting subscription service is a noninteractive audio-only service that was in existence on or before July 31, 1998. U.S.C. § 114(j)(11). Music Choice—which transmits music via cable and satellite television and the internet—is an example of a pre-existing subscription service. PSS/Satellite II, 78 Fed. Reg. at 23,055 n.5.

[208] 17 U.S.C. § 114(d)(2).

[209] DMCA § 402; 17 U.S.C. § 112(e)(1); H.R. REP. NO. 105-796, at 89 (1998) (Conf. Rep.).

or identifying in advance when a specific song, album or artist will be played.[210] Another example is the "sound recording performance complement," which limits the number tracks from a single album or by a particular artist that may be played during a 3-hour period.[211]

Payment and reporting of royalties under the section 112 and 114 licenses are made to a single non-profit agent: SoundExchange.[212] SoundExchange was established by the RIAA in 2000 and in 2003 was spun off as an independent entity.[213] The Copyright Act specifies how royalties collected under section 114 are to be distributed: 50% goes to the copyright owner of the sound recording, typically a record label; 45% goes to the featured recording artist or artists; 2½% goes to an agent representing nonfeatured musicians who perform on sound recordings; and 2½% to an agent representing nonfeatured vocalists who perform on sound recordings.[214] Section 112 fees are paid by SoundExchange directly to the sound recording owner.[215] Prior to distributing royalty payments, SoundExchange deducts the reasonable costs incurred in carrying out its responsibilities.[216]

Notably, the Act does not include record producers in the statutorily defined royalty split. As a result, record producers must rely on contracts with one of the parties specified in the statute, often the featured recording artist, in order to receive royalties from digital performances.[217] To help facilitate these contracts, SoundExchange has

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[210] *See* 17 U.S.C. § 114(d)(2)(B)-(C).

[211] 17 U.S.C. § 114(d)(2)(B)(i), (d)(2)(C)(i), (j)(13).

[212] 37 C.F.R. § 380.11 ("*Collective* is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011-2015 license period, the Collective is SoundExchange, Inc."); *see also Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Bd.*, 571 F.3d 69, 91 (D.C. Cir. 2009).

[213] *Technology Briefing: Internet; Online Royalty Pool Created*, N.Y. TIMES, Nov. 29, 2000, at C4; *Global Business Briefs*, WALL ST. J., Oct. 2, 2003, at B5.

[214] 17 U.S.C. § 114(g)(2); *see About Digital Royalties*, SOUNDEXCHANGE, http://www.soundexchange.com/artist-copyright-owner/digital-royalties/ (last visited Jan. 26, 2015). Royalties collected pursuant to section 112 are not distributed according to this split, and instead are paid entirely to the record labels. Review of Copyright Royalty Judges Determination, 73 Fed. Reg. 9143, 9146 (Feb. 19, 2008).

[215] 17 U.S.C. § 112(e); *see also* Review of Copyright Royalty Judges Determination, 73 Fed. Reg. 9143, 9146 (Feb. 19, 2008) (explaining that "[r]oyalties collected under section 114 are paid to the performers and the copyright owners of the sound recordings . . . whereas, the royalties collected pursuant to the section 112 license are not paid to performers").

[216] 17 U.S.C. § 114(g)(3).

[217] *See* 17 U.S.C. 114(g)(2); *About Digital Royalties*, SOUNDEXCHANGE, http://www.soundexchange.com/artist-copyright-owner/digital-royalties/ (last visited Jan. 26, 2015); *see also*

begun processing direct payments to producers based upon written direction from the featured artist.[218]

Since SoundExchange became an independent entity in 2003, it has distributed over $2 billion to artists and labels.[219] The collective engages in outreach to identify and locate artists and labels who may be due royalties from the funds that is has collected.[220] Nonetheless, significant amounts of unclaimed funds have accumulated over time.[221] Press accounts indicate that SoundExchange had unclaimed royalties of approximately $96 million as of the end of 2013.[222] Under the applicable regulations, SoundExchange retains all undistributed royalties for not less than three years, and thereafter may release them to offset its administrative costs and/or to engage in ratesetting and enforcement activities.[223]

Interactive/Noninteractive Distinction

The statutory licensing framework applies only to noninteractive (*i.e.*, radio-style) services; interactive or on-demand services are not covered.[224] The distinction between interactive and noninteractive services has been the matter of some debate. The statute provides that an interactive service is one that enables a member of the public to receive either "a transmission of a program specially 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 by or on behalf of the recipient."[225]

The statutory definition leads to the question whether so-called "personalized" or "custom" music streaming services—services that tailor the music they play to individual user preferences—transmit programs that are "specially created for the

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Music Licensing Hearings at 14 (statement of Neil Portnow, President/CEO of The Recording Academy).

[218] NARAS First Notice Comments at 5.

[219] *Our Work*, SOUNDEXCHANGE, http://www.soundexchange.com/about/our-work/ (last visited Jan. 26, 2015).

[220] *SoundExchange Outreach Efforts*, SOUNDEXCHANGE, http://www.soundexchange.com/wp-content/uploads/2014/11/Outreach-Fact-Sheet_11.5.14.pdf (last visited Jan. 26, 2015).

[221] *See* Glenn Peoples, *SoundExchange Financials Show Fewer Unclaimed Royalties, Persistent Data Problems*, BILLBOARD (Dec. 24, 2014), http://www.billboard.com/articles/business/6415147/soundexchange-fewer-unclaimed-royalties-data-problems.

[222] *Id.*

[223] *See, e.g.*, 37 C.F.R. §§ 380.8, 380.17, 380.27.

[224] *See* 17 U.S.C. §§ 112(e), 114(d)(2)-(3), (f). The distinction between interactive and noninteractive services has been the matter of some debate, and is addressed *infra*.

[225] 17 U.S.C. § 114(j)(7).

recipient." In *Arista Records LLC v. Launch Media, Inc.* ("*Launch Media*"), the Second Circuit held that one such service that played songs for users based on users' individual ratings was not interactive because the service did not displace music sales.[226] Following the *Launch Media* decision, personalized music streaming services such as Pandora and Rdio obtain statutory licenses as noninteractive services for their public performance of sound recordings. The CRB-established rates do not currently distinguish between such customized services and other services that simply transmit undifferentiated, radio-style programming over the internet.

Ratesetting Standards

Notably, under section 114, the rate standard applicable to "preexisting" satellite radio and music subscription services (*i.e.*, those services that existed as of July 31, 1998) differs from that for other services such as internet radio and newer subscription services.[227] This distinction is a legislative artifact. The section 114 statutory license was first created with the enactment of the DPRSRA in 1995, and at the time it applied only to satellite radio and subscription music services. Royalty rates and terms under the more limited 1995 license were governed by the four-factor policy-oriented standard in section 801(b)(1) of the Act—that is, the same standard that had long applied to the section 115 license for musical works.[228] With the enactment of the DMCA in 1998, Congress expanded the section 114 license to include internet radio, created a new statutory license for associated ephemeral recordings in section 112, and created a new ratesetting standard—the "willing buyer/willing seller"—standard. Congress, however, grandfathered preexisting services (*i.e.,* those that existed before the DMCA's enactment) under the old royalty ratesetting standard.

Accordingly, because of the staggered enactment of the section 112 and 114 licenses, royalty rates for a limited set of older services—Sirius XM, as the only preexisting satellite service, and Music Choice and Muzak, as the only preexisting subscription services—are governed by the four-factor standard in section 801(b) of the Act.[229] Meanwhile, for all internet radio and other newer digital music services, and for all ephemeral recordings regardless of the service, the CRB is to 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."[230] As explained in Section III, the continuing propriety of that disparity is a matter of dispute among stakeholders.

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[226] *Launch Media*, 578 F.3d 148, 161, 163-64 (2d Cir. 2009).

[227] 17 U.S.C. § 114(j)(10), (11); *see* PSS/Satellite II, 78 Fed. Reg. at 23,055.

[228] *See* 17 U.S.C. §§ 114(f)(1), 115(c)(3), 801(b)(1).

[229] *See* 17 U.S.C. §§ 114(f)(1), 801(b)(1); PSS/Satellite II, 78 Fed. Reg. at 23,055 & n.5.

[230] 17 U.S.C. § 114(f)(2)(B). The provision further requires the CRB to consider "whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may

CRB Ratesetting Proceedings

The statutory rates that apply under the section 112, 114 and 115 licenses are established by the CRB.[231] CRB ratesetting proceedings for the section 112, 114, and 115 licenses take place at five-year intervals, and the timing of these proceedings is set by statute.[232]

The CRB is composed of three judges, and Congress imposed strict qualifications for these positions. Each CRB judge is required to have at least seven years of legal experience.[233] The chief copyright royalty judge must have a minimum of five years of experience in adjudications, arbitrations, or court trials. As for the other two judges, one must have significant knowledge of copyright law and the other must have significant knowledge of economics.[234] The Register of Copyrights also plays a role in ratesetting, in that she is responsible for reviewing the CRB's determinations to ensure they are free from material legal error, and may also be called upon to address material questions of substantive law that impact the proceedings.[235] Final ratesetting determinations are appealable to the United States Court of Appeals for the District of Columbia Circuit.[236]

Congress intended the ratesetting process to permit voluntary industry agreements when possible.[237] For example, Congress provided antitrust exemptions to statutory licensees and copyright owners of sound recordings, so that they could designate common agents to collectively negotiate and agree upon royalty rates.[238] The statute also allows for settlement of ratesetting disputes, and mandates a three-month "voluntary negotiation period" at the start of each proceeding before the parties submit their cases.[239] If a settlement is reached among some or all of the participating parties, the Act

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interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings," and "the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk." *Id.*

231 17 U.S.C. § 801(b)(1).

232 17 U.S.C. § 804(b).

233 17 U.S.C. § 802(a).

234 17 U.S.C. § 802(a).

235 H.R. REP. NO. 108-408, at 26 (2004) *reprinted in* 2004 U.S.C.C.A.N. 2,332, 2,341; 17 U.S.C. § 802(f)(1).

236 17 U.S.C. § 803(d)(1).

237 H.R. REP. NO. 108-408, at 24.

238 17 U.S.C. §§ 112(e)(2), 114(e)(1), 115(c)(3)(B) (These antitrust exemptions are limited to negotiations addressing rights within the scope of the statutory licenses in sections 112, 114, and 115).

239 *See* 17 U.S.C. § 803(b)(1)-(3).

empowers the CRB to adopt that settlement "as a basis for statutory terms and rates" that will apply to all parties under the statutory license.[240] Notably, however, the Act does not require the CRB to immediately act on such settlements. In the past, the CRB has deferred the adoption of partial settlements until the end of the full ratesetting proceeding.[241]

Absent a settlement, the CRB must proceed to determine the rates and terms of the statutory license. Although the CRB has some flexibility in organizing its procedures, many aspects of its proceedings are dictated by the statute.[242] In many instances, these procedures depart from practices used in ordinary civil litigation. For instance, participating parties must file their written direct cases in support of their requested rates—including witness testimony and supporting exhibits—before any discovery has been taken.[243] Additionally, the statute requires separate direct and rebuttal phases of ratesetting hearings, effectively resulting in two trials.[244] These procedures cannot be altered by the CRB even upon stipulation of the parties.

Royalty Rates

In general, the CRB (like the CARP before it) has adopted "per-performance" rates for internet radio, rather than the percentage-of-revenue rates that are typical in PRO licenses.[245] That per-stream approach has proven controversial. After the CRB's "Webcasting II" decision in 2007, a number of internet radio services and broadcasters complained that the per-performance rates were unsustainable. These concerns led Congress to pass legislation giving SoundExchange the authority to negotiate and agree to alternative royalty schemes that could be binding on all copyright owners and others

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[240] 17 U.S.C. § 801(b)(7).

[241] *See* SoundExchange First Notice Comments at 8-9; *see also* Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 Fed. Reg. 13,026, 13,027 (Mar. 9, 2011) (adopting partial settlement entered into in June 2009 as basis for final rates and terms for commercial webcasters).

[242] *See* 17 U.S.C. § 803(b)(6).

[243] 17 U.S.C. § 803(b)(6).

[244] 17 U.S.C. § 803(b)(6)(C).

[245] *See, e.g.,* 37 C.F.R. § 380.3(a)(1); *see also* Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240, 45,272 (July 8, 2002). Section 112 rates have been a relatively insignificant part of the CRB's ratesetting proceedings, and have been established as a modest percentage of the 114 rate. *See e.g.,* 37 C.F.R. § 385.3(c) (establishing ephemeral recording rate to be 5% of the total royalties paid under the section 112 and 114 licenses).

entitled to royalty payments in lieu of the CRB-set rates.[246] Similar complaints after the CARP's 1998 webcasting decision led Congress to enact analogous legislation in 2002.[247]

In the wake of Congress' actions, SoundExchange reached agreement with a number of internet radio services, in general adopting royalty rates that were more closely aligned with the services' revenues. For example, in 2009, SoundExchange negotiated rates with large commercial "pureplay" internet radio services (*i.e.*, services like Pandora that only transmit over the internet).[248] Under that agreement, those services agreed to pay the greater of 25% of gross revenues or specified per performance rates.[249]

c. Privately Negotiated Licenses

A streaming service that does not fall under the section 112 and 114 licenses—*i.e.*, an interactive service—must negotiate a license with a record company in order to use the label's sound recordings.[250] Since direct licenses are agreed upon at the discretion of the copyright owner and the potential licensee, the license terms can be vastly different from those that apply under the statutory regime. It is common for a music service seeking a sound recording license from a label to pay a substantial advance against future royalties, and sometimes an administrative fee.[251] Other types of consideration may also be involved. For example, the major labels acquired a reported combined 18% equity stake in the on-demand streaming service Spotify allegedly based, at least in part, on their willingness to grant Spotify rights to use their sound recordings on its service.[252]

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[246] *See* Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974. Congress later extended the timeframe for negotiations. *See* Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926; *see also* Terry Hart, *A Brief History of Webcaster Royalties*, COPYHYPE (Nov. 29, 2012), http://www.copyhype.com/2012/11/a-brief-history-of-webcaster-royalties.

[247] Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780.

[248] Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 34,796, 34,797 (July 17, 2009); Brian T. Yeh, *Statutory Royalty Rates for Digital Performance of Sound Recordings: Decision of the Copyright Royalty Board*, *in* MUSIC LICENSING RIGHTS AND ROYALTY ISSUES 35, 49 (Thomas O. Tremblay ed., 2011).

[249] Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. at 34,799-800; KOHN at 1498.

[250] 17 U.S.C. § 114(d)(3)(C).

[251] A2IM Second Notice Comments at 5-6; Resnick Second Notice Comments at 2-3; *see also* Hannah Karp, *Artists Press for Their Share*, WALL ST. J. (July 21, 2014), http://online.wsj.com /news/articles/SB20001424052702303833804580023700490515416 (reporting that Warner Music Group received an advance from Google of over $400 million).

[252] *See* Helienne Lindvall, *Behind the Music: The Real Reason Why the Major Labels Love Spotify*, GUARDIAN (Aug. 17, 2009), http://www.theguardian.com/music/musicblog/2009/aug/17/major-labels-spotify.

4. Pre-1972 Sound Recordings

When Congress acted in 1971 to grant federal copyright protection to sound recordings, it extended federal protection prospectively, to recordings created on or after February 15, 1972.[253] Sound recordings fixed before February 15, 1972 are protected by a patchwork of differing state laws.[254]

The disparate treatment of pre-1972 sound recordings under federal versus state law has given rise to a number of significant policy concerns, including issues about the preservation and use of older recordings without the benefit of federally recognized limitations on copyright owners' exclusive rights.[255] These issues were extensively addressed in a 2011 Copyright Office report on potential federalization of copyright for pre-1972 recordings.[256]

In its report, the Office surveyed state laws and determined that "the protections that state law provides for pre-1972 sound recordings are inconsistent and sometimes vague and difficult to discern."[257] In addition, the Office's report concluded that state law did not provide adequate protection for uses that would be considered fair uses under federal law.[258] The Office therefore recommended that pre-1972 recordings be brought within the federal copyright system, which would offer uniform protection to their owners as well as appropriate exceptions and limitations for the benefit of users.

Since the Office's report was released, there have been some notable developments in this area. A significant question has arisen concerning whether state law protection extends to the public performance of pre-1972 recordings.[259] In the context of their negotiated deals with record labels, some major services, including YouTube and Spotify, obtain licenses that cover the use—including the performance—of pre-1972

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[253] Sound Recording Act of 1971, 85 Stat. at 392.

[254] The Copyright Act expressly permits states to continue state law protection for pre-1972 sound recordings until February 15, 2067, at which time all state protection will be preempted by federal law and pre-1972 sound recordings will enter the public domain. 17 U.S.C. § 301(c). There is, however, a significant class of pre-1972 sound recordings that do enjoy federal copyright protection—sound recordings of foreign origin for which copyright protection was "restored" as part of the Uruguay Round Agreements Act in 1994. *See* PRE-1972 SOUND RECORDINGS REPORT at 17-20.

[255] *See* PRE-1972 SOUND RECORDINGS REPORT at 64-70.

[256] *See generally id.*

[257] *Id.* at 48.

[258] *Id.* at 86-87.

[259] In a 1977 report on public performance rights in sound recordings, the Copyright Office recognized that Congress had left the decision whether or not to recognize a performance right for pre-1972 sound recordings to the states. PERFORMANCE RIGHTS REPORT at 18.

sound recordings.[260] Some services that use the section 112 and 114 statutory licenses, such as Music Choice,[261] make payments to SoundExchange for use of pre-1972 works pursuant to the same statutory rates and terms applicable under sections 112 and 114.[262] Others, including Sirius XM and Spotify, do not pay royalties either to copyright owners directly or to SoundExchange for performances of pre-1972 sound recordings.[263]

Recently, three courts—two in California and one in New York—have held that the unauthorized public performance of pre-1972 sound recordings violates applicable state law. In the initial case, a California federal district court ruled that Sirius XM infringed rights guaranteed to plaintiffs by state statute.[264] A state court in California subsequently adopted the federal court's reading of the California statute in a second action against Sirius XM.[265] Following these decisions, in a third case against Sirius XM, a federal district court in New York has indicated that the public performance of pre-1972 sound recordings constitutes common law copyright infringement and unfair competition under New York law.[266] Notably, the reasoning employed in these decisions is not expressly limited to digital performances (*i.e.*, internet streaming and satellite radio); they thus could have potentially broad implications for terrestrial radio (currently exempt under federal law for the public performance of sound recordings) as well. In the meantime, similar lawsuits have been filed against other digital providers,

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[260] Tr. at 161:18-21 (June 5, 2014) (Scott Sellwood, Google/YouTube); Tr. at 152:04-09 (June 5, 2014) (Steven Marks, RIAA).

[261] Music Choice First Notice Comments at 15; Tr. at 190:08-18 (June 24, 2014) (Paul Fakler, Music Choice).

[262] PRE-1972 SOUND RECORDINGS REPORT at 45 n.196; *but see* PSS/Satellite II, 78 Fed. Reg. at 23,073 (indicating pre-1972 sound recordings are not covered by section 112 and 114 licenses).

[263] *See* Hannah Karp, *Turtles and Sirius XM: Not Happy Together*, WALL ST. J. (Aug. 3, 2013), http://blogs.wsj.com/speakeasy/2013/08/03/turtles-and-sirius-xm-not-happy-together. Previously, Sirius XM did include pre-1972 recordings in its royalty accounting logs to SoundExchange, which were non-itemized, but stopped in 2011 after SoundExchange asked Sirius XM to start reporting exactly what it was paying for. *See* Hannah Karp, *Sirius Is Sued Over Music Royalties for Pre-1972 Recordings*, WALL ST. J. (Aug. 26, 2013), http://www.wsj.com/articles/SB10001424127887324591204579037260890310376.

[264] *See Flo & Eddie Inc. v. Sirius XM* ("*Flo & Eddie v. Sirius XM CA*"), No. 13-cv-5693, 2014 U.S. Dist. LEXIS 139053, at *22-23 (C.D. Cal. Sept. 22, 2014).

[265] *Capitol Records, LLC v. Sirius XM*, No. BC520981 (Cal. Super. Ct. Oct. 14, 2014) (order regarding jury instructions), *available at* http://www.project-72.org/documents/Sirius-XM-Order-Granting-Jury-Mot.pdf.

[266] *See Flo & Eddie Inc. v. Sirius XM* ("*Flo & Eddie v. Sirius XM NY*"), No. 13-cv-5784, 2014 U.S. Dist. LEXIS 166492, at *40-44, *50-52 (S.D.N.Y. Nov. 14, 2014) (denying Sirius XM's motion for summary judgment, and asking Sirius XM to show cause why judgment should not be entered on behalf of plaintiffs), *reconsideration denied*, 2014 U.S. Dist. LEXIS 174907 (Dec. 12, 2014).

including Pandora, Google, Apple's Beats service, and Rdio, alleging the unauthorized use of pre-1972 recordings.[267]

Another issue that has been the subject of recent litigation is whether the DMCA safe-harbor provisions extend to pre-1972 sound recordings.[268] Under section 512(c), an internet service provider is not liable for "infringement of copyright by reason of the storage at the direction of a user of" infringing material, provided that the service meets certain statutory conditions, including take-down requirements.[269] Meanwhile, a separate provision of the Act, section 301(c), preserves state law protection for pre-1972 sound recordings, stating that "any rights or remedies under the common law or statute of any state shall not be annulled or limited by this title until February 15, 2067."[270] In its 2011 report, the Office examined the interplay between these two provisions, and concluded that the DMCA safe harbors did not apply to pre-1972 sound recordings.[271] Although one decision predating the Office's report found that the DMCA safe harbors do apply to pre-1972 sound recordings,[272] more recent decisions have agreed with the Copyright Office that the safe harbors are a creature of federal law and do not limit state law protections.[273]

D. Synchronization Rights

To incorporate music into an audiovisual work—such as a film, video television program, or video game—the creator of that work must obtain synchronization licenses from both the owner of the musical work and the owner of the sound recording. Synchronization (often shortened to "synch") refers to the use of music in "timed-relation" to visual content.[274] Although the Copyright Act does not refer explicitly to a

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[267] *See Flo & Eddie, Inc. v. Pandora Media, Inc*., No. 14-cv-07648 (C.D. Cal. Oct. 2, 2014); Complaint, *Capitol Records, LLC v. Pandora Media, Inc*., No. 651195/2014 (N.Y. Sup. Ct. Apr. 17, 2014); *see also* Eriq Gardner, *Sony, Google, Apple Hit With Lawsuits Over Pre-1972 Music,* HOLLYWOOD REPORTER (Jan. 23, 2015), http://www.hollywoodreporter.com/thr-esq/sony-google-apple-hit-lawsuits-766187.

[268] *See* 17 U.S.C. § 512(a)-(d).

[269] 17 U.S.C. § 512(c).

[270] 17 U.S.C. § 301(c).

[271] PRE-1972 SOUND RECORDINGS REPORT AT 130-32.

[272] *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 640–42 (S.D.N.Y. 2011). *But see Capitol Records, Inc. v. MP3tunes, LLC*, No. 07-cv-9931, 2012 WL 242827, at *1–*2 (S.D.N.Y. Jan. 9, 2012) (citing Copyright Office report and acknowledging that its earlier decision "may involve a 'substantial ground for difference of opinion'").

[273] *Capitol Records, LLC v. Vimeo, LLC,* 972 F. Supp. 2d 500, 536-37 (S.D.N.Y. 2013); *see also Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 537, 552 (S.D.N.Y. 2013) (denying motion for reconsideration); *Capitol Records, Inc. v. Naxos of America, Inc.,* 830 N.E.2d 250 (N.Y. 2005).

[274] *See Steele v. Turner Broad. Sys., Inc*. 646 F. Supp. 2d 185, 193 (D. Mass. 2009).

synchronization right, it is generally understood to be an aspect of music owners' reproduction and/or derivative work rights.[275]

The licensing of music for audiovisual works, unlike that for other uses, occurs in the free market for both musical works and sound recordings. The synch market thus stands as a useful counterpoint to the regulated licensing markets discussed above. A notable feature of the synch market is the relatively even balance between royalties paid for the musical works rights and those paid for the sound recording rights. Musical work and sound recording owners are generally paid equally—50/50—under individually negotiated synch licenses.[276]

The synchronization market for uses in commercial works such as film, television programs, and video games appears reasonably efficient and flexible. In addition to in-house resources, a number of intermediaries help handle licensing for those who wish to use music in a new creative work. Music supervisors working for production companies facilitate selection, negotiation, and delivery of music for use in audiovisual productions.[277] Companies such as Greenlight, Dashbox, Cue Songs, and Rumblefish provide online services that offer different songs for synchronization purposes.[278]

An evolving aspect in the music licensing marketplace is the exploitation of music videos that record labels produce to accompany new releases. Traditionally, any royalties for these videos were nominal, as they were created largely to promote sales of

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[275] *See, e.g.*, *Buffalo Broad. v. ASCAP*, 744 F.2d at 920; *Agee*, 59 F.3d at 321.

[276] *See* NMPA & HFA First Notice Comments at 16; Tr. at 60:20-22 (June 4, 2014) (Brittany Schaffer, NMPA/Loeb & Loeb LLP) ("synchronization licenses are generally divided in terms of income 50/50 between sound recording and the musical composition."). While parity may be commonplace for individually negotiated deals, the same does not seem to hold true for broader licenses with consumer-facing video services such as YouTube. Under an HFA-administered YouTube license, publishers are paid 15% of YouTube's net revenue from videos uploaded by non-record label users that incorporate HFA-controlled publishing rights and embody a commercially released or distributed sound recording (*i.e.*, a lip sync video), and 50% of revenue from videos that incorporate HFA-controlled publishing rights but a user-created recording (*i.e.*, a cover recording). NMPA/HFA/YOUTUBE LICENSING OFFER, *Licensing Offer Overview*, http://www.youtubelicenseoffer.com/docs/notice.pdf (last visited Jan. 29, 2015). By comparison, YouTube's standard contract for independent record labels reportedly allocates 45% of YouTube subscription music video revenue to labels, as compared to 10% to publishers. Ed Christman, *Inside YouTube's Controversial Contract with Indies*, BILLBOARD June 20, 2014, http:// www. billboard.com/biz/articles/news/digital-and-mobile/6128540/analysis-youtube-indie-labels-contract-subscription-service?mobile_redirection=false.

[277] NMPA & HFA Second Notice Comments at 10-13.

[278] *Id.* at 14-15.

records through music video channels such as MTV.[279] But more recently, as videos have become among the most common ways in which consumers wish to enjoy music,[280] there is strong interest in developing this market. Record labels seek to license these professionally created videos—which incorporate musical works—to online providers such as YouTube and Vevo.[281]

In the early 2000s major record labels and publishers entered into "New Digital Media Agreements" ("NDMAs") to allow labels efficiently to obtain licenses from their major publisher counterparts so they can pursue new digital products and exploit music videos in online markets.[282] These licensing arrangements, in turn, became a model for a more recent 2012 agreement between UMG and NMPA that allowed UMG to seek similar rights from smaller independent publishers on an "opt-in" basis. The licensing arrangement includes rights for the use of musical works in "MTV-style" videos, live concert footage, and similar exploitations.[283]

Like the major record labels, larger music publishers have entered into direct licensing relationships with the on-demand video provider YouTube that allow them some amount of control over the use of user-uploaded videos incorporating their music and provide for payment of royalties.[284] Following the settlement of infringement litigation

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[279] *See* PASSMAN at 177-78 (reflecting the decline of the traditional market for music video on platforms such as the MTV television network); KOHN at 1119 (noting that promotional music videos have synchronization fees that are "quite nominal, set at an amount intended merely to cover the administrative costs of preparing the paperwork for the license grant. This is because the copyright owner stands to substantially benefit from . . . performance royalties resulting from the exhibition of the music video.").

[280] RIAA Second Notice Comments at 14.

[281] Vevo is a joint venture between UMG, SME, the Abu-Dhabi Media Company, and YouTube. *See* Alex Pham, *YouTube Confirms Vevo Deal*, BILLBOARD (July 2, 2013), http://www.billboard.com /biz/articles/news/digital-and-mobile/1568816/youtube-confirms-vevo-deal; *see also* PASSMAN at 259 (for record company-produced videos streamed, "the record labels get about 70% of ad revenues and/or subscription monies," and generally pay publishers "in the range of 10% of the ad revenues (a little under 15% of the 70% that the company gets")).

[282] *See* RIAA First Notice Comments at 14 n.28; NMPA Second Notice Comments at 33.

[283] *See id.* at 33; Susan Butler, *UMG/NMPA Broker Model License Agreement*, MUSIC CONFIDENTIAL, June 21, 2012; Ed Christman, *NMPA Inks Deal With Universal Music Group Over VEVO, YouTube Videos*, BILLBOARD (June 19, 2012), http://www.billboard.com/biz/articles/news/publishing/ 1093134/nmpa-inks-deal-with-universal-music-group-over-vevo-youtube. The licensing arrangement excludes rights for synch uses in motion pictures, television, advertising, video games and other products that are typically individually negotiated by publishers. *Id.*

[284] *See YouTube Licensing Offer Overview*, YOUTUBE LICENSING OFFER, http://www.youtubelicense offer.com/notice (last visited Jan. 26, 2015).

by a class of independent music publishers against YouTube in 2011,[285] NMPA and its licensing subsidiary HFA announced an agreement with YouTube in which smaller publishers could choose to license their musical works to YouTube by opting in to prescribed licensing terms. Those who choose to participate in the arrangement grant YouTube the right to "reproduce, distribute and to prepare derivative works (including synchronization rights)" for videos posted by YouTube's users.[286] The license does not, however, cover the public performance right. Music publishers who opt into the YouTube deal receive royalties from YouTube and have some ability to manage the use of their music through HFA, which administers the relationship and can access YouTube's content identification tools on behalf of individual publishers.[287] Over 3,000 music publishers have entered into this licensing arrangement with YouTube.[288]

Another developing area is the market for so-called "micro-licenses" for music that is used in videos of modest economic value, such as wedding videos and corporate presentations. In the past, income received by rightsholders from licensing such uses might not overcome administrative or other costs. But the market is moving to take advantage of technological developments—especially online applications—that make micro-licensing more viable. This includes the aforementioned services like Rumblefish, but also efforts by NMPA, HFA, and RIAA to license more synchronization rights through programs that allow individual copyright owners to effectuate small licensing transactions.[289]

E. Licensing Efficiency and Transparency

New digital services face a formidable challenge when attempting to license music. One study showed that acquiring the necessary rights to offer a marketable digital music offering[290] requires roughly 18 months of effort, with some entities never able to

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[285] *See The Football Ass'n Premier League Ltd. v. YouTube, Inc.*, 633 F. Supp. 2d 159 (S.D.N.Y. 2009).

[286] *YouTube License Agreement,* YOUTUBE LICENSING OFFER, http://www.youtubelicenseoffer.com /docs/license.pdf (last visited Jan. 26, 2015); *see also* Susan Butler, *Anatomy of a Trade Group License*, MUSIC CONFIDENTIAL, Sept. 9, 2011.

[287] *See YouTube Licensing Offer Overview*, YOUTUBE LICENSING OFFER, http://www.youtubelicense offer.com/notice (last visited Jan. 26, 2015).

[288] Susan Butler, *U.S. Music Licensing: The Rights Holders (Part Two, Conclusion)*, MUSIC CONFIDENTIAL, June 5, 2014.

[289] Ed Christman, *RIAA & NMPA Eyeing Simplified Music Licensing System, Could Unlock 'Millions' in New Revenue*, BILLBOARD (June 13, 2013), http://www.billboard.com/biz/articles/news/record-labels/1566550/riaa-nmpa-eyeing-simplified-music-licensing-system-could.

[290] *See* RIAA First Notice Comments at 8 ("To be competitive, today's streaming, cloud and subscription music services require licenses to the full catalog of songs (and shares thereof) owned by virtually every music publisher."); DiMA Second Notice Comments at 16 ("Digital service providers and record companies do, in fact, need to obtain licenses for millions of songs

successfully negotiate the licenses needed to launch their services.[291] One of the key reasons for this complexity is the lack of an "authoritative list of rights holders and the recordings/works they represent."[292]

As discussed in detail in Section III, it is widely acknowledged that reliable, up-to-date information about copyrighted works is a critical prerequisite for efficient licensing in the modern music marketplace. Both copyright owners and music services must be able to uniquely identify particular sound recordings and underlying musical works, along with the dynamic and often fractured ownership status of these distinct works. In addition, they need to be able to pair sound recordings with the musical works they embody. While the industry has made some progress on this front, much remains to be done.

1. Data Standards

One of the initial considerations regarding management of reliable and up-to-date copyright information for musical works and sound recording copyrights is the use of standard identifiers. Fortunately, the music industry already employs a variety of standard identifiers recognized by the International Organization for Standardization ("ISO"), the international standard-setting body. The ISO has established two key standards for the identification of works themselves—the International Standard Music Work Code ("ISWC") for musical works, and the International Standard Recording Code ("ISRC") for sound recordings.[293]

The ISWC represents a unique, permanent, and internationally recognized reference number for the identification of musical works. The standard was developed by the International Confederation of Societies of Authors and Composers ("CISAC"). In the U.S. and Canada, ASCAP is the appointed agency that assigns ISWCs, and works with

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in order to meet consumer expectations and be commercially viable."). Notably, the recently launched streaming service "The Overflow" offers a limited catalog of "Christian music" and related genres. Glenn Peoples, *David Beside Goliath: New Christian Music Streaming Service The Overflow Points to a New Strategy*, BILLBOARD (Jan. 05, 2015) http://www.billboard.com/articles/business/6429451/overflow-christian-subscription-streaming-music-service; THE OVERFLOW, http://theoverflow.com (last visited Jan. 20, 2015) (reporting on recently launched streaming service The Overflow, which offers a limited catalog of Christian music and related genres).

[291] DAVID TOUVE, MUSIC BUSINESS ASSOCIATION, THE INNOVATION PARADOX: HOW LICENSING AND COPYRIGHT IMPACTS DIGITAL MUSIC STARTUPS 6-7 (2012) ("TOUVE"); *see also* John Seabrook, *Revenue Streams: Is Spotify the Music Industry's Friend or Its Foe?*, NEW YORKER (Nov. 24, 2014), *available at* http://www.newyorker.com/magazine/2014/11/24/revenue-streams (reporting that Spotify's U.S. licensing efforts took two years).

[292] TOUVE at 5.

[293] *See* Jessop First Notice Comments at 4.

other representatives of songwriters and publishers to assign ISWCs. As relevant here, to obtain an ISWC, a publisher must provide the following minimum: at least one original title for the work; all songwriters of the work identified by their Interested Parties Information ("IPI") code (discussed below); and whether the work is derived from an existing work.[294] One significant issue with ISWCs, then, is that they cannot be assigned until all the songwriters on a musical work are identified. This has the benefit of assuring that data are complete before an identifier is attached. But it also leads to a substantial lag time before the ISWC for a particular musical work can be assigned—unfortunately, this can occur well after a record is released, so that digital files embodying the individual tracks often will not include ISWCs identifying the underlying musical works.[295] ASCAP and BMI—which also use proprietary numbering systems to track works internally—add ISWCs to their databases as those codes are assigned.[296]

The ISRC was created as a unique, permanent, and internationally recognized reference number for the identification of sound and music video recordings. ISRCs are assigned at the track—rather than album—level. The ISO has appointed IFPI as the international ISRC agency. IFPI in turn, designates national or regional agencies to manage the issuance of ISRCs within a specific country or region. The U.S. ISRC agency is RIAA. RIAA authorizes individual record labels to assign ISRCs to their own recordings.[297] ISRCs are required to be included on digital files provided for the iTunes store and by many other digital platforms.

There are some shortcomings with the ISRC system. First, there is no single definitive U.S. database for ISRCs. Instead, each sound recording owner must maintain its own ISRC records and metadata.[298] Notably, however, SoundExchange, is currently compiling a database of sound recordings performed under the section 112 and 114

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[294] *What is an ISWC*, ISWC INTERNATIONAL AGENCY, http://www.iswc.org/en/iswc.html (last visited Jan. 9, 2015).

[295] Tr. at 334:13-337:20 (June 23, 2014) (Andrea Finkelstein, SME; Jacqueline Charlesworth & Sarang Damle, U.S. Copyright Office); Tr. at 343:2-344:16, 346:17-21 (June 23, 2014) (Lynn Lummel, ASCAP).

[296] ASCAP Second Notice Comments at 11 ("It should be underscored that each work will have two identifiers—the ISWC as well as the PRO's own internal Work ID number.").

[297] *Obtaining Code*, USISRC, http://www.usisrc.org/about/obtaining_code.html (last visited Jan. 25, 2015). RIAA also authorizes "ISRC managers" to assign ISRCs to sound recordings produced by artists and labels that do not wish to manage their own ISRC assignments. *Id.; see also Registration Fees*, USISRC, http://www.usisrc.org/faqs/registration_fees.html (last visited Jan. 25, 2015).

[298] Pipeline Project 2014, Belmont University's Mike Curb College of Music Business and Entertainment ("Pipeline Project") Second Notice Comments at 7; *see also Types*, USISRC, https://www.usisrc.org/applications/types.html (last visited Jan. 25, 2015).

licenses, and expects to have good identification and ownership information, including ISRCs, for approximately 14 million recordings in the relatively near term.[299]

In addition, in the case of multiple owners, ISRCs do not require a complete list of owners before assignment of ISRCs. Instead, the ISRC website recommends that multiple owners simply designate one of the owners to assign the ISRC.[300]

The ISO has adopted two other codes to identify the individuals or entities associated with particular works. The IPI code allows a musical work to be associated with the various parties that are involved in its creation, marketing, and administration. IPI codes apply to composers, authors, composer/authors, arrangers, publishers, administrators, and sub-publishers. The codes are assigned by CISAC and are necessary to obtain an ISWC.[301]

The International Standard Name Identifier ("ISNI") is akin to the IPI, but while the IPI scheme is limited to musical works, ISNI is designed to be a global identification system for creators of *all* types of copyrighted works, including authors, songwriters, recording artists, and publishers. The ISNI International Agency was founded in 2010 to develop the standard, with the goal of eventually replacing existing, disparate identification standards, including the IPI.[302] ISNIs are assigned by an international network of registration agencies which rely upon a centralized database to assign and track ISNI identifiers.[303] Over 8 million identities have been registered so far across multiple classes of creators and works.[304] At the moment, however, it appears that most ISNIs are being assigned to literary authors in Europe. It also seems that the number of registration agencies globally remains limited, with only one agency so far in the United States.[305]

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[299] SoundExchange Second Notice Comments at 4-5.

[300] Pipeline Project Second Notice Comments at 7.

[301] *The IPI System*, IPISYSTEM.ORG, http://www.ipisystem.org/SUISASITES/IPI/ipipublic.nsf/pages/index1 (last visited Jan. 9, 2015).

[302] *See* Jennifer Gatenby & Andrew MacEwan, *ISNI: A New System For Name Identification*, INFORMATION STANDARDS QUARTERLY, Summer 2011, at 4-5, *available at* http://www.niso.org/publications/isq/2011/v23no3/gatenby; Jennifer Gatenby & Joep Kil, *ISNI From Development to Operations*, ISNI, www.isni.org/filedepot_download/58/95.

[303] *See* Gatenby & MacEwan, *ISNI: A New System For Name Identification* at 4-5.

[304] ISNI, http://www.isni.org (last visited Jan. 9, 2015).

[305] Pipeline Project Second Notice Comments at 5. Bowker, an affiliate of ProQuest, assigns ISNIs and tracks the assignment and usage of them. *See Bowker Becomes First ISNI Registration Agency in the U.S.*, BOWKER (June 21, 2012), http://www.bowker.com/en-US/aboutus/press_room/2012/pr_06212012a.shtml; Bowker, *Use of ISNI Is Growing Fast Among Authors, Says New Bowker Analysis*, YAHOO FINANCE (May 7, 2014), http://finance.yahoo.com/news/isni-growing-fast-among-authors-144800650.html.

The music industry also employs identifiers not associated with ISO, including Universal Product Codes ("UPC"). In the music context, a UPC is a set of numbers, along with a corresponding barcode, that identify a finished music product. A different UPC is usually necessary for each product or version of a product to distinguish among, for example, albums, digital singles, or remixed versions of sound recordings. UPCs are generally required by most major physical retailers, and are now required by the iTunes store and other digital platforms. Record labels generally acquire UPCs from GS1 US, a nonprofit group that sets standards for international commerce. UPCs can also be obtained for free or at a nominal cost from a music distributor such as CD Baby or TuneCore.[306]

In addition to standards that have been or are being developed by international standard-setting entities, there are also private initiatives for identifying music and its owners, for example, through the use of digital acoustic fingerprinting and similar technologies. Examples include Gracenote, Shazam, and The Echo Nest—and perhaps most notably, YouTube. An acoustic fingerprint is a digital rendering of the acoustical properties of a particular sound recording, typically one embodied in a digital file such as an mp3 file. That fingerprint can be stored and searched for matches to other digital music files.[307] An acoustic fingerprint does not, on its own, provide ownership or authorship information, but it can be associated with metadata—such as the standardized identifiers discussed above—that does. One advantage of using digital fingerprints is that while it is relatively trivial to strip metadata such as ISRCs and ISWCs from individual music files, it is arguably more difficult to alter a file's acoustic fingerprint without changing the quality of the audio.[308]

2. Public Data

The U.S. Copyright Office operates a public registration system, which maintains information that can help to identify musical works, sound recordings, and their owners. The registration database, however, is not a comprehensive resource for this purpose. Copyright registration is not mandatory, and so registration records are far

[306] *How to Get UPC Barcodes for Your Products*, WALL ST. J., http://guides.wsj.com/small-business/starting-a-business/how-to-get-upc-codes-for-your-products-2 (last visited Jan. 9, 2014); Kristin Thomson, *Metadata for Musicians*, FUTURE OF MUSIC COALITION (Nov. 4, 2014), https://futureofmusic.org/article/article/metadata-musicians.

[307] Michael Brown, *White Paper: Audio Fingerprinting*, MAXIMUM PC (Apr. 3, 2009), http://www.maximumpc.com/article/features/white_paper_audio_fingerprinting.

[308] *See* Ciumac Sergiu, *Duplicate Songs Detector Via Audio Fingerprinting,* CODE PROJECT (June 20, 2013), http://www.codeproject.com/Articles/206507/Duplicates-detector-via-audio-fingerprinting.

from complete. In addition, even when a work has been registered, the registration record is static and thus will not reflect a change in ownership.[309]

The database that houses the Office's registration records is not currently designed to identify or locate works through the use of standard identifiers, such as those described above, and such identifiers are not required in the registration process.[310] As a result, a relatively small number of registration records for musical works and sound recordings reflect these standard identifiers.[311]

Apart from the original registration, some, but not all, copyright owners choose to record assignments and transfers of ownership through the Copyright Office's recordation process. Again, however, such records are far from complete.[312] Nor, due to the historical separation of the registration and recordation systems, is information about recorded documents reliably linked to registration records.[313]

3. Non-Government Databases

Several entities actively develop and maintain their own discrete databases, many of which include standard identifiers and other metadata used by the music industry to track sound recordings and musical works.

As noted above, the RIAA does not keep a central database of sound recordings associated with ISRCs, and so the most comprehensive U.S. sound recording database is likely that of SoundExchange. SoundExchange maintains a database of sound recordings whose uses have been reported to it under the section 112 and 114 licenses, together with information regarding the associated recording artists and labels. This

[309] ROBERT BRAUNEIS, ABRAHAM L. KAMINSTEIN SCHOLAR IN RESIDENCE, U.S. COPYRIGHT OFFICE, TRANSFORMING RECORDATION AND REENGINEERING AT THE UNITED STATES COPYRIGHT OFFICE 127-129 (2015) ("BRAUNEIS"), *available at* http://www.copyright.gov/docs/recordation/.

[310] Technological Upgrades to Registration and Recordation Functions, 78 Fed. Reg. 17,722 (Mar. 22, 2013); BRAUNEIS at 120-121.

[311] As of March 2013, for example, ISRCs were associated with only 5,510 (0.03%) of registration records in the Copyright Office Catalog. *Id.* at 121.

[312] *Id.* at 110-111.

[313] *Id.* The Office has recently embarked upon public processes to consider possible upgrades to its systems that could improve the searchability and usability of its records. Such changes might include, for example, a more robust registration database and a shift to a more user-friendly and accessible electronic recordation system. *See* Strategic Plan for Recordation of Documents, 79 Fed. Reg. 2696 (Jan. 15, 2014); Technological Upgrades to Registration and Recordation Functions, 78 Fed. Reg. 17,722 (Mar. 22, 2013).

database is not currently publicly accessible or available to be used for licensing purposes.[314]

In the realm of musical works, HFA maintains an extensive database of ownership information and provides an online tool enabling the public to search for songwriter and publisher data for all songs that have been registered by its member publishers.[315] ASCAP, BMI, and SESAC each also have databases covering the compositions in their repertoires that are available to the public through their respective websites.[316] In addition, ASCAP and BMI—along with the Society of Composers, Authors and Music Publishers of Canada ("SOCAN")—are currently collaborating to create a common, authoritative resource for the musical works represented by the several organizations. The joint initiative, called MusicMark, will enable publishers to submit a single file for registration of a song and revise ownership data across the PROs simultaneously, even if the work was co-written by members of different societies. Each PRO will then integrate the registration data into its own repertoire database. By enabling PRO members to more efficiently register musical works through a single interface—including works co-written by songwriters who are members of different PROs—MusicMark should provide a more accurate and synchronized view of copyright information for works in the repertoires of the participating PROs.[317]

While each of these databases represents an important and valuable component of the U.S. music marketplace, because they are separate and separately controlled, they do not offer a comprehensive licensing resource. The HFA and PRO databases are currently searchable by the public only manually, on an individual song basis.[318] In addition, these organizations do not warrant the accuracy or completeness of the information they provide (perhaps because they are relying upon representations by third parties concerning authorship and ownership).[319] Finally, it is unclear what effect publisher

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[314] SoundExchange Second Notice Comments at 5.

[315] SONGFILE, http://www.songfile.com (last visited Jan. 25, 2015).

[316] ASCAP's database is called ACE, and BMI's database is called the BMI Repertoire. *See Ace Title Search*, ASCAP, https://www.ascap.com/Home/ace-title-search/index.aspx (last visited Jan. 29, 2015); *BMI Repertoire*, BMI, http://repertoire.bmi.com/startpage.asp (last visited Jan. 29, 2015). SESAC also has a database called SESAC Repertory. *SESAC Repertory*, SESAC, http://www.sesac.com/Repertory/RepertorySearch.aspx?x=39&y=19 (last visited Jan. 29, 2015).

[317] MUSICMARK, http://www.musicmark.com (last visited Jan. 9, 2015).

[318] *See* SONGFILE, http://www.songfile.com (last visited Jan. 25, 2015); *Ace Title Search*, ASCAP, https://www.ascap.com/Home/ace-title-search/index.aspx (last visited Jan. 29, 2015); *BMI Repertoire*, BMI, http://repertoire.bmi.com/startpage.asp (last visited Jan. 29, 2015); *SESAC Repertory*, SESAC, http://www.sesac.com/Repertory/RepertorySearch.aspx?x=39&y=19 (last visited Jan. 29, 2015).

[319] *Terms of Use Agreement*, ASCAP, http://www.ascap.com/about/legal-terms/terms-of-use.aspx (last visited Jan. 16, 2015); *Terms and Conditions of Use*, BMI, http://www.bmi.com/legal/entry/

withdrawal from the PROs in favor of direct administration of the relevant rights—should it come to pass—might have on the efficacy of the PRO databases.[320]

4. International Efforts

One example of international efforts to address data information deficiencies is (or was) the planned Global Repertoire Database ("GRD") for musical works, to be developed by a working group spearheaded and funded by music publishers and collective management organizations in the EU with the support of the World Intellectual Property Organization ("WIPO"). The GRD was intended to provide a comprehensive and authoritative source of data about the ownership and administration of musical works throughout the world. Its supporters anticipated enabling registrations directly from publishers, composers and collective management organizations, and maintaining a database of those registrations, with procedures to resolve ownership disputes. Unfortunately, despite the acknowledged need for solutions in data sharing, support for the project has waned and the GRD effort has been put on hold (at least for the time being).[321]

A similar effort remains underway with respect to sound recordings. Phonographic Performance Ltd ("PPL"), the U.K. collective rights organization, is building a Global Recordings Database and has so far compiled ownership data on over 5.6 million recordings released in the United Kingdom. PPL intends to expand its efforts by

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terms_and_conditions_of_use (last visited Jan. 25, 2015); *SESAC Repertory Terms and Conditions*, SESAC, http://www.sesac.com/Repertory/Terms.aspx (last visited Jan. 25, 2015); *Songfile Terms of Use*, SONGFILE, http://www.songfile.com/termsofuse.html (last visited Jan. 25, 2015).

320 Notably, in the wake of the *Pandora* decision—which criticized UMPG's and Sony/ATV's failure to provide catalog data to Pandora—these publishers have recently posted their U.S. catalogs online. *See* Press Release, UMPG, Universal Music Publishing Group To Offer Expanded Access To Song Catalog Data Through Company's Website (June 27, 2014), *available at* http://www.umusicpub.com/#contentRequest=newsdetail&contentLocation=sub&contentOptions=%26articleID%3D6437%26from%3Dpressreleases; *Sony/ATV Makes Entire Catalogue Available Online*, MUSIC BUSINESS WORLDWIDE (JULY 16, 2014), http://www.musicbusinessworldwide.com/sonyatv-makes-entire-catalogue-available-online/.

321 *PRS 'disappointed' at Global Repertoire Database collapse*, MUSIC ALLY (June 11, 2014), http://musically.com/2014/07/11/prs-disappointed-at-global-repertoire-database-collapse; Paul Resnikoff, *Repertoire Database Declared a Global Failure. . .* , DIGITAL MUSIC NEWS (July 10, 2014), http://www.digitalmusicnews.com/permalink/2014/07/10/global-repertoire-database-declared-global-failure.

working with major record companies and a range of overseas music licensing companies to include worldwide data.[322]

Another initiative is the U.K.'s Copyright Hub, a web portal connected to a network of rightsholders that aims to make it easier for people to track down and license copyrighted works.[323] At present, the Copyright Hub's functionality is fairly basic, offering helpful information about copyright law and website links to licensing organizations. The plan is to change from a signposting tool into an inquiry router that sends queries to rights managers' databases, and returns results to Hub users.[324] In addition, further development may enable creators to register rights information with third-party registries linked to the Hub.[325]

5. Data Sharing Initiatives

As explained above, data regarding the creation, ownership, and administration of sound recordings and musical works are currently maintained in discrete and independently administered databases. A number of initiatives have attempted to overcome this situation by developing standards related to the communication of information about works among disparate sources. In particular, these initiatives are aimed at allowing relevant information and metadata to be efficiently communicated in a common format so that each party requiring access to the data can understand and automatically process that data without excessive administrative costs.

One such initiative is Digital Data Exchange ("DDEX"), an industry consortium consisting of media companies, music licensing entities, digital service providers and others.[326] DDEX has developed standardized formats in which rights and licensing information is represented and communicated.[327] For example, DDEX offers digital sales reports standards that are being used in the U.K. to provide standard reporting formats

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322 RICHARD HOOPER & ROS LYNCH, COPYRIGHT WORKS: STREAMLINING COPYRIGHT LICENSING FOR THE DIGITAL AGE 3 (2012), *available at* http://www.copyrighthub.co.uk/Documents/dce-report-phase2.aspx.

323 THE COPYRIGHT HUB, http://www.copyrighthub.co.uk (last visited Jan. 25, 2015).

324 *Id.*

325 *Id.*; Tom Cox, *Copyright Hub Pilot Introduced in the UK,* INTELLECTUAL PROPERTY BLAWG (Aug. 8, 2013), http://www.intellectualpropertyblawg.com/copyright-law/copyright-hub-pilot-introduced-in-the-uk; *Welcome to the Copyright Hub*, WORLD INTELLECTUAL PROPERTY REVIEW (Jan. 9, 2013), http://www.worldipreview.com/article/welcome-to-the-copyright-hub.

326 *See* DDEX First Notice Comments at 1.

327 *See, e.g.*, MUSIC BUSINESS ASSOCIATION, MUSIC METADATA STYLE GUIDE V2, at 35-38, *available at* http://musicbiz.org/wp-content/uploads/2014/08/MusicMetadataStyleGuide-MusicBiz-FINAL.pdf (last modified Aug. 14, 2014).

between digital music services and the U.K. PRO, PRS for Music.[328] By employing DDEX messaging standards, entities wishing to transact with multiple companies can avoid handling multiple formats and delivery methods.[329]

A similar initiative is WIPO's proposed International Music Registry ("IMR"), which seeks to provide a single access point to the different rights management systems used around the world. WIPO is currently conducting a series of stakeholder discussions on the IMR's scope and structure.[330]

[328] Press Release, RightsFlow, PRS For Music And Rightsflow Partner On DDEX Standardized Reporting Initiative (Dec. 13, 2010), http://mi2n.com/print.php3?id=136849.

[329] *See* DDEX First Notice Comments at 1-2.

[330] *What Copyright Infrastructure is needed to facilitate the Licensing of Copyrighted Works in the Digital Age: the International Music Registry?*, WIPO, http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_aut_ge_11/wipo_ip_aut_ge_11_t12.doc; *The International Music Registry*, WIPO, http://www.wipo.int/imr/en (last visited Jan. 27, 2015).

III. Challenges of the Current System

Perhaps not surprisingly in light of its bewildering array of rights and practices, those who participated in the study identified many significant obstacles in the current music licensing marketplace. As detailed below, stakeholders have a wide range of opinions concerning how best to address them.

Despite the areas of controversy, however, on a somewhat brighter note, study participants were able to articulate some broad areas of consensus as to the overarching principles that should guide any revision of our licensing system, as follows: First, music creators need to be fairly compensated for their efforts.[331] Second, the licensing process needs to be more efficient, including through bundling of necessary rights.[332] Third, market participants need access to authoritative data to identify and license the music they use.[333] And fourth, usage and payment information should be transparent

[331] *See, e.g.*, Copyright Alliance First Notice Comments at 6 ("We believe all authors and creators are entitled to fair compensation for their creative work."); DiMA First Notice Comments at 1 ("DiMA members share the belief that rights owners should be appropriately compensated for the use of copyrighted works."); NMPA & HFA First Notice Comments at 31 (noting that "[f]or music publishers and songwriters, music licensing is only effective if it provides a fair market royalty for the use of their songs"); SGA First Notice Comments at 3 (identifying "fair market value compensation for the use of musical works" as an "indispensable need").

[332] *See, e.g.*, Public Knowledge & CFA First Notice Comments at 5 ("Copyright law's music licensing provisions can help alleviate . . . bottlenecks and make music licensing more efficient and fair for all."); NMPA & HFA First Notice Comments ("Music publishers and songwriters seek an efficient digital music marketplace. . . ."); RIAA Second Notice Comments at 13 ("Commenters desire a more efficient licensing process, and focused on blanket licensing as one way to achieve such efficiency."); NARAS First Notice Comments at 2 ("The Recording Academy supports a structure that is fair, simple and efficient for both the licensor and licensee."); GIPC Second Notice Comments at 7 (urging the Office to "keep in mind issues of efficiency in the marketplace so as to facilitate new, licensed services").

[333] *See, e.g.*, Modern Works Music Publishing First Notice Comments at 10 ("Congress should encourage cooperation among licensors to create technologies that enable licensees to easily search rights databases."); Pilot Music Business Services Second Notice Comments at 3 ("[O]ne centralized database is needed"); Pipeline Project Second Notice Comments at 18 ("It seems to us that the statutory license was the twenty-century's solution to efficiency; however, as we progress further into the digital age, and as data becomes more useful, we no longer see a great need for a compulsory license."); Tr. 381:04-11 (June 23, 2014) (Waleed Diab, Google/YouTube) ("[T]he ability to match the information on the sound recording side and the composition side is absolutely necessary. . . . I think what you are hearing is, there is absolutely a need for a centralized, standardized, data base, somewhere that services can go and pull that information.").

and accessible to rights owners.[334] Many of the stakeholders' comments reflect these important goals.

A. Compensation and Licensing Disparities

1. Effect of Market Trends on Creator Income

According to the Supreme Court, copyright is intended to increase the "harvest of knowledge" by assuring creators "a fair return for their labors."[335] And, as noted above, industry participants are in general agreement that a well-functioning music licensing system should adequately compensate those who create and record songs.[336] There is, however, substantial debate as to whether the current music licensing system is achieving this goal and, if it is not, the reasons why it is failing creators.

In recent years, many music creators have decried what they see as a precipitous decline in their income.[337] Understanding the reasons for this apparent decrease requires a basic understanding of creators' various income streams. Songwriters have three primary sources of income, which they generally share with music publishers: mechanical royalties, synchronization royalties, and performance royalties. Recording artists receive a share of revenues from their record labels for the sale of physical and digital albums and singles, sound recording synchronization royalties, and digital performance

[334] *See, e.g.*, NSAI Second Notice Comments at 2-3 (expressing concern about advances and bonuses that "are never paid to the songwriter or composer" and proposing requiring that "such payments be disclosed by record labels and music publishers"); SGA First Notice Comments at 3 (calling for "complete transparency throughout the licensing, use and payment process"); Kohn First Notice Comments at 11 (proposing that service providers "be required to provide transparent access to transaction data in real-time to an independent validation service"); RIAA Second Notice Comments at 19 ("The major record companies . . . support the idea that where there is direct licensing, publishers/writers should have a direct audit right with respect to third parties that use their works.").

[335] *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545-46 (1985).

[336] *See* RIAA Second Notice Comments at 8 ("[N]obody seems to question the basic premise that royalty rates *should* reflect fair market value.").

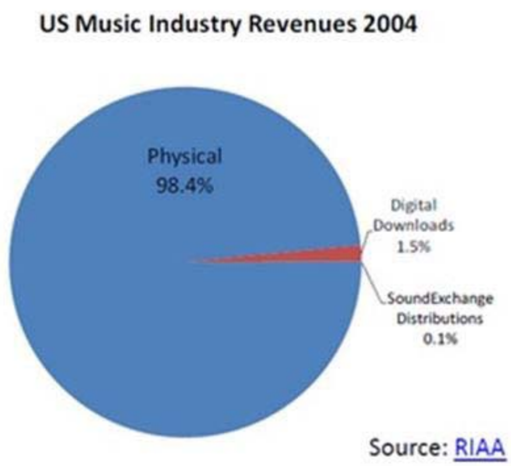
[337] *See, e.g.*, SGA First Notice Comments at 10 ("[T]he income of the music and recording industries (and especially of individual music creators and recording artists) have been diminished, according to reliable estimates, by as much as two-thirds."); A2IM First Notice Comments at 10 (noting that "the decline in sound recording revenues" has "had a dramatic effect on the income of both music labels . . . and their recording artists"); *see also* Nate Rau, *Nashville's musical middle class collapses*, THE TENNESSEAN (Jan. 13, 2015), http://www.tennessean.com/story/entertainment/music/2015/01/04/nashville-musical-middle-class-collapses-new-dylans/21236245 (observing that industry trends have led to "the collapse of Nashville's music middle class").

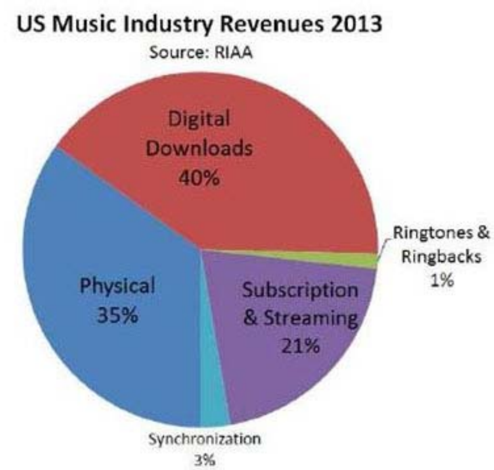
royalties. In addition, recording artists may derive income from live performances, the sale of merchandise, and other sources.[338]

a. From Physical Formats to Downloads to Streaming

In recent years there has been a profound shift in the way music is consumed—from purchases of physical albums, to downloads of digital singles, to on-demand access through digital streaming services. These shifts in music consumption patterns have led to corresponding changes in the relative mix of income streams to copyright owners—in particular, an increased reliance on performance royalties as compared to reproduction and distribution royalties.[339]

For example, the below charts from the RIAA illustrate the shift from U.S. physical sales to digital downloads and other sources of revenue from 2004 to 2013. They reflect remarkable change in less than a decade:[340]





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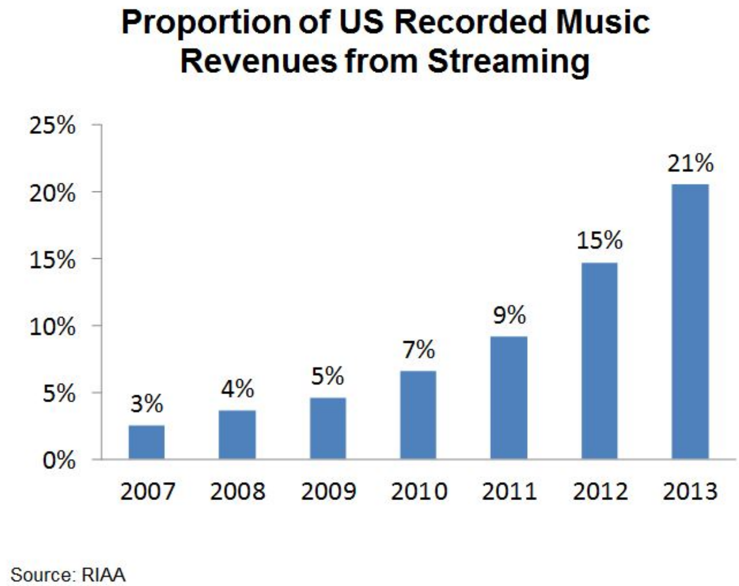
[338] Under so-called "360" record deals, artists may be required to share a portion of these additional revenues with their label. *See* Doug Bouton, Note, *The Music Industry in Flux: Are 360 Record Deals the Saving Grace or the Coup de Grace?*, 9 VA. SPORTS & ENT. L.J. 312, 318 (2010).

[339] *See, e.g.*, IPAC First Notice Comments at 13 (observing that "the decline in revenue from physical album sales, to downloads, and ultimately streaming, has drastically reduced the income opportunities for songwriters and composers"); RIAA Second Notice Comments at 38 ("Songwriters and recording artists have become more dependent on performance revenue, but that revenue is not sufficient on its own to sustain a livelihood.").

[340] *See* RIAA, *A Fruitful Anniversary for iTunes,* MUSIC NOTES BLOG (Apr. 25, 2013), http://www.riaa.com/blog.php?content_selector=riaa-news-blog&blog_selector=A-Fruitful-Anniversary-&blog_type=&news_month_filter=4&news_year_filter=2013 (providing 2004 chart); RIAA First Notice Comments at 51 (providing 2013 chart). Charts reproduced with the permission of RIAA.

Other data from the RIAA show how streaming, in particular, has boomed in recent years:[341]



NMPA submitted data showing a similar shift.[342] In 2012, NMPA reported that 30% of U.S. music publisher revenues came from performance royalties, 36% from mechanical royalties, 28% from synch royalties, and 6% from other sources.[343] Two years later, NMPA reported that 52% of music publisher revenues came from public performance royalties, while only 23% came from mechanical royalties, 20% from synch licenses, and 5% from other sources.[344] Other recent sales data show that streaming is continuing its surge—according to Nielsen, the number of on-demand streams in the United States grew 54% from 2013 to 2014, with "over 164 billion songs streamed on-demand through audio and video platforms."[345]

The meteoric rise of streaming has corresponded with a sharp decline in physical and digital download sales. In 2014, according to Nielsen data, total U.S. album sales (in both physical and digital formats) fell by 11.2%, and digital download sales decreased

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341 RIAA First Notice Comments at 50. Chart reproduced with the permission of RIAA.

342 NMPA Second Notice Comments at 8 (citing sources).

343 Ed Christman, *NMPA's David Israelite to Congress: A More Efficient Mechanical Licensing System*, Billboard (June 13, 2012), http://www.billboard.com/biz/articles/news/publishing/1093490/nmpasdavid-israelite-to-congress-a-more-efficient-mechanical.

344 Press Release, NMPA, U.S. Music Publishing Industry Valued at $2.2 Billion (June 11, 2014), *available at* https://www.nmpa.org/media/showrelease.asp?id=233.

345 NIELSEN, 2014 NIELSEN MUSIC U.S. REPORT, http://www.nielsen.com/content/dam/corporate/us/en/public%20factsheets/Soundscan/2014-year-end-music-report.pdf.

12.5%, from the year before.[346] Of course, this has been accompanied by a commensurate drop in mechanical revenues for music publishers and songwriters. According to NSAI, "[m]any songwriters report a reduction of 60 to 70% or more" in mechanical royalties, and those royalties "continue to decrease by an alarming rate."[347] Many believe that in the not-too-distant future, interactive streaming will eclipse digital downloads to become the dominant means by which consumers access music.[348]

Meanwhile, since the late 1990s, there has been a marked decline in industry revenues overall.[349] RIAA observes that, since 1999, total U.S. recorded music retail revenues have dropped about 53%.[350] As relative newcomer Spotify summed up the situation, "the majority of revenue in the industry has evaporated."[351]

What is a matter of some debate among stakeholders, however, is the actual cause of this striking decline. Some commenters view the reduction in overall revenue and creator income as the result of ordinary market forces. For example, NAB suggested that general market factors—including an extended recession, a decline in consumer discretionary spending, and increased competition for consumers' shrinking entertainment budgets—have all contributed to reduced creator income.[352] Other

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[346] *Id.*; *see also* BMI Second Notice Comments at 16 ("[T]he instant availability to the public of the widest possible choice of recorded music by means of streaming technology has come at the expense of an accelerating drop-off in the sale of recordings (hard copies and downloads).").

[347] NSAI Second Notice Comments at 6.

[348] *See* IFPI, DIGITAL MUSIC REPORT 2014, at 5, http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf ("It is now clear that music streaming and subscription is a mainstream model for our business."); ASCAP First Notice Comments at 5-6 (stating that "digital music streaming services account for an increasingly large portion of music revenues in the U.S."); SoundExchange First Notice Comments at 22 ("The music marketplace changed rapidly from one long dominated by the sale of physical products, to one in which digital downloads are the primary means of acquiring ownership of copies. Now, it is changing again, and obtaining access to music through streaming services is ascendant.").

[349] *See* Michael DeGusta, *The REAL Death of the Music Industry*, BUSINESS INSIDER (Feb. 18, 2011), http://www.businessinsider.com/these-charts-explain-the-real-death-of-the-music-industry-2011-2.

[350] RIAA Second Notice Comments at 38.

[351] *How is Spotify contributing to the music business?*, SPOTIFY, http://www.spotifyartists.com/spotify-explained/#how-is-spotify-contributing-to-the-music-business (last visited Jan. 30, 2015) (citing global data).

[352] NAB First Notice Comments at 9-10.

stakeholders identified industry-specific market trends as a reason for the decline, such as increased competition driving down the value of synch licenses.[353]

Others attribute at least a good portion of the decrease to the shift from album sales to individual song purchases.[354] IPAC explained this dynamic in the context of mechanical royalties:

> Dramatically lower album sales is the primary market development that has led to songwriters reporting significant income declines in recent years. During the heyday of the CD, album cuts made almost as much money in mechanical royalties as the most popular single on the CD. Today's music industry is seeing significantly fewer full album purchases and significantly more individual song purchases. As a result, mechanical royalty income generated from the songs on an album has declined dramatically, leading to the decline in songwriter income.[355]

But IPAC also observed that this trend has been exacerbated by the shift to streaming, which it claims generates lower royalties for copyright owners,[356] a topic that is addressed next.

b. Impact of Music Streaming Models

A major area of debate is whether digital music streaming services fairly compensate rightsholders, particularly music publishers and songwriters. Digital streaming providers assert that they provide copyright owners with entirely new revenue streams by paying performance royalties to both sound recording and musical work owners for

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[353] LaPolt Second Notice Comments at 3 ("[W]hile synchronization licenses are more plentiful than ever, these licenses are paying lower and lower rates per individual agreement for the average songwriter."); NMPA & HFA Second Notice Comments at 8 (noting that "increased competition has driven down synch fees"); NSAI Second Notice Comments at 6 ("With hundreds of television networks and online content providers compared to just a few years ago, more synch licenses are issued, but for a much lower amount per use.").

[354] *See* CFA & Public Knowledge First Notice Comments at 60-62 ("The leading edge of the shift was driven by unbundling of albums and the sale of singles. Consumers were no longer forced to buy songs they did not want in order to get the ones they desired."); Tr. at 274:01-12 (June 23, 2014) (Paul Fakler, NAB/Music Choice) ("Consumers no longer are forced to buy a bundled album containing recordings that they don't want to buy. So there are a lot of factors that have gone into declines of record sales.").

[355] IPAC Second Notice Comments at 8; *see also* NSAI Second Notice Comments at 6 ("One major reason is dramatically less income from album cuts not released as singles. A few years ago a non-single cut on an album with high sales volume produced greater income for many songwriters. Today album cuts, with a few rare exceptions, produce very little income.").

[356] IPAC Second Notice Comments at 8-9.

interactive and noninteractive services.[357] With respect to sound recording royalties specifically, DiMA noted that "[d]igital radio alone paid out $590.4 million in royalties to artists and rightsholders last year."[358]

Copyright owners, as well as the RIAA, acknowledge the increase in performance royalties.[359] ASCAP and BMI in recent years have both announced record-high collections and royalty distributions.[360] But notwithstanding the overall increase in performance royalties, many copyright owners believe that "the downward spiral of record sales and therefore artist and mechanical royalties has not yet been compensated by the increase in streaming revenue."[361] In other words, increases in performance revenues have not made up for the dramatic decrease in sales.

Significantly, the leading interactive streaming audio service, Spotify, believes that the "rapid decline [in industry revenue] is not due to a fall in music consumption but to a shift in music listening behavior towards formats that do not generate significant income for artists."[362] ASCAP observed that "technological developments have significantly increased the use of musical works, yet significantly decreased the income earned by songwriters."[363] Songwriters increasingly worry about their income (or lack thereof)

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357 DiMA First Notice Comments at 45 ("The substantial royalties paid by digital music services constitute new revenue streams that were unimagined just a few decades ago.").

358 *Id.*

359 RIAA First Notice Comments Ex. A at 1 ("In 2013, strong growth in streaming revenues contributed to a US music industry that was stable overall at $7 billion for the fourth consecutive year."); *see also* IFPI, DIGITAL MUSIC REPORT 2014 at 5 ("The US music market continued to stabilize, growing slightly in trade revenue terms, helped by rising consumer demand for music streaming services.").

360 Ben Sisario, *Collectors of Royalties for Music Publishers May See Better Results*, N.Y. TIMES (Sept. 23, 2013), http://www.nytimes.com/2013/09/23/business/media/collectors-of-royalties-for-music-publishers-may-see-better-results.html; Press Release, *ASCAP Reports Strong Revenues in 2013,* ASCAP (Feb. 12, 2014), http://www.ascap.com/press/2014/0213-2013-financials.aspx.

361 ABKCO First Notice Comments at 5; *see also, e.g.,* NMPA Second Notice Comments at 7 (noting that "performance royalties are increasing in importance while mechanical income has diminished. Almost all musical work owners are in agreement that this is the most challenging aspect of the new digital marketplace"); RIAA Second Notice Comments at 38; ASCAP Second Notice Comments at 23 (finding that "overall songwriter income has declined because mechanical right income has dropped by a large margin.").

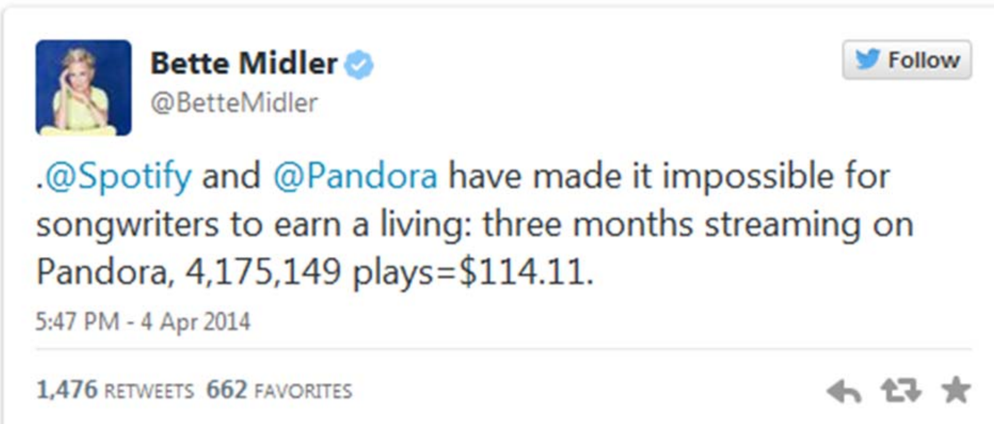
362 *How is Spotify contributing to the music business?*, SPOTIFY, http://www.spotifyartists.com/spotify-explained/#how-is-spotify-contributing-to-the-music-business (last visited Jan. 30, 2015). Spotify states, however, that its subscription service "aims to regenerate this lost value by converting music fans from these poorly monetized formats to our paid streaming format, which produces far more value per listener." *Id.*

363 ASCAP First Notice Comments at 39.

from digital streaming services, especially those that they regard as poorly "monetized"—*i.e.*, ad-supported services that do not require a subscription fee or generate a large amount of advertising revenue.

A growing number of high-profile songwriter/artists—including Taylor Swift and Thom Yorke—are leveraging their sound recording rights to remove their music from Spotify, principally out of concern that Spotify's free ad-supported tier of service does not fairly compensate them for their songs.[364] As Swift put it succinctly: "I think that people should feel that there is a value to what musicians have created, and that's that."[365]

Songwriter concerns are vividly illustrated by the following tweet by Bette Midler:



Other songwriters have made similarly bleak claims.[366] For instance, the songwriter Aloe Blacc recently reported:

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[364] Seabrook, *Revenue Streams: Is Spotify the Music Industry's Friend or Its Foe?*; Stuart Dredge, *Thom Yorke Explains Why He Hates Spotify*, Business Insider (Oct. 7, 2013), http://www.businessinsider.com/thom-yorke-explains-why-he-hates-spotify-2013-10; Sasha Bogursky, *Taylor Swift, Garth Brooks and other artists lead the fight against Spotify*, Fox News (Nov. 19, 2014), http://www.foxnews.com/entertainment/2014/11/19/taylor-swift-garth-brooks-artists-lead-fight-against-spotify/.

[365] Jack Dickey, *Taylor Swift on* 1989, *Spotify, Her Next Tour and Female Role Models*, Time (Nov. 13, 2014), http://time.com/3578249/taylor-swift-interview. In a similar move, GMR recently demanded that YouTube remove videos from its service containing approximately 20,000 songs that GMR represents, including the Eagles and Pharrell Williams. Eriq Gardner, *Pharrell Williams' Lawyer to YouTube: Remove Our Songs or Face $1 Billion Lawsuit*, Hollywood Reporter (Dec. 22, 2014), http://www.hollywoodreporter.com/thr-esq/pharrell-williams-lawyer-youtube-remove-759877.

[366] *See, e.g.*, Maya Kosoff, *Pharell Made Only $2,700 In Songwriter Royalties From 43 Million Plays of 'Happy' On Pandora*, Business Insider (Dec. 23, 2014), http://www.businessinsider.com/pharrell-made-only-2700-in-songwriter-royalties-from-43-million-plays-of-happy-on-pandora-2014-12; David Lowery, *My Song Got Played On Pandora 1 Million Times and All I Got Was $16.89, Less Than*

> Avicii's release "Wake Me Up!" that I co-wrote and sing, for example, was the most streamed song in Spotify history and the 13th most played song on Pandora since its release in 2013, with more than 168 million streams in the US. And yet, that yielded only $12,359 in Pandora domestic royalties—which were then split among three songwriters and our publishers. In return for co-writing a major hit song, I've earned less than $4,000 domestically from the largest digital music service.[367]

Notably, songwriters who are not also recording artists with some measure of control over their recordings typically do not have the option to withdraw their works from low-paying services, because—due to the combination of the section 115 compulsory license and the ASCAP and BMI consent decrees—they have no choice other than to permit the exploitation of their musical works by such providers. And even recording artists cannot remove their music from noninteractive digital services like Pandora that qualify for the section 112 and 114 compulsory licenses.

For their part, the digital music services deny that they are the cause of the decline in songwriter income. These services note that they pay royalties for the public performance of sound recordings, while terrestrial radio does not, and so the total royalties they pay to both sound recording and musical work owners must be considered.[368] Accordingly, Pandora challenged the numbers cited by Midler and Blacc by publicizing the total amounts paid for all rights to perform the songs, including sound recording rights—stating that they paid $6,400 in royalties in Midler's case and over $250,000 for the plays of "Wake Me Up!".[369]

Digital music services emphasize that they "pay the lion's share of their revenues over to rights owners,"[370] and suggest that the songwriter concerns are more accurately traced to

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What I Make From a Single T-Shirt Sale!, THE TRICHORDIST (June 24, 2013), http://thetrichordist.com/2013/06/24; Doug Gross, *Songwriters: Spotify doesn't pay off . . . unless you're a Taylor Swift*, CNN (Nov. 13, 2014), http://www.cnn.com/2014/11/12/tech/web/spotify-pay-musicians (noting that the songwriters of the Bon Jovi hit "Livin' on a Prayer" split $110 in royalties from Pandora for 6.5 million plays of that song).

[367] Aloe Blacc, *Streaming Services Need to Pay Songwriters Fairly*, WIRED (Nov. 5, 2014), http://www.wired.com/2014/11/aloe-blacc-pay-songwriters.

[368] DiMA First Notice Comments at 46.

[369] Andy Gensler, *Bette Midler Disparages Pandora, Spotify Over Artist Compensation*, BILLBOARD (Apr. 6, 2014), http://www.billboard.com/biz/articles/news/digital-and-mobile/6039697/bette-midler-disparages-pandora-spotify-over-artist; Alison Kosik, *The puzzling and 'antiquated' world of music royalties*, CNN MONEY (Nov. 17, 2014), http://money.cnn.com/2014/11/17/media/aloe-blacc-music-royalties.

[370] DiMA First Notice Comments at 46; *see also* Glenn Peoples, *Pandora Revenue Up 40 Percent, Listening Growth Softens*, BILLBOARD (Oct. 23, 2014), http://www.billboard.com/biz/articles/news/

the division of total royalties between sound recording owners and musical work owners.[371] From the services' perspective, total content costs are the relevant consideration. They assert that they are "agnostic" as to how that total is divided among various rightsholders.[372]

Digital music services and broadcasters also contend that, to the extent individual creators believe they are not receiving adequate income, the blame might lie with intermediaries. DiMA stated that "there is little transparency about what happens to the significant royalties generated from digital music services after they are paid to record labels, music publishers, and PROs, and processed under the financial terms of recording artists' and songwriters' own private arrangements with rightsowners."[373] DiMA thus alleged that, rather than being paid out to individual creators, "a significant portion of the royalties received are retained by [intermediaries] for their own account, or applied toward the recoupment of advances paid to recording artists and songwriters."[374] SAG-AFTRA and AFM, which represent individual artists, expressed a similar worry that direct licensing deals "can create uncertainty regarding which benefits of the deal are subject to being shared with Artists at all." They noted in particular that "[d]irect license deals increasingly have been reported to include 'breakage'—advance payments or guaranteed payments in excess of the per-performance royalty earned under the license—equity shares, promotion or other non-usage based elements" and that even if such amounts are shared with artists, they "may

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digital-and-mobile/6296383/pandora-revenue-up-40-percent-listening-growth-softens (noting Pandora pays 46.5% of its revenues in royalties to copyright owners).

[371] *See* DiMA First Notice Comments at 11 ("[M]uch of the current debate over rates stems from disagreement among the labels, publishers and PROs about how to allocate the *content owners' fixed share of the pie*, rather than from a notion that service providers are not paying enough, in the aggregate, for content.").

[372] *See* Tr. at 193:13-18 (June 4, 2014) (Scott Sellwood, Google/YouTube) ("[I]f there could be some agreement between publishers and labels as to total content cost, we don't—we're very agnostic, we don't care whether it's a performance or a reproduction, tell us how much it costs."); *accord* Tr. at 112:02-113:08 (June 17, 2014) (Vickie Nauman, CrossBorderWorks) ("[Third-party technology developers'] incentives are not to solve the problems between the publishers and the labels and the PROs . . . [T]hey want to know that they can come to a simple source and pay for the rights.").

[373] DiMA First Notice Comments at 47.

[374] *Id.*; *see also* NAB First Notice Comments at 10-12 ("To the extent recording artists have not been adequately sharing in the new revenue streams from on-demand streaming services . . . it is likely due to these same creative accounting schemes that the record companies have employed for decades to underpay artists.").

be subject to recoupment and less transparent than payments under the compulsory license."[375]

c. Non-Performing Songwriters

While all creators have been affected by the shift from full-album sales to digital streaming models, songwriters who are not also performing artists appear to have been especially hard hit. Unlike songwriter-artists, "pure" songwriters who write works for others to perform do not have the potential to make up for lost income through touring or merchandise sales.

According to NSAI, since 2000, the number of full-time songwriters in Nashville has fallen by 80%.[376] NSAI further observes that two decades ago, there were some 3,000 to 4,000 publishing deals available for songwriters in Nashville; that number has since dropped to 300 to 400.[377] A publishing deal is crucial, as it "essentially pays a songwriter an annual salary to write songs."[378] Without such a deal, it may be impossible for a songwriter to finance his or her creative efforts. A recent article in *The Tennessean* concludes that the result of the shift away from album sales to streaming "has been the collapse of Nashville's musical middle class."[379]

d. Additional Considerations

Piracy

In addition, a broad range of stakeholders—with the exception of the CFA and Public Knowledge[380]—pointed to piracy as a continuing challenge that depresses revenues for both legal music providers and rightsholders. But piracy was not a significant focus of discussion. Unlike in the Napster era, stakeholders now seem resigned to this marketplace condition and the perhaps irreversible impact it has had on the industry. RIAA—which abandoned its lawsuits against individual file-sharers several years ago[381]—observed that piracy "certainly is in the background when you talk about whether digital music services are earning enough money or paying enough money,

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[375] SAG-AFTRA & AFM Second Notice Comments at 2.

[376] Rau, *Nashville's musical middle class collapses*.

[377] NSAI Second Notice Comments at 6.

[378] Rau, *Nashville's musical middle class collapses*.

[379] *Id.*

[380] CFA & Public Knowledge First Notice Comments at 70 ("In today's music market, the claim that piracy is still a problem is contradicted by a great deal of evidence on actual consumer behavior.").

[381] David Kravets, *Copyright Lawsuits Plummet in Aftermath of RIAA Campaign*, WIRED (May 18, 2010), http://www.wired.com/2010/05/riaa-bump/.

competing against free remains a problem."[382] DiMA agreed that "the truth is that any legitimate digital service right now competes with free."[383] This sentiment was echoed by Spotify as well: "We are competing with piracy. It's a reality that we all face on every level of the ecosystem. We are all competing with free."[384]

Impact of DMCA Safe Harbors

While piracy may now be considered as an accepted background fact, the same cannot be said of the DMCA safe harbors, codified in section 512 of the Copyright Act, which remain highly controversial. Section 512 curtails liability for online providers for infringing user-posted content provided that they remove such content expeditiously in response to a copyright owner's takedown notice.[385] Although the operation of the DMCA safe harbors is beyond the scope of this study, the Office briefly notes these DMCA concerns since they were so frequently expressed.[386]

Many copyright owners blame the DMCA's safe harbor regime for allowing digital providers the opportunity to profit from the unauthorized use of copyrighted music without paying licensing fees.[387] One composer, Hélène Muddiman, likened the situation to a company giving away someone else's CDs at a fairground and making money by advertising to the people in line.[388] Music publisher Jason Rys contended that

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[382] Tr. at 98:02-04 (June 24, 2014) (Susan Chertkoff, RIAA); *see also* RIAA Second Notice Comments at 6 ("It remains a problem that the legitimate market for licensed musical works must operate in an environment in which there is also a huge amount of infringing use.").

[383] Tr. at 111:09-11 (June 24, 2014) (Lee Knife, DiMA).

[384] Tr. at 122:01-04 (June 24, 2014) (James Duffett-Smith, Spotify).

[385] 17 U.S.C. § 512(c); DMCA § 202(a).

[386] In a separate public process, the Department of Commerce's Internet Policy Task Force—led by the U.S. Patent and Trademark Office ("USPTO") and the National Telecommunications and Information Administration ("NTIA")—has, in keeping with its July 2013 Green Paper, established a "multi-stakeholder" dialogue on "improving the operation of the notice and takedown system for removing infringing content from the Internet under the DMCA." *See* Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, 78 Fed. Reg. 61,337, 61,338 (Oct. 3, 2013); *see also* DEPARTMENT OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 54 (2013) ("GREEN PAPER"), *available at* http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf. The Office will be interested to see the results of that process.

[387] *See* Lincoff First Notice Comments at 9.

[388] Tr. at 136:10-139:05 (June 17, 2014) (Hélène Muddiman, Hollywood Elite Composers); *see also* Zoë Keating, *What should I do about Youtube?*, ZOEKEATING.TUMBLER.COM (Jan. 22, 2015) http://zoekeating.tumblr.com/post/108898194009/what-should-i-do-about-youtube (describing YouTube's negotiating tactics for licenses covering its new subscription service, which include

"due to the DMCA there's nothing you can realistically do to stop your songs from appearing on YouTube."[389]

In addition to complaining that the notice and takedown regime created under the DMCA results in an impossible game of "whack-a-mole"—since removed content is frequently reposted, requiring the owner to serve another takedown notice[390]—some stakeholders also point out that the digital companies' ability to exploit infringing content unless and until a notice is sent affords these providers significant added leverage in licensing negotiations, since content owners must either agree to a license or devote significant resources to an unending takedown process. This dynamic, in turn, is thought to have a "depressive effect" on royalty rates.[391]

For their part, digital services stress the considerable effort that is required to respond to copyright owners' slew of takedown notices. The number of takedown requests submitted to Google, for example, continues to climb and suggests a staggering amount of online infringement. In 2010, Google received approximately 3 million DMCA takedown requests; in 2014, that number was 345 million—over 940,000 takedown requests every day.[392]

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excluding artists from YouTube's revenue-sharing program if the artist declines to license their works for the subscription service).

389 Tr at 228:08-10 (June 16, 2014)(Jason Rys, Wixen Music Publishing); *see* Tr at 119:10-21 (June 24, 2014) (Dick Huey, Toolshed Inc.) (the DMCA is "a defense that's used by the largest tech companies in some cases to avoid direct licensing").

390 Audiosocket First Notice Comments at 1; Buckley Second Notice Comments at 4; DotMusic First Notice Comments at 8.

391 BMI First Notice Comments at 28-29 ("Another explanation [for reduced songwriter, composer and recording artist income] is the depressive effect of the [DMCA] safe harbors, which shield Internet service providers . . . from liability for certain user activities."). To cite a recent example, Irving Azoff of GMR recently threatened litigation against YouTube for the unauthorized performances of his clients' music notwithstanding the safe harbors, explaining that "they are the ones that have been least cooperative and the company our clients feel are the worst offenders." Gardner, *Pharrell Williams' Lawyer to YouTube: Remove Our Songs or Face $1 Billion Lawsuit*. GMR's apparent position is that if YouTube is able to identify music for the purpose of monetizing it through its Content ID system, it should also be able to take it down without the service of individual takedown notices. *Id.*

392 Joe Mullin, *Google Handled 345 Million Copyright Takedowns in 2014*, ARSTECHNICA (Jan. 6, 2015), http://arstechnica.com/tech-policy/2015/01/google-handled-345-million-copyright-takedowns-in-2014; *Section 512 of Title 17: Hearing Before the Subcomm. On Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 47 (2014) (Statement of Katherine Oyama, Sr. Policy Counsel, Google Inc.).

2. Disparate Treatment of Analogous Rights and Uses

Closely tied to the issue of fair compensation is the disparate legal treatment of sound recordings and musical works, both vis-à-vis each other and across different delivery platforms. Many participants regard these disparities as unwarranted, and blame them for the unfairness and inefficiency in the music licensing system.

a. Inconsistent Ratesetting Standards

As explained above, ratesetting standards under the statutory licenses and consent decrees differ based on the right and use at issue. The CRB establishes rates for mechanical reproductions of musical works under section 115 under the four-factor, public policy-oriented standard in section 801(b)(1) of the Copyright Act.[393] Under the ASCAP and BMI consent decrees, the rate courts establish rates for the public performance of musical works under a "fair market value" analysis which attempts to determine the price that a willing buyer and willing seller would agree to in an arm's length transaction, but gives substantial weight to antitrust concerns.[394]

As also described above, rates for the digital performance of sound recordings under section 114 are set under different standards, depending on the type of use. Royalty rates for a limited set of older services—Sirius XM, as the only preexisting satellite service, and Music Choice and Muzak, as the only preexisting subscription services—are governed by the same four-factor standard in section 801(b)(1) as mechanical reproductions of musical works subject to compulsory licensing under section 115.[395] Meanwhile, royalty rates for all internet radio and newer noninteractive subscription services, and for all ephemeral recordings under section 112 regardless of the type of service, are established under the so-called "willing buyer/willing seller" standard, which many believe yields more market-oriented rates than those established under section 801(b)(1).[396]

Most stakeholders seem to acknowledge that it is problematic for the law to impose differing ratesetting standards, especially for businesses that provide similar services.[397]

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[393] 17 U.S.C. § 801(b)(1).

[394] ASCAP First Notice Comments at 25 (quoting *United States v. BMI* (*Music Choice II*), 316 F.3d 189, 194 (2d Cir. 2003)); *ASCAP v. MobiTV, Inc.*, 681 F.3d 76, 82 (2d Cir. 2012) (stating that "the rate-setting court must take into account the fact that ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music").

[395] *See* 17 U.S.C. §§ 114(f)(1), 801(b)(1).

[396] *See* 17 U.S.C. §§ 112(e)(4), 114(f)(2)(B).

[397] *See, e.g.*, SoundExchange First Notice Comments at 6-8, 14-16; DiMA First Notice Comments at 40; RIAA First Notice Comments at 30-32; Public Knowledge & CFA First Notice Comments at 23-26; Sirius XM First Notice Comments at 3; NARAS First Notice Comments at 8-9.

As DiMA noted, "[t]he 'playing field' regarding ratesetting standards is not level, and the result is fundamental inequity."[398] Depending upon whether they wish to see higher or lower royalty rates, however, these same stakeholders disagree as to which ratesetting standard should apply.

Music services and public interest groups support adoption of the 801(b)(1) standard for all statutory licenses, as the standard more likely to produce lower rates. Public Knowledge and CFA, for example, opined that the 801(b)(1) standard's balancing of policy considerations and focus on "creating economic incentives with the ultimate purpose of encouraging artists and platforms to create new works and bring those works to market" better aligns with the constitutional purpose of copyright law.[399] Similarly, Sirius XM pointed out that the 801(b)(1) standard provided more "latitude to consider the enumerated policy factors, including recognizing the 'relative contributions' of technological pioneers, and ensuring that both copyright owners and users are treated fairly."[400] It also noted that rates set under the standard have proven less susceptible to legal challenge or congressional modification.[401]

Taking a somewhat different tack, DiMA criticized the willing buyer/willing seller standard for "requir[ing] judges to set a rate based solely on *marketplace benchmarks*," where "there is very little record evidence of market rates for directly licensed internet radio services that are not tied to a separate rights grant for additional service types and functionalities (such as direct licenses for interactive services)."[402] In a related vein, Spotify noted that under the willing buyer/willing seller standard, benchmark rates proffered by licensees "are often premised on the agreements entered into by only the largest of licensors . . . [who] demand 'Most Favored Nations' provisions to ensure that only the highest rates are utilized in the market as opposed to rates that would arise from true free market negotiations."[403]

In contrast, copyright owners and their representatives support the adoption of the willing buyer/willing seller standard for all rates across the board. They posit that the willing buyer/willing seller standard is fairer to music owners and creators, who cannot opt out of compulsory licenses.[404] BMI stated that it is "simple and self-evident" that

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398 DiMA First Notice Comments at 40.

399 Public Knowledge & CFA First Notice Comments at 24-25.

400 Sirius XM First Notice Comments at 13.

401 *Id.* at 14-15.

402 DiMA First Notice Comments at 36 (emphasis in original).

403 Spotify First Notice Comments at 7.

404 See, *e.g.*, NMPA & HFA First Notice Comments at 8, 15-16; Wixen First Notice Comments at 2; BMI First Notice Comments at 3; IPAC First Notice Comments at 6; NARAS First Notice Comments at 1; Tr. at 292:17-20 (June 24, 2014) (Peter Brodsky, Sony/ATV).

creators should be paid at a fair market value rate.[405] Sony/ATV argued that the 801(b)(1) standard "creates artificially deflated rights," whereas a willing buyer/willing seller standard "will create fair market value" for copyright owners.[406] In sum, copyright owners strongly object to a ratesetting standard that does not aspire to free-market rates.

In this regard, a number of copyright owners, including NMPA, ASCAP, BMI, SESAC, and NARAS, expressed support for the Songwriter Equity Act ("SEA"), proposed legislation that would change the ratesetting criteria applicable to section 115 from the 801(b)(1) formula to the willing buyer/willing seller standard.[407]

b. Different Ratesetting Bodies

Another disparity in the ratesetting process involves the bodies that oversee the ratesetting proceedings. As discussed above, antitrust consent decrees entered into with the DOJ by ASCAP and BMI dictate that rates set for the public performance of musical works administered by those PROs are overseen by two judges of the U.S. District Court for the Southern District of New York that sit as rate courts for the respective consent decrees. Antitrust concerns play a predominant role in the setting of these rates.[408] In contrast, the CRB, which sets rates for the statutory licenses in sections 112, 114, and 115, does not set rates with antitrust concerns specifically in mind.[409] Instead, the CRB is designed to be an expert ratesetting body, and to bring to bear "a significant mastery of economics and marketplace factors as well as considerable knowledge of copyright law."[410]

A number of stakeholders criticized this divided ratesetting regime. Licensees pointed out that similar services must petition different bodies to obtain the rights necessary to engage in a single activity—for example, interactive streaming—leading to increased costs. When rates are set by different bodies at different times, there is a question as to

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[405] BMI First Notice Comments at 3.

[406] Tr. at 291:04-07 (June 24, 2014) (Peter Brodsky, Sony/ATV).

[407] SEA, H.R. 4079, 113th Cong. (2014); *see also Songwriter Equity Act Gains Support in Congress*, BMI, http://www.bmi.com/news/entry/songwriter_equity_act_gains_support_in_congress (last visited Jan. 30, 2015). The SEA would also eliminate the current prohibition in section 114(i) that prohibits the PRO rate courts from considering sound recording performance rates in establishing the performance royalties due for musical works.

[408] *BMI v. DMX*, 683 F.3d at 49.

[409] Indeed, as noted, Congress provided copyright owners and users with an antitrust exemption to allow those groups to engage in collective negotiation of rates under the statutory licenses. *See* 17 U.S.C. §§ 112(e)(2); 114(e)(1), 115(c)(3)(B).

[410] H.R. REP. NO. 108-408, at 25; *see generally* 17 U.S.C. § 802(a).

how to adjust and harmonize the different rates.[411] Others raised fundamental structural and procedural concerns, such as the propriety of a single district court being tasked with an ongoing economic responsibility it is not specifically designed to handle, in comparison to a dedicated tribunal such as the CRB. Bob Kohn, author of a well-known treatise on music licensing, noted that "rate court proceedings have morphed from the nature of a fairness hearing for proposed rates to an actual rate setting process—something which the courts are not equipped to do, especially without jurisdiction over rate setting for mechanical reproductions of musical works and transmissions of sound recordings."[412]

Music services fear that fragmented consideration of royalty rates across different ratesetting bodies can lead to unsustainable results.[413] On this point, a representative from Spotify stated:

> One thing that is absolutely essential, though, is that any rate setting standard is not looked at in a vacuum. . . . If we have an increase in publishing rates, for example, that go up beyond, much higher than they are at the moment, then we could be in a situation where we pay out more than one hundred percent of our revenue, which is unsustainable.[414]

Adding to general concerns about disparate ratesetting processes is the fact that section 114(i) of the Copyright Act prevents the PRO rate courts from considering fees set by the CRB for digital performance of sound recordings, thus further encouraging balkanization.[415]

Recognizing the shortcomings inherent in the current divided approach, some participants proposed unifying ratesetting proceedings for music licensing in a single body, observing that this could also lead to cost savings through the elimination of duplicative proceedings.[416]

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[411] Tr. at 237:08-21 (June 16, 2014) (Gary R. Greenstein, Wilson Sonsini Goodrich & Rosati).

[412] Kohn First Notice Comments at 12.

[413] Tr. at 194:05-18 (June 4, 2014) (Scott Sellwood, Google/YouTube) ("[T]he main concern for us that comes from fragmentation is an incremental creep in total content cost from which we can't really sustain the business."). RIAA, however, likened this concern to "saying if Dunkin' Donuts finds out that the price of coffee is going up that now they are going to tell their flour supplier that they are going to pay less." Tr. at 98:12-19 (June 24, 2014) (Susan Chertkoff, RIAA).

[414] Tr. at 258:01-14 (June 23, 2014) (James Duffett-Smith, Spotify).

[415] *See* NMPA & HFA First Notice Comments at 21-22; BMI First Notice Comments at 12; SESAC First Notice Comments at 3-5; NARAS First Notice Comments at 4; CTIA First Notice Comments at 11-12; Tr. at 268:11-269:14 (June 16, 2014) (Timothy A. Cohan, PeerMusic).

[416] *See* FMC First Notice Comments at 4 (suggesting that "it may be more useful to have arbitration and dispute resolution mechanisms take place under the same court, perhaps the

c. Pre-1972 Sound Recordings

As explained above, legal uncertainties surround state law protection for pre-1972 sound recordings. This has led digital music providers to take different approaches as to the payment of royalties for the streaming of pre-1972 sound recordings—some pay, and some do not. In recent months, questions of whether and how to pay for such uses have become more immediate due to judicial decisions in California and New York upholding the right of pre-1972 sound recording owners to collect for performances of their works—and additional lawsuits are pending.[417]

As a general matter, some stakeholders support the full federalization of sound recordings—*i.e.*, the total inclusion of pre-1972 sound recordings within the federal Copyright Act, subject to existing exceptions and limitations—while others have favored a more limited solution that would, for example, provide a payment mechanism under the section 112 and 114 licenses for noninteractive digital services with a safe harbor from state liability. In addition, it seems that some parties, particularly digital music services, might be content to operate without a federal statutory obligation to compensate pre-1972 sound recording owners. But these stakeholders at least acknowledge that a federal licensing scheme would be preferable to obtaining direct licenses under scattered state laws for each sound recording performed, which is no longer merely a hypothetical scenario.[418]

Full Federalization Considerations

Full federalization means that all rights and limitations in the Copyright Act applicable to post-1972 sound recordings would also apply to pre-1972 sound recordings.[419] The Copyright Office's 2011 report on the treatment of pre-1972 recordings recommends full federalization. Specifically, the Office concluded that this approach would "improve the certainty and consistency of copyright law, will likely encourage more preservation and access activities, and should not result in any appreciable harm to the economic interests of right holders."[420]

Copyright Royalty Board"); Lincoff First Notice Comments at 4-11 (proposing a unified "digital transmission right" encompassing rights of musical works and sound recording owners with rates set by the CRB).

[417] The decisions came down shortly after the close of the record in this study, so it is possible that stakeholders' positions as to how our licensing system should handle pre-1972 recordings have evolved somewhat from their earlier expressed views.

[418] *See, e.g.*, DiMA First Notice Comments at 39; Music Choice First Notice Comments at 13-16.

[419] *See* PRE-1972 SOUND RECORDINGS REPORT at ix.

[420] *Id.*

A range of study participants agree with the Office's view.[421] The prospect of receiving federally required compensation for pre-1972 exploitations is a driver for some; NARAS, which largely agreed with the Office's findings, observed that "older artists, who contributed greatly to our nation's cultural legacy, often rely on their recordings as their sole source of income."[422] Others consider access to the full spectrum of the Copyright Act's rights and limitations to be an important element of any solution. Some creators of pre-1972 sound recordings, for instance, believe they should have access to federal termination rights.[423] The Library of Congress (which submitted comments as an interested party) worried that preserving "millions of historic music and sound recordings" will be impossible under the current regime, where "pre-1972 recordings are subject to a variety of disparate state laws and state common law that . . . lack statutory language to exempt archival copying for preservation purposes."[424] Others, including digital music services, feel strongly that the fair use doctrine and DMCA safe harbor provisions should apply to pre-1972 recordings.[425]

Partial Federalization Alternative

Supporters of partial federalization, while open to consideration of a broader solution, believe that a measure requiring compensation for use of pre-1972 sound recordings

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421 *See, e.g.*, Kernochan Center Second Notice Comments at *passim*; Brigham Young University Copyright Licensing Office ("BYU") First Notice Comments at 3; FMC First Notice Comments at 8-10; Kohn First Notice Comments at 14-15; Library of Congress First Notice Comments at 2-4; Public Knowledge Second Notice Comments at 3-5; Tr. at 164:22-165:02 (June 17, 2014) (Eric Harbeson, Music Library Association).

422 NARAS First Notice Comments at 6.

423 *See, e.g.*, *id.* at 7-8; Tr. at 154:11-154:21 (June 5, 2014) (Robert Meitus, Meitus Gelbert Rose LLP). *But see* PRE-1972 SOUND RECORDINGS REPORT at 148-49 (recommending against federal termination rights to existing grants, but supporting such rights for grants made after effective date of federalization legislation). With respect to older recordings that fall within the scope of federal protection, one participant suggested providing authors of sound recordings with the opportunity to recapture their creations if the record labels stop exploiting the works commercially. Rinkerman Second Notice Comments at 2. According to the proposal, these rights would incentivize the continued availability of works and prevent works from languishing in limbo based on perceptions of marketability. *Id.* RIAA responded that, since digital music platforms make it easier to re-issue obscure recordings without the costs associated with physical distribution, owners do not need additional incentive to exploit commercially viable works under their control. Tr. at 211:16-212:09 (June 24, 2014) (Susan Chertkof, RIAA).

424 Library of Congress First Notice Comments at 2-3.

425 DiMA First Notice Comments at 39; BYU First Notice Comments at 3. Though DiMA "takes no view" on the federalization issue, it claims that, to the extent Congress considers incorporating pre-1972 sound recordings into federal copyright law, such a change should be "absolute and full." Tr. at 157:05-18 (June 5, 2014) (Lee Knife, DiMA).

should be enacted in the near term.[426] SoundExchange explained that full federalization "would raise a number of complicated issues," but resolving those issues should not delay providing legacy artists with fair compensation for the use of their works.[427] SoundExchange noted in particular that "the artists who created pre-1972 recordings are especially dependent on digital revenue streams, because they are often less likely than more current artists to be able to generate significant income from touring, product sales and other sources."[428] For those who support such an approach, obtaining royalties from digital performance services is of primary importance and partial federalization should be implemented as a short-term solution while issues of full federalization continue to be debated.[429]

Accordingly, some stakeholders advocated for Congress to simply expand the section 112 and 114 statutory licensing scheme to encompass pre-1972 sound recordings. According to these parties, bringing pre-1972 sound recordings within the scope of federal copyright protection in this manner would supply digital music services with an easy means to offer lawful public performances of those recordings while generating new sources of revenue for copyright owners.[430] Proponents of partial federalization have supported Congress' adoption of the Respecting Senior Performers as Essential Cultural Treasures Act (otherwise known as the "RESPECT Act"), legislation introduced in 2014 that would extend the section 112 and 114 licenses to cover pre-1972 recordings but at the same time provide protection from state law liability for such uses.[431]

d. Terrestrial Radio Exemption

As explained above, current law does not require traditional terrestrial—or "over-the-air"—radio broadcasters to compensate sound recording owners for the public performance of their recordings.[432] Digital music services, by contrast, must pay both sound recording owners and musical work owners for performances. The Copyright Office has long supported a full public performance right for sound recordings.

Recording artists and record labels argue that they are entitled to compensation from terrestrial radio stations in the same way that songwriters and publishers receive

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426 *See, e.g.*, A2IM First Notice Comments at 7-8; ABKCO First Notice Comments at 3; RIAA First Notice Comments at 32-33; *see also* NARAS First Notice Comments at 6-8 (supporting partial federalization as a "stop gap").

427 SoundExchange First Notice Comments at 11-13.

428 *Id.* at 11-12.

429 Tr. at 180:11-14 (June 24, 2014) (Casey Rae, FMC).

430 *See* LaPolt First Notice Comments at 10 ("Recording artists with pre-1972 recordings were denied an estimated $60 million in royalties in 2013 alone.").

431 RESPECT Act, H.R. 4772, 113th Cong. (2014).

432 17 U.S.C. §§ 106(4), 106(6), 114(a).

compensation when their songs are played on the radio.[433] They characterize the terrestrial broadcast exemption as an antiquated "loophole" that causes "glaring inequity."[434] They believe that the terrestrial radio industry does not adequately compensate sound recording owners for helping to generate billions of dollars in annual advertising revenues for radio services.[435] In this regard, they assert that the promotional effect of radio airplay on record sales claimed by broadcasters is overstated, and that sound recording owners should not be forced to forgo compensation in exchange for the suggestion of promotional value.[436]

In addition, copyright owners and digital streaming services together urge that current law gives terrestrial radio unwarranted competitive advantage over new, innovative entrants.[437] They note that wireless communications technologies have improved to the point where digital services are competing directly with traditional terrestrial radio, and consumers are using the same devices to receive digital and analog transmissions of the same recordings.[438] As one participant put it, "[t]o me it seems obvious that having an individual song play or performance on terrestrial radio in your car is fundamentally the same as a satellite radio Sirius XM play in your car as is a Pandora stream via a wireless cellphone tower through your car radio."[439]

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[433] *See* SoundExchange First Notice Comments at 16 ("The rationale for requiring terrestrial radio services to pay royalties to artists and copyright owners is the same as for all other platforms."); *see also, e.g.,* A2IM First Notice Comments at 8; RIAA First Notice Comments at 30-31; SAG-AFTRA & AFM First Notice Comments at 6.

[434] *See, e.g.*, SAG-AFTRA & AFM First Notice Comments at 6; SoundExchange First Notice Comments at 16.

[435] *See* A2IM First Notice Comments at 8 ("AM/FM broadcasters make billions selling ads to folks who tune in for our music while our sound recording creators get nothing."); NARAS First Notice Comments at 9 ("Broadcast radio is the only industry in America that bases its business on using the intellectual property of another without permission or compensation."); SAG-AFTRA & AFM First Notice Comments at 6 ("Radio has built a $15 billion industry based primarily on the exploitation of the creative work of Artists, and should finally be required to fairly compensate those Artists.").

[436] SoundExchange First Notice Comments at 16; LaPolt First Notice Comments at 6.

[437] DiMA First Notice Comments at 40-41; FMC First Notice Comments at 15; RIAA First Notice Comments at 30-31; Sirius XM First Notice Comments at 2-4; *see also* Copyright Alliance First Notice Comments at 2.

[438] Sirius XM First Notice Comments at 3-4; *see also* DiMA First Notice Comments at 40-41 (noting that "platform distinctions do not make sense in the digital environment where the very same consumer electronics devices—such as automobile in-dash receivers—are capable of receiving digital and/or analog transmissions of the same sound recording").

[439] Geo Music Group & George Johnson Music Publ'g at 13.

Predictably, terrestrial broadcasters opposed a new requirement to pay performance royalties for sound recordings, likening such payments to a "tariff" aimed at subsidizing the recording industry.[440] They state that the terrestrial broadcast exemption represents a "reciprocal dynamic" by which "record labels and performing artists profit from the free exposure and promotion provided by radio airplay, while local radio stations receive revenues from advertisers that purchase airtime to sell their products and services."[441] As evidence of the high promotional value of broadcast radio, they point out that record companies spend millions of dollars annually trying to persuade radio stations to play or promote their recordings.[442]

Foreign performance royalties are an important consideration in this debate. Virtually all industrialized nations recognize a more robust sound recording performance right than the United States; according to proponents of the right, the United States stands out on the list of countries (among them Iran and North Korea) that do not.[443] Proponents further point out that the terrestrial radio exemption prevents U.S. sound recording owners and performers from collecting royalties for foreign radio broadcasts, as most countries do not require payment of performance royalties to American sound recording owners due to the lack of reciprocity.[444] According to one estimate, in addition to forgone domestic royalties, U.S. sound recording owners are deprived of between $70 and $100 million in foreign royalties each year.[445]

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[440] *See* NAB First Notice Comments at 29.

[441] *Id.* at 28 (citing research indicating the promotional benefit provided to the recording industry from free radio airplay ranges from $1.5 to $2.4 billion annually).

[442] *Id.*; *see also* GAO REPORT at 50 (explaining that it is common for record companies to employ independent promoters to encourage the broadcast industry to perform their songs).

[443] *See* Tr. at 287:11-17 (June 23, 2014) (Blake Morgan, ECR Music Group and #IRespectMusic); *The Register's Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intell. Prop. and the Internet of the H. Comm. on the Judiciary,* 113th Cong. 3 (2013) ("*The Register's Call for Updates Hearing*") (statement of Rep. Melvin L. Watt) ("I think it is time, and the time is long overdue, for Congress to recognize a performance right in sound recordings . . . . To not do so just prolongs this longstanding inequity and keeps us out of pace with the international community."); SoundExchange First Notice Comments at 16-17 ("The free ride given to terrestrial radio also makes the U.S. an outlier internationally. At least 75 nations recognize some form of performance right for terrestrial radio, and the U.S. is the only western industrialized nation that does not.").

[444] *See, e.g.,* RIAA First Notice Comments at 30-31; FMC First Notice Comments at 14-15; SoundExchange First Notice Comments at 17.

[445] *See* GAO REPORT at 30; *see also* Mary LaFrance, *From Whether to How: The Challenge of Implementing a Full Public Performance Right in Sound Recordings*, 2 Harv. J. of Sports & Ent. L 221, 226 (2011).

For their part, broadcast industry representatives dispute the amount of royalties sound recording owners are unable to recover as a result of the limited performance right.[446] They posit that U.S. expansion of the performance right will be insufficient to compel reciprocity, claiming many foreign nations will continue to balk at paying royalties unless the U.S. makes other conforming changes to its law as well.[447] They also maintain that many U.S. sound recording owners are already paid when their works are performed abroad, as foreign collection societies are sometimes willing (or even compelled) to pay for these uses.[448]

B. Government's Role in Music Licensing

1. PRO Consent Decrees

PROs, publishers, songwriters, and others criticized the ASCAP and BMI consent decrees on many fronts, arguing that the 75-year-old regime is outdated,[449] that PROs "can no longer meet the evolving needs of writers, publishers, music licensees and

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[446] NAB claims that proponents of reconciling international performance right laws have "failed to substantiate the actual amount of revenue at issue." NAB Second Notice Comments at 3. It further asserts that, even if substantiated, "[t]he estimated . . . $70 million dollars in foreign performance tariffs essentially constitute a rounding error to the major record companies." NAB First Notice Comments at 29 n.15.

[447] NAB Second Notice Comments at 3 ("[Proponents] also ignore the fact that many of these foreign regimes are distinctly less generous to sound recordings in other respects. If the U.S. is to adopt their regimes in one respect, presumably it should do so in others such as a much shorter term of protection, no protections against anti-circumvention devices, and cultural and other playlist quotas.").

[448] NAB alleges that "the U.K. adheres to 'simultaneous publication rules,' which grant U.S. sound recordings the same rights as U.K. sound recordings when they are released in both countries simultaneously," though no evidence documenting that point was submitted during the course of this study. NAB Second Notice Comments at 3-4; *see also* LaFrance, *From Whether to How: The Challenge of Implementing a Full Public Performance Right in Sound Recordings* at 225 (explaining that "[i]n practice, many foreign collecting societies . . . have been willing to reciprocate even before being legally required to do so," but noting that laws and collecting society practices are not identical and reciprocal arrangements are generally negotiated on a case-by-case basis).

[449] SGA First Notice Comments at 4; *see also* BMI First Notice Comments at 3 (noting that "the decrees must be reviewed with an eye towards modernization"); LaPolt Second Notice Comments at 15 (explaining that the consent decrees are "restrictive and outdated"); NSAI Second Notice Comments at 6 ("Non-performing songwriters are threatened with extinction under . . . the outdated ASCAP and BMI Consent Decree models."); Wixen First Notice Comments at 3 (ASCAP and BMI "cannot sufficiently represent songwriters' interests while operating under the outdated consent decrees.").

ultimately the consumers,"[450] and that while the "consent decrees were imposed to protect against anticompetitive behavior, they are now used to distort and manipulate the market for the benefit of a handful of powerful digital distribution companies that are the gatekeepers between music's creators and those who want to enjoy that music."[451] Licensees and others, however, believe that the consent decrees are vital to preventing anticompetitive conduct by the PROs and major publishers.[452] Some believe that direct antitrust regulation should be extended even further, to encompass all licensing of public performances of musical works.[453]

As noted above, the DOJ is undertaking a review of the consent decrees to examine their continued operation and effectiveness, and has solicited public comments, which reflect many of the same concerns that the Office heard during this study.[454] While the DOJ is focused on whether the consent decrees can or should be modified as a matter of antitrust policy, this study examines the impact of the decrees on the music licensing marketplace in general.

a. Royalty Rates

Under the consent decrees, any party may obtain permission from ASCAP or BMI to perform musical works upon the submission of an application. If, after the application

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[450] ASCAP First Notice Comments at 3.

[451] NMPA, Comments Submitted in Response to the DOJ's Antitrust Consent Decree Review at 5 (Aug. 6, 2014), *available at* http://www.justice.gov/atr/cases/ascapbmi/comments/307900.pdf.

[452] *See, e.g.*, CFA & Public Knowledge First Notice Comments at 6 ("[T]he court's ruling in [*In re Petition of Pandora Media*] should put an end to the claims that these antitrust decrees are 'obsolete' or 'outdated.'"); CTIA First Notice Comments at 6 ("[T]he decrees remain essential to foster competitive market pricing for music performance rights."); DiMA Second Notice Comments at 16 ("[The PRO] collectives require government oversight . . . . [T]he natural behavior for collectives and monopolies is to instinctively leverage their position and attempt to extract supra-competitive rates and terms."); FMC First Notice Comments at 6 (Even if the consent decrees are examined regarding changes in the marketplace, "there would be no compelling reason to completely eliminate the consent decrees and the important limitations they place on PROs and publishers from engaging in anticompetitive behavior."); RMLC First Notice Comments at 5 ("[T]he pattern of price corrections and other decree enforcement measures implemented by the federal judiciary following vigorously contested trials and appeals is testimony to the continuing need for judicial supervision of ASCAP and BMI."); TMLC First Notice Comments at 5 ("[The] status quo requires, at the very least, maintaining constraints protecting music users such as those provided for in the ASCAP and BMI consent decrees.").

[453] *See, e.g.*, CTIA First Notice Comments at 6 ("Due to the nature of the markets, SESAC and the major publishers also exercise substantial supra-competitive market power. That market power should also be controlled.").

[454] *Antitrust Consent Decree Review*, U.S. DOJ, http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html (last visited Jan. 30, 2015).

is received, the PRO and user cannot agree to the licensing fee, either may apply to the applicable rate court for a determination of the rate.

In general, licensees expressed more confidence in the rate court process than did the PROs and copyright owners. For instance, DiMA opined that the "time-tested" rates have "consistently established royalty rates that appropriately approximate the 'fair market value' of particular licenses in different contexts."[455] CTIA observed that the rate courts are "essential to foster competitive market pricing for music performance rights."[456]

In contrast, PROs and copyright owners stated that the rate courts deflate public performance royalties below their true market value.[457] Songwriters and publishers believe that the rate court rates are inequitable to copyright owners, asserting that the rates they set are "below-market,"[458] "unfair and unrealistic[],"[459] and "artificially low."[460] In support of these claims, several stakeholders pointed to the 12 to 1 (some say 14 to 1) discrepancy between the rates set by the CRB for the public performance of sound recordings and rates set by rate courts for the public performance of musical works.[461]

Copyright owners complained that the "fair market value" standard employed by the rate courts is inadequate, with a "lack of clarity regarding what factors the rate court

[455] DiMA First Notice Comments at 30.

[456] CTIA First Notice Comments at 6.

[457] ASCAP First Notice Comments at 26 (Royalty rates are "set at rates below what the evidence indicates are market levels."); LaPolt First Notice Comments at 11 ("The compulsory rates set by the rate courts for licenses are severely lower than their true market value."); NARAS Second Notice Comments at 2 (explaining that "recent rate court decisions made pursuant to the Consent Decrees have resulted in royalty rates for digital music services that are below fair market value").

[458] BMI First Notice Comments at 9.

[459] Council of Music Creators First Notice Comments at 5.

[460] SCL First Notice Comments at 12.

[461] ASCAP First Notice Comments at 29 n.45, 44 ("This almost 12-to-1 disparity in SoundExchange and PRO payments is unprecedented in the global music marketplace." ASCAP elsewhere notes the ratio may be higher, citing a rate of "12 to 14 times greater.") (citation omitted); BMI First Notice Comments at 2 (finding that "recording artists are paid as much as . . . twelve times [what songwriters and publishers are paid] for the public performance right."); Music Managers' Forum ("MMF") & Featured Artists' Coalition ("FAC") Second Notice Comments at 10 (noting "the price for musical compositions is disadvantaged by a factor of 10 or 12 to 1"); SESAC First Notice Comments at 4 (referencing a ratio of 13:1); Tr. at 58:19-21 (June 17, 2014) (Gary R. Greenstein, Wilson Sonsini Goodrich & Rosati) (referencing "14-to-1 fees to the sound recording copyright owner versus the musical work copyright owner").

should consider . . . and the weight given to those factors."[462] A number of copyright owners highlighted section 114(i), which precludes consideration of rates set for sound recording performances by the rate courts, as one reason for below-value PRO performance rates.[463] In addition, ASCAP objected that "neither ASCAP nor BMI are free to refuse to license their repertories," leading to a lack of "competitive market transactions involving non-compelled sellers" to use as benchmarks for the government-regulated rate.[464]

b. Rate Court Proceedings

A common complaint about the rate court process is that it is expensive and time-consuming.[465] Netflix observed that "both the substantial costs of litigation and the business uncertainties inherent in court-determined approximations of what is a competitive rate impose unnecessary risks and costs on all parties."[466] Music Choice complained that "costs are disproportionately burdensome on individual licensees," whereas a PRO can spread its costs across copyright owners.[467] But ASCAP observed, "ASCAP and applicants have collectively expended well in excess of one hundred million dollars on litigation expenses related to rate court proceedings, much of that incurred since only 2009."[468] And attorney Christian Castle objected that "songwriters did not ask for [the process], cannot escape it, and are forced to participate."[469]

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[462] ASCAP First Notice Comments at 24; *see also* SESAC First Notice Comments at 6 ("The consent decrees . . . offer no definition or guidelines as to what constitutes 'reasonable.'").

[463] *See* BMI First Notice Comments at 10 ("We believe that the prohibition against the PRO rate courts considering the rates set for sound recordings provides in part an explanation for this unintended disparity."); *see also* ABKCO First Notice Comments at 2; ASCAP First Notice Comments at 29-30.

[464] ASCAP First Notice Comments at 25.

[465] *Id.* at 3 ("Rate court proceedings have become extremely time and labor-intensive, costing the parties millions in litigation expenses."); BMI First Notice Comments at 8-9 ("Federal rate court litigation is an exceptionally slow process to set prices to keep up with the rapidly-evolving digital marketplace, and it is exceedingly expensive for all participants . . . ."); SESAC First Notice Comments at 7 ("[T]he consent decrees . . . hold[] songwriters and music publisher royalties' hostage to systematically protracted rate negotiations and expensive, time-consuming rate court proceedings.").

[466] Netflix First Notice Comments at 6.

[467] Music Choice First Notice Comments at 5.

[468] ASCAP First Notice Comments at 23.

[469] Castle First Notice Comments at 8.

Federal copyright litigation is not only expensive but often lengthy,[470] and the rate courts are no exception. According to BMI, "a typical rate court case can take many years to be resolved, which includes the inevitable, potentially multi-year, appeal of the trial court's decision."[471] ASCAP noted that although the consent decree "mandates that proceedings must be trial-ready within one year of the filing of the initial petition, that deadline is rarely met."[472] As music attorney Dina LaPolt commented, the drawn-out proceedings create the perception that rate courts "cannot keep up with the pace set by the new digital marketplace."[473]

c. Interim Fees

Other concerns revolve around the fact that the rate for a particular license may not be established until long after the licensee begins using musical works. The ASCAP and BMI consent decrees allow music users to perform the PRO's repertoire upon the mere filing of an application for a license, without payment of any license fee.[474] As a general matter, songwriters, publishers, and PROs found it unfair that "the current rate court system . . . does not provide for an inexpensive, effective way to set interim fees to compensate creators while the long rate-setting process plays out."[475]

This feature potentially exposes the PROs to gamesmanship by applicants, as "the burden is on the PRO to make a motion for the imposition of an interim fee—a motion that is, like the rate court proceeding itself, expensive and time-consuming."[476] As ASCAP elaborated: "Even when an interim fee is paid, it is often at less than full value," leading many licensees to make "strategic choices to stay on interim terms until ASCAP determines it must commence an expensive rate court proceeding."[477] BMI observed that "it is not unheard of for an applicant to go out of business before a fee is ever set; as a result, the PROs (and, of course, in turn, our writers, composers and publishers) are never compensated for the use of their valuable repertoires."[478]

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[470] *See* U. S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS 24-26 (2013) *available at* http://copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf.

[471] BMI First Notice Comments at 9.

[472] ASCAP First Notice Comments at 22.

[473] LaPolt Second Notice Comments at app. 4.

[474] ASCAP First Notice Comment at 15; BMI First Notice Comment at 16.

[475] BMI First Notice Comments at 3; *see also* LaPolt Second Notice Comments at app. 4 (noting that "some licensees employ the rate court as a dilatory tactic to use performance licenses for a time without having to compensate the PROs.").

[476] BMI First Notice Comments at 16.

[477] ASCAP First Notice Comments at 16 & n.22.

[478] BMI First Notice Comments at 17; *see also* ASCAP First Notice Comments at 15-16.

d. Inconsistent Regulation of PROs

Yet another concern is the disparate treatment of entities that license performance rights. The largest PROs, ASCAP and BMI, are subject to direct government oversight and regulated pricing under the consent decrees. Other entities that represent significant catalogs of works, however, such as SESAC and GMR—and major publishers, who may withdraw from the PROs to license public performance rights directly—are not. Some contend that the application of different rules to these different players creates an unwarranted competitive imbalance and opportunities for regulatory arbitrage.[479]

Licensees argued that SESAC, for example, has taken advantage of this discrepancy by engaging in anticompetitive behavior that is prohibited under the consent decrees.[480] As noted above, in 2014, RMLC and local television stations each separately sued SESAC seeking antitrust relief.[481] RMLC argued that SESAC's practices created "significant overcharges to radio stations for their uses of SESAC music,"[482] while the local television stations criticized SESAC for offering only a blanket license and refusing to provide licensees with repertoire information.[483] These suits were both allowed to proceed after

[479] SCL First Notice Comments at 12 ("Commercial entities like SESAC, startups like Azoff MSG Entertainment [GMR] and a variety of foreign PROs are all competing for the opportunity to the collect revenues of the music creators but unlike ASCAP and BMI, are not constrained by antiquated regulations in their efforts to do so."); Sarah Skates, *Global Music Rights Has Growing Roster, Negotiating Power*, MUSIC ROW (Oct. 30, 2014), http://www.musicrow.com/2014/10/global-music-rights-has-growing-roster-negotiating-power/ (opining that GMR "would likely have more power than other PROs ASCAP and BMI when negotiating licenses on behalf of its members, due to the fact that it would not be subject to the same regulatory agreements that govern the more established organizations").

[480] Music Choice First Notice Comments at 10 ("Given the current state of SESAC's repertory, the same facts supporting the continued need for rate court regulation of ASCAP and BMI apply equally to SESAC, and SESAC should be subject to the same regulation and rate court supervision as the other PROs.").

[481] *See RMLC v. SESAC*, 29 F. Supp. 3d 487; *Meredith Corp.*, 1 F. Supp. 3d 180.

[482] RMLC First Notice Comments at 2.

[483] TMLC First Notice Comments at 14; s*ee also* Sirius XM First Notice Comments at 6 ("[SESAC's] combination of concentrated ownership and either an unwillingness or inability to be transparent as to what works are actually in the repertory creates a completely untenable situation.").

the respective courts denied SESAC's motions to dismiss.[484] (The parties to the New York case brought by Meredith Corporation have since agreed to a settlement.[485])

SESAC disagreed that it has a competitive advantage, instead contending that because "the industry . . . arose in a culture that assumes that the rates set by the rate courts are accurate . . . SESAC must also accept those rates."[486] And copyright owners suggested that the rates obtained by SESAC and GMR outside of the consent decrees might be useful as market benchmarks in rate court proceedings.[487]

Even within the consent decree framework, there are regulatory discrepancies. The ASCAP and BMI decrees are administered by different district court judges, and in the past, there have been periods of time during which the ASCAP and BMI decrees included significantly different terms.[488] The decrees are still not entirely aligned. For example, the ASCAP consent decree expressly prohibits ASCAP from licensing any rights other than public performance rights, while the BMI consent decree contains no such provision. BMI has expressed the view that it may license other rights under its consent decree—but has yet to do so.[489] In short, "[n]othing obligates the rate courts to reach similar results on rate-setting or other issues."[490]

e. Parties' Proposals

Stakeholders suggested a broad range of solutions to the perceived shortcomings of the consent decrees governing ASCAP and BMI. The most salient proposals are discussed below.

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484 *RMLC v. SESAC*, 29 F. Supp. 3d at 500-03 (dismissing price fixing allegation, but allowing monopoly claim to proceed); *Meredith Corp. v. SESAC LLC*, No. 09-cv-9177, 2011 WL 856266, at *1 (S.D.N.Y. Mar. 9, 2011) (denying motion to dismiss).

485 Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement at 1-2, 5, *Meredith Corp.*, 1 F. Supp. 3d 180 (No. 09-cv-9177). TMLC, which was not a party to the litigation, was also a signatory to the settlement. *Id.* at 1 n.2.

486 Tr. at 61:04-11 (June 5, 2014) (Reid Alan Waltz, SESAC); *see also* Tr. at 58:20-59:03 (June 23, 2014) (Bill Lee, SESAC) ("Although SESAC is not under a rate court, many rate court decisions do have a negative impact on SESAC's ability to modify license agreements. And ultimately it is the creator, the songwriter, who suffers because of that lack of modernization.").

487 Production Music Association Second Notice Comments at 5.

488 *See generally* RICHARD A. EPSTEIN, ANTITRUST CONSENT DECREES: IN THEORY AND PRACTICE 30-39 (2007) ("EPSTEIN") (describing differences between the decrees and concluding that the consent decrees "did not keep ASCAP and BMI in parity at all times, so that differential regulations governed key portions of their business").

489 *See* BMI, Comments on Department of Commerce Green Paper at 4-5.

490 LaPolt First Notice Comments at 12.

Complete or Partial Withdrawal of Rights

As discussed above, the ASCAP and BMI rate courts recently concluded that, under the consent decrees, music publishers could not withdraw only "new media" (*i.e.*, digital streaming) rights from the PROs to be licensed directly. As a result, the major publishers have petitioned the DOJ seeking modification of the consent decrees to allow for such partial withdrawals. As an alternative plan, major publishers are also evaluating whether to withdraw their works entirely from the PROs and directly negotiate public performance rates outside of the consent decree framework.[491]

A broad range of stakeholders expressed serious apprehension about complete publisher withdrawal, predicting "havoc" for the music industry.[492] BMI noted that complete withdrawal "is potentially catastrophic for smaller publishers and songwriters who depend on BMI for their livelihood, and for BMI's hundreds of thousands of customers who depend on BMI to fulfill their copyright obligations."[493] Significantly, Martin Bandier, chairman and CEO of Sony/ATV—one of the major publishers considering full withdrawal—similarly predicted that if Sony/ATV found it necessary to withdraw, such an outcome could be "catastrophic" for ASCAP and BMI.[494]

Part of the concern is that many administrative costs of running a PRO, such as negotiating licenses or monitoring radio stations, do not scale downward with a reduction in revenues; a royalty check costs the same amount to process whether it is large or small. ASCAP and BMI offset their administrative costs by charging a commission (roughly 13% of royalties paid in both cases[495]). If major publishers are to wholly withdraw, the commissions collected by the PROs from the substantial royalties generated by those catalogs would no longer be available to defray fixed overhead expenses. As a result, the remaining smaller members of these organizations would have to shoulder the full administrative costs, likely through significantly higher commissions.[496] Some commenters questioned whether the PROs would be able to

[491] BMI First Notice Comments at 9 ("[M]any knowledgeable publishers . . . have lost confidence in the efficacy of the rate court process to yield fair market-value. That loss of confidence is driving publishers to move away from the PROs to avoid this perceived inadequacy.").

[492] *See, e.g.*, Tr. at 23:17-20 (June 17, 2014) (Timothy Cohan, PeerMusic) ("[T]here seems to be consensus that there would be universal havoc—I think that's an apt term—if total withdrawals were to happen."); Tr. at 30:05-06 (June 17, 2014) (Ashley Irwin, SCL) (stating that publisher withdrawals would result in "total havoc").

[493] BMI Second Notice Comments at 12.

[494] Sisario, *Pandora Suit May Upend Century-Old Royalty Plan*.

[495] A2IM First Notice Comments at 6.

[496] *See, e.g.*, ASCAP Second Notice Comments at 3-4 (predicting that "withdrawing publishers will result in a loss of revenue but without an attendant drop in expenses, which will have to be

continue in operation in such a circumstance.[497] A related concern is that smaller publishers might face unsustainable increases in licensing and transaction costs as independent entities, which could lead to greater consolidation in the music publishing market.[498]

Nonetheless, based on their public statements and comments during this study, at least two major publishers—UMPG and Sony/ATV—appear poised to withdraw.[499] In contrast to Sony/ATV, a representative from UMPG suggested that such an action would not be the end of the PROs:

> We could withdraw tomorrow, and it would be seamless. The landscape would not change that much. You're talking about introducing maybe a few additional players to the licensing process, Universal being one of them. The societies don't go away. The societies continue to exist for those writers and publishers who don't have the resources that we're fortunate enough to have to create infrastructures to deal with licensing and data management, but there are several solutions, they are all workable, and they don't impact the industry or the writer community negatively.[500]

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unfairly borne by the remaining ASCAP members"); *see also* LaPolt First Notice Comments at 12-13; NARAS Second Notice Comments at 2.

[497] Tr. at 9:09-15 (June 5, 2014) (Sam Mosenkis, ASCAP) ("[I]f the revenues . . . decrease[] by 60 percent, clearly operating ratios are going to increase, possibly to a point where we can't operate efficiently enough and the whole concept of efficient licensing really drops down the drain."); *see also* NSAI Second Notice Comments at 3 ("If major music publishers directly license and collect the digital performance royalties easiest to accomplish, it is unlikely that ASCAP and BMI could continue to exist on what is left, at least with the same efficiency and cost.").

[498] *See, e.g.*, RIAA First Notice Comments at 39 ("[O]utright withdrawal is a possibility that imperils the whole musical work performance licensing system, and creates a risk that there will be no practical way to access works, and shares of works, owned by smaller publishers.").

[499] *See* ASCAP First Notice Comments at 36; Tr. at 37:02-39:08 (June 17, 2014) (David Kokakis, UMPG); *see also* Ed Christman, *Sony/ATV's Martin Bandier Repeats Warning to ASCAP, BMI*, BILLBOARD (July 11, 2014), http://www.billboard.com/biz/articles/news/publishing/6157469/sonyatvs-martin-bandier-repeats-warning-to-ascap-bmi (reporting the details of a letter sent by Sony/ATV chairman and CEO, Martin Bandier, to Sony/ATV songwriters explaining that Sony/ATV "may have no alternative but to take all of our rights out of ASCAP and BMI"). Warner/Chappell did not participate in the study, but previously announced "their intentions to withdraw their New Media licensing rights from ASCAP" along with other large publishers, following completion of the June 2012 deal between Pandora and Sony/EMI. *In re Pandora*, 2013 WL 5211927, at *3.

[500] Tr. at 34:18-35:09 (June 17, 2014) (David Kokakis, UMPG).

As an alternative to full withdrawal, partial withdrawal of only new media rights remains a possibility if the rate courts' "all in or all out" interpretations of the consent decrees are reversed on appeal, or the DOJ concludes that it should support a modification of the decrees to permit it. The PROs and major publishers have advanced several arguments in favor of partial withdrawal, including their view that it would allow for fairer, market-based rates for new media uses, that it would allow for greater flexibility in licensing terms, and that directly negotiated licenses with digital services would provide a competitive benchmark in ratesetting proceedings governing non-withdrawing publishers.[501]

Licensees, however, stated that even partial withdrawal would undermine the protection of the consent decrees, and allow the withdrawing publishers to raise rates through the exercise of unfettered market power.[502] Music Choice claimed that for the brief period before the ASCAP rate court banned publishers' partial withdrawal, "negotiations with Sony and UMPG were oppressive, and resulted in substantially higher royalty rates."[503] Others echoed the concern that publishers would engage in anticompetitive behavior.[504]

Songwriters also have significant concerns about publisher withdrawals, specifically as to how the writer's share of performance royalties would be administered and paid. Songwriter contracts typically provide that the writer's share will be collected and paid through a PRO,[505] but many of these contracts likely do not contemplate publisher withdrawal from the PRO.[506] Songwriters fear that, if they instead receive payment through the publisher, they will be vulnerable to the publisher's less transparent

[501] *See, e.g.*, ASCAP First Notice Comments at 34-35.

[502] DiMA First Notice Comments at 32 ("[I]f the antitrust consent decrees were to be modified by the Department of Justice to accommodate 'limited' withdrawals . . . the marketplace for musical work public performance rights would be significantly compromised.").

[503] Music Choice First Notice Comments at 6.

[504] Public Knowledge & CFA First Notice Comments at 5 ("When ASCAP allowed the largest music publishers to remove their digital rights from the existing contracts, [the publishers] immediately returned to the abusive practices that had made the consent decree necessary in the first place."); Tr. at 52:07-20 (June 24, 2014) (Paul Fakler, Music Choice) ("[After publishers did partially withdraw] there was evidence from the record, of collusion, strong arm tactics to inflate the rates, sharing confidential information about negotiations.").

[505] Tr. at 12:07-09 (June 17, 2014) (Garry Schyman, SCL) ("We only receive the writer's share, and that's contractual."); Tr. at 24:13-16 (June 17, 2014) (Timothy Cohan, PeerMusic) ("Contracts have mentioned the writer's share for a long, long time. They are not consistent. It is often negotiated from contract to contract.").

[506] Tr. at 12:10-14 (June 17, 2014) (Garry Schyman, SCL) ("[V]ery often the contracts do not specify what would happen if the music is withdrawn from a PRO. It merely says if money is collected through your society, that you are entitled to receive your share.").

accounting.[507] FMC suggested that "[a]ny further amendments to the consent decrees must be done with complete transparency and with a thoughtful consideration of the impact on songwriters' leverage and compensation."[508]

The SCL voiced concerns that withdrawal of publishers from U.S. PROs would cause problems for foreign songwriters, who enter into exclusive arrangements with their local performing rights society, which in turn authorize U.S. PROs to collect royalties on their behalf through reciprocal relationships. According to SCL, a U.S. publisher representing a foreign author's works under a sub-publishing agreement lacks the authority to withdraw that writers' rights from the U.S. PRO.[509] Questioned about this, David Kokakis of UMPG responded that his company has "considered the international implications" of withdrawal and does not "currently intend to disrupt that [reciprocity] model."[510] Kokakis maintained that "exploitation of foreign works in the United States . . . would continue to run through the [U.S.] societies."[511]

A number of study participants proposed continued reliance upon the PROs to collect and administer royalties from licensees even under directly negotiated deals.[512] According to ASCAP, when the major publishers sought to withdraw their new media rights, ASCAP entered into administration arrangements with the withdrawing publishers "that enabled the publishers to negotiate directly their digital rights in the free market, but leave the administration of such deals—receiving fees, processing music use information data, matching works to interested parties and paying all interested parties—to ASCAP" for a fee.[513] Such an arrangement might also address the concern that the withdrawing publishers would "lack the infrastructure to license and collect performance royalties from bars, restaurants or live performance venues."[514]

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[507] NARAS Second Notice Comments at 2 (noting that "the rest of the music ecosystem would lose the efficiency, transparency and stability provided by the PROs."); Public Knowledge & CFA First Notice Comments at 18; Tr. at 33:22-34:06 (June 24, 2014) (Rick Carnes, SGA).

[508] FMC First Notice Comments at 6-7.

[509] Tr. at 31:16-32:04 (June 17, 2014) (Ashley Irwin, SCL) ("[M]y deal with [a foreign PRO] does not allow a sub-publisher to pull out of an American society. It contravenes my agreement with my local society. So I don't know if anybody has considered what the foreign societies will do if the publishers pull out here that are representing, once again, a reciprocity thing.").

[510] Tr. at 34:11-13, 43:09-10 (June 17, 2014) (David Kokakis, UPMG).

[511] *Id*. at 43:17-19.

[512] *Id*. at 38:06-08; BMI Second Notice Comments at 14; s*ee also* Tr. at 45:05-10 (June 16, 2014) (Ashley Irwin, SCL) (proposing bifurcation of public performance right between publishers and songwriters, so that songwriters could continue to utilize the PROs).

[513] ASCAP Second Notice Comment at 6.

[514] NSAI Second Notice Comments at 3; *see also* NMPA & HFA First Notice Comments at 20 ("[Withdrawal] presents a Hobson's choice for music publishers—either pull out of ASCAP

Elimination Versus Expansion of Consent Decrees

During the course of this study, PROs, publishers, and songwriters have advocated for the sunset of the consent decrees that govern ASCAP and BMI.[515] ASCAP noted the anomaly that the decrees "continue[] into perpetuity regardless of the increased competition in the marketplace for licensing the public performance of musical works."[516] ASCAP thus views the decrees as "particularly punitive in nature when viewed in light of current DOJ policy," which mandates the inclusion of sunset provisions in standard consent decrees, and under which the DOJ "does not currently enter into consent decrees with terms longer than ten years."[517] ASCAP observed that the marketplace has undergone massive changes since its decree was first adopted in 1941, in that "ASCAP now faces vibrant competition, not only from BMI, but also from unregulated competitors such as SESAC, foreign PROs, and new market entrants, as well as from ASCAP's own publisher and writer members."[518] BMI similarly points out that "outmoded views of the purported monopoly power of regulated collectives such as BMI and ASCAP need to be discarded" as "digital technology has made it easier for creators and distributors, including unregulated competitors to PROs, to identify performances and their owners."[519]

In contrast, licensees fear that sunset of the consent decrees would lead not just to higher but "supracompetitive" rates that are all the more problematic when licensees have to pay performance royalties for both sound recordings and mechanical rights.[520] A wide range of licensees accordingly support the continuation of the consent decrees in essentially unchanged form.[521]

Some participants went further by suggesting that the restrictions imposed by the consent decrees should be extended to the smaller PROs not currently subject to direct

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.").

[515] BMI First Notice Comments at 20; ASCAP First Notice Comments at 4.

[516] *Id.* at 37-38.

[517] *Id.* at 38; *see also* BMI First Notice Comments at 13 ("In 1979, the [DOJ] determined that entering into perpetual consent decrees was not in the public interest.").

[518] ASCAP First Notice Comments at 38.

[519] BMI First Notice Comments at 25.

[520] *See, e.g.*, Music Choice First Notice Comments at 8.

[521] *See, e.g.*, DiMA First Notice Comments at 15 ("The processes and protections assured by these consent decrees serve several important roles that are critical to an efficient, properly functioning marketplace for these rights . . . .").

supervision. For example, Netflix suggested that all PROs should be subject to the same ratesetting authority and that PROs could divide the shares of the royalty pools among themselves.[522] Participants also suggested that withdrawing major publishers should be subject to oversight and possibly a consent decree to protect against a concentration of market power.[523]

Rate Court Changes

The costs and length of rate court proceeding are frustrating for many. Some—including ASCAP and BMI—have suggested replacing the rate courts with an alternative dispute resolution process such as arbitration.[524] IPAC advocated for private negotiation followed by expedited mediation within prescribed time limits.[525]

Licensees, however, were skeptical. NAB stated that "[t]here is no reason to believe that, without drastic elimination of appropriate and essential discovery and appellate review, private arbitration will be any more efficient, speedy, or cost-effective than the rate courts."[526] FMC voiced a concern that sealed arbitration proceedings would threaten transparency.[527] Even while acknowledging the rate courts' flaws, a number of licensees supported the continuation of that regime, in part due to its procedural safeguards, including use of the Federal Rules of Civil Procedure and Evidence.[528] As one licensee opined, "the *process* of rate-setting under the ASCAP and BMI consent decrees—and the

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[522] Netflix First Notice Comments at 7.

[523] *See, e.g.*, Tr. at 44:22-45:05 (June 5, 2014) (Lee Knife, DiMA) ("I think whenever you have that type of concentration of market power, that kind of demands some type of oversight, again, whether or not that's in the form of a compulsory license, a statutory license, a consent decree, or something like that."); Tr. at 52:07-20 (June 24, 2014) (Paul Fakler, Music Choice).

[524] ASCAP First Notice Comments at 23-24 (explaining that arbitration would offer a more definite timeline and would discourage applicants from relying on the license application or interim licenses); *Music Licensing Hearings* at 52 (statement of Michael O'Neill, CEO, BMI) ("We believe that replacing the current rate court with arbitration in New York under the American Arbitration Association rules would be a faster, less expensive, and a more market-responsive mechanism for all parties to obtain fair, market-value rate decisions."); Content Creators Coalition Second Notice Comments at 2-3.

[525] IPAC First Notice Comments at 9.

[526] NAB Second Notice Comments at 2; s*ee also* Music Choice Second Notice Comments at 8; Tr. at 55:14-16 (June 24, 2014) (Willard Hoyt, TMLC) ("It has been our experience that arbitration is not, necessarily, less expensive than the rate court.").

[527] Tr. at 88:21-89:05 (June 23, 2014) (Casey Rae, FMC).

[528] Music Choice First Notice Comments at 29.

hypothetical competitive market standard for rate-setting applied in Rate Court cases—has worked reasonably well."[529]

PROs and publishers also seek to encourage interim payment of royalties pending the determination of a final rate. MMF and FAC suggested that "[a]t the very least US licensees should be required to make an interim payment pending the issuing of a final license with an agreed tariff."[530] BMI suggested that rather than invoking the burdensome rate court process to set an interim rate, the fee could be set at the rate the licensee paid under its last license or, for new users, the "going industry rate."[531]

Bundled Licensing

There appears to be broad agreement among stakeholders that PROs and other licensing entities should be able to bundle performance rights with reproduction and distribution rights, and potentially other rights, to meet the needs of modern music services.[532] NSAI, for example, opined that "[t]he most efficient path to digital service providers obtaining necessary licenses would be to allow the PRO's to license and collect mechanical royalties."[533]

Stakeholders offered conflicting methods by which bundled rights could be made available. For instance, NMPA suggested that bundled rights could be sought directly from the music publishers that own and administer the song in question.[534] But the PROs suggested that their existing structures could be leveraged to facilitate bundled

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[529] Netflix First Notice Comments at 7-8 (emphasis in original); *see also* Sirius XM First Notice Comments at 4 ("In our experience, the ASCAP and BMI consent decrees and the licensing process that they mandate work relatively well."); Spotify First Notice Comments at 10 (explaining that "the current system where the PROs are subject to regulation via the consent decrees is working well").

[530] MMF & FAC Second Notice Comments at 10.

[531] BMI First Notice Comments at 17.

[532] *See* ASCAP First Notice Comments at 30; DiMA First Notice Comments at 25 ("A mechanism should be put in place that enables the collective administration of an 'all-in,' combined mechanical and performance royalty."); IPAC First Notice Comments at 8 ("A unified licensing scheme for uses that require both public performance and mechanical licenses could benefit both licensees and copyright owners."); RIAA First Notice Comments at 6 ("[T]he marketplace needs bundles of rights."); Public Knowledge & CFA First Notice Comments at 28; SCL First Notice Comments at 12.

[533] NSAI Second Notice Comments at 8.

[534] NMPA & HFA First Notice Comments at 18; Tr. at 239:15-18 (June 24, 2014) (Jay Rosenthal, NMPA).

licensing on a blanket basis, if only the consent decrees were amended.[535] Several parties also observed that allowing bundling of rights would align U.S. music licensing with collective practices in Europe.[536]

Elimination of Section 114(i)

Songwriters and publishers expressed support for the SEA, which, in addition to addressing the ratesetting standard under section 115, would amend section 114(i) to remove language prohibiting the rate courts and other bodies from considering the license fees payable for the public performance of sound recordings when determining rates to be paid for musical works.[537] Proponents of the SEA stated that rate courts should be able to consider all relevant evidence[538] and predicted that the courts, after considering the CRB-established sound recording rates, would increase performance rates for musical works so that they were more commensurate with rates paid for sound recordings.[539]

Music services opposed amending section 114(i) on the ground that eliminating the evidentiary exclusion of the CRB-set rate for sound recordings would increase rates for musical works without a proportional decrease of rates for sound recordings, leading to an overall escalation of total content costs to potentially unsustainable levels.[540] Some noted that those who now support the elimination of that provision are the same parties who sought it in the first place, as the provision was enacted out of copyright owners'

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[535] ASCAP First Notice Comments at 30-34; BMI First Notice Comments at 15-16; Tr. at 273:13-15 (June 24, 2014) (Richard Reimer, ASCAP); Tr. at 38:03-04 (June 24, 2014) (Stuart Rosen, BMI).

[536] BMI First Notice Comments at 6; Tr. at 32:20-33:01 (June 4, 2014) (Dan Coleman, Modern Music Works Publishing); Tr. at 273:07-12 (June 24, 2014) (Richard Reimer, ASCAP).

[537] SEA, H.R. 4079 § 2.

[538] *See, e.g.,* NMPA & HFA First Notice Comments at 21-22; BMI First Notice Comments at 18-19; SESAC First Notice Comments at 3-4; NARAS First Notice Comments at 4; Geo Music Group & George Johnson Music Publ'g First Notice Comments at 16; Tr. at 198:09-17 (June 5, 2014) (Daniel Gervais, Vanderbilt University Law School) (noting "when you read in the Copyright Royalty Board determination that the value of a sound recording is unrelated to the value of the song . . . [t]o me, that complete disconnect is not warranted").

[539] *See, e.g.,* BMI First Notice Comments at 18; ASCAP First Notice Comments at 27-30; SESAC First Notice Comments at 5; NMPA & HFA First Notice Comments at 26-28; NARAS First Notice Comments at 4; LaPolt First Notice Comments at 12.

[540] *See e.g.*, CTIA First Notice Comments at 12 (noting that "publishers want it both ways—they want the higher sound recording fees to be relevant in setting their fees, but they want to protect their affiliate record companies and ensure that sound recording fees are not dragged down by much lower musical works fees"); Music Choice First Notice Comments at 34 ("The simple fact is that the disparity in rates between the Section 114 license and the PRO licenses does not prove that the PRO rates are too low; it proves that the Section 114 rates are too high.").

concern that consideration of sound recording license fees might depress musical work rates.[541] Opponents further observed that music publishers themselves previously testified before the CRB that it was economically logical and necessary to maintain a distinction between musical work and sound recording rates, and are now simply questioning their prior judgment in light of the higher sound recording rates set by the CRB.[542]

2. Mechanical Rights Licensing

Many parties have called for either the complete elimination or modernization of section 115, citing issues such as the administrative challenges of the license, the inaccuracy and slowness of the ratesetting process, and frustration with government-mandated rates.

a. Royalty Rates and Standard

A broad range of parties expressed dissatisfaction with royalty rates established by the CRB. Music publishers and songwriters argue that the rates determined under the section 801(b)(1) standard applicable to section 115 are depressed as a result of the government ratesetting process and do not reflect the fair market value of musical works. While advocating for the elimination of the compulsory license, these parties also assert that at the very least mechanical rates should be established under the more market-oriented willing buyer/willing seller standard that applies under the section 112 and 114 licenses.[543]

Musical work owners explain that section 115 acts as a ceiling that does not allow them to seek higher royalties through voluntary negotiations.[544] Many point to the fact that the current 9.1 cent rate for phonorecords has not kept pace with inflation, since the

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[541] CTIA First Notice Comments at 11-12.; Tr. at 254:06-19 (June 16, 2014) (Russell Hauth, NRBMLC) ("Now that the sound recording industry has got a great rate, the musical works want the same, and they want to not be separated any longer. You know, I've got to say that's fairly hypocritical.").

[542] *See*, *e.g.,* NRBMLC First Notice Comments at 11-12; Tr. at 254:06-19 (June 16, 2014) (Russell Hauth, NRBMLC); Tr. at 76:22-79:07 (June 24, 2014) (Bruce Rich, RMLC); Tr. at 85:13-86:07 (June 24, 2014) (Paul Fakler, NAB).

[543] *See* ABKCO First Notice Comments at 1; BMI First Notice Comments at 5; Gear Publ'g Co. & Lisa Thomas Music Servs., LLC First Notice Comments at 4; IPAC First Notice Comments at 7; *see also* Tr. at 119:01-09 (June 17, 2014) (John Rudolph, Music Analytics); Tr. at 33:20-34:02 (June 23, 2014) (Jay Rosenthal, NMPA).

[544] *See* Carapetyan Second Notice Comments at 1 ("The reality is it is rarely used in standard industry practice, serving only as a framework for negotiating terms of direct licenses, but acting as a *de facto* ceiling for royalty rates nonetheless."); Geo Music Group & George Johnson Music Publ'g First Notice Comments at 10 (opining that "the *statutory rate is still a cap* and *as non-effective as it gets*.") (emphasis in original); NSAI Second Notice Comments at 7.

original 2 cent rate set by statute in 1909 would be 51 cents today if adjusted for inflation.[545] In addition, a number of participants noted a 9 to 1 inequity of rates between sound recordings and musical works for downloads and CDs: when a song is downloaded from iTunes for $1.29, approximately 80 cents is allocated for the sound recording, but only 9.1 cents goes to the musical work.[546] By way of contrast, rates for privately negotiated synchronization licenses—which are not subject to government oversight—generally reflect a 1 to 1 ratio between musical works and sound recordings.[547]

Digital music services, however, disagree, contending that the statutory rates set under the section 801(b)(1) standard reflect fair market value, or higher.[548] According to them, the statutory rates provide a "useful benchmark for direct deals" by providing a framework by which to negotiate such deals.[549] They contend that the willing buyer/willing seller standard is faulty at best since "the 'market' the standard seeks to construct or emulate does not exist and often has never existed,"[550] whereas the section 801(b)(1) standard is "flexible" and more predictable and accounts for fairness in compensating copyright owners.[551]

Though record labels are in agreement with digital music services that the section 801(b)(1) standard does not result in rates lower than fair market value, they have also advocated changing the rate standard to the willing buyer/willing seller standard.[552] Record labels point to the importance of emphasizing fair market value as "the goal of any rate-setting process" and argue that harmonizing the statutory rate standards by

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[545] *See* LaPolt Second Notice Comments at 9; MMF & FAC Second Notice Comments at 6; Modern Works Music Publishing First Notice Comments at 4-5; *see also* Tr. at 250:15-21 (June 4, 2014) (Brittany Schaffer, NMPA/Loeb & Loeb LLP).

[546] NMPA & HFA First Notice Comments at 16; Tr. at 266:14-267:05 (June 16, 2014) (Ilene Goldberg); *see also* Kohn First Notice Comments at 19-20.

[547] LaPolt First Notice Comments at 14; NMPA & HFA First Notice Comments at 16; *see also* Tr. at 60:20-22 (June 4, 2014) (Brittany Schaffer, NMPA/Loeb & Loeb LLP).

[548] *See* DiMA First Notice Comments at 23 ("The Section 801(b) standard has been time-tested to provide fair rates (*i.e.*, 'reasonable fees') that have been accepted for more than half a century in many different contexts, including ratesetting proceedings under Sections 114(f)(1)(B), 115, and 116."); DiMA Second Notice Comments at 21; Sirius XM First Notice Comments at 13-14; *see also* Tr. at 310:01-09 (June 23, 2014) (Lee Knife, DiMA).

[549] DiMA First Notice Comments at 19.

[550] DiMA Second Notice Comments at 20; *see also* Music Choice First Notice Comments at 37.

[551] DiMA Second Notice Comments at 20-21; *see also* Tr. at 278:21-279:02 (June 23, 2014) (Paul Fakler, NAB/Music Choice); Tr. at 294:02-10 (June 23, 2014) (Cynthia Greer, Sirius XM).

[552] RIAA First Notice Comments at 25.

bringing section 115 within the willing buyer/willing seller standard would achieve that goal.[553]

b. Administrative Burdens

Stakeholders expressed near universal concern about the inefficiencies of the mechanical licensing process. The section 115 statutory license creates a per-work licensing model; the same model is employed when seeking licenses through intermediaries such as HFA.[554] Licensees seeking to release individual records typically obtain a mechanical license for the specific product through HFA or directly from the publisher.[555] But digital services seeking large volumes—sometimes millions—of licenses are more likely to rely on the section 115 statutory license for at least some of their licensing needs. Consequently, digital providers expressed considerable frustration with the song-by-song licensing process.[556]

Although the statutory licensing process is more commonly relied upon now than it has been in the past, RIAA regarded this development as merely "an indication that musical work licensing is so broken that mass use of the compulsory license process is the best of a lot of bad options."[557] In addition to the burden of seeking licenses for individual works, licensees complain about the lack of readily available data concerning musical work ownership, as described further below.[558] Digital services asserted that the inaccessibility of ownership information leads to costly and burdensome efforts to identify the rightsholders and potentially incomplete or incorrect licenses, exposing them to the risk of statutory infringement damages despite diligent efforts.[559]

A number of licensees also objected to the detailed accounting and payment requirements imposed by section 115.[560] DiMA noted that for "direct license agreements

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553 *Id.*

554 *See, e.g.*, BMI First Notice Comments at 5; DiMA First Notice Comments at 20; Spotify First Notice Comments at 3-5; RIAA First Notice Comments at 10-11.

555 *See id.* at 40 (describing the previously high volume of mechanical licenses issued through HFA and the increasing practice of direct licensing for new songs and new albums).

556 *See* DiMA First Notice Comments at 20 (noting that "the costs [in filing NOIs with the Copyright Office] can be overwhelming given the volume of works at issue"); Tr. at 172:06-13 (June 16, 2014) (Lawrence J. Blake, Concord Music).

557 RIAA First Notice Comments at 23 n.36.

558 DiMA First Notice Comments at 20.

559 *Id.* at 20-21.

560 CTIA First Notice Comments at 13 (explaining that "virtually all participants in the market have recognized that the licensing regime for the reproduction and distribution rights, which requires specific monthly reporting and payment, is complex and burdensome"); LaPolt Second

for rights otherwise covered by the section 115 statutory licenses, it is customary for digital music services to pay rightsowners on a *quarterly basis*."[561] The statute, however, requires accounting and payment on a monthly basis, which increases administrative burdens and out-of-pocket costs.

c. Perceived Unfairness

Many stakeholders are of the view that the section 115 license is unfair to copyright owners. As one submission summed it up: "The notifications, statements of account, license terms, lack of compliance, lack of audit provisions, lack of accountability, lack of transparency, 'one size fits all' royalty rates and inability to effectively enforce the terms of the license demonstrate a complete breakdown in the statutory licensing system from start to finish."[562]

Lack of Audit Rights

Though there may be significant practical limitations on copyright owners' ability to exercise audit rights due to the burden and expense of examining licensees,[563] the right to audit is nonetheless highly valued. Accordingly, there is a particular industry concern that section 115 does not provide music publishers with the right to verify the statements of account they receive from licensees.

Section 115 differs from other statutory licenses in the Copyright Act in providing for an "honor system" of self-reporting without a verification procedure.[564] Owners of musical works, therefore, have no choice other than to rely upon user-certified royalty

Notice Comments at 10; Tr. at 234:21-235:01 (June 23, 2014) (Cheryl Potts, Crystal Clear Music & CleerKut).

[561] DiMA First Notice Comments at 22 (emphasis in original). *See* 17 U.S.C. § 115(c)(5).

[562] Gear Publ'g Co. & Lisa Thomas Music Servs., LLC First Notice Comments at 5-6; Geo Music Group & George Johnson Music Publ'g First Notice Comments at 9.

[563] Music Choice First Notice Comments at 21 ("Although many cases are filed by songwriters and recording artists for underpayment of royalties, far more cases go unlitigated. This is because, among other reasons, (1) the audit provisions in the authors' contracts are often very restrictive; (2) it is very expensive for an author to hire forensic accountants to conduct an audit; (3) once an audit begins, the record company or publisher uses various tactics, including accounting records that seem designed to obfuscate royalty revenues received and royalties due, to impede the audit; and (4) even after underpayments are established, authors often must accept pennies on the dollar for their claims because the cost of litigation against the record companies and publishers is so high.").

[564] NMPA & HFA First Notice Comments at 14.

statements that they may find difficult to trust.[565] Further complicating the situation is that a compulsory licensee may pay all royalties to one co-owner without any notification to the others.[566]

As one stakeholder put it, "[a]n audit right is particularly necessary in the music industry which has an admittedly long and storied history of dubious accounting practices and exploiting songwriters. Every songwriter deserves and should be entitled to a straight count; self-certification . . . is not sufficient."[567] Another stated, "it's trust but you can't verify . . . . [W]e've got to rely on the kindness of strangers that they're going to report accurately."[568]

For many musical work owners, the issue is not just trust, but fairness. As musician David Lowery explained, "I have seen instances where a supposed compulsory licensee has failed to comply with its payment obligations for years, ignored termination notices, and yet is still able to continue to receive the benefits of new statutory licenses for songwriters who await the same fate."[569] Or, as another songwriter advocate concluded: "Having been compelled by the government to license their songs to strangers, it seems only fair that the songwriter at least be able to confirm to their reasonable satisfaction that they are getting a straight count."[570]

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565 Castle First Notice Comments at 2. As discussed above, in lieu of requiring certifications, the mechanical licensing agent HFA instead conducts audits of licensees—a substantial benefit for its publisher members. *See* Michael Simon, *The Basics of Mechanical Licensing from Harry Fox*, ARTISTS HOUSE MUSIC (July 12, 2007), http://www.artistshousemusic.org/articles/the+basics+of+mechanical+licensing+from+harry+fox (noting HFA's audits of licensees). But the section 115 license does not require this.

566 IPAC First Notice Comments at 3-4 ("If the digital music service pays all royalties for the use of a musical work to only one co-owner, then that co-owner is obligated to pay the other co-owners of the musical work their respective share of the monies received. This practice effectively shifts to the copyright owner the accounting and payment obligations of the user. This example also puts co-owners of the musical work who have not received the Notice at a disadvantage—these co-owners will likely be unaware that their musical works are being used, be unaware that royalties are due, and be in a difficult position in terms of that co-owner's rights to audit the digital music service.").

567 Rys First Notice Comments at 2.

568 Tr. at 209:17-20 (June 16, 2014) (Keith Bernstein, Crunch Digital).

569 Lowery First Notice Comments at 1; *see also* IPAC First Notice Comments at 3-4.

570 Castle First Notice Comments at 3.

While record companies seemed to offer some support for the ability of publishers and songwriters to audit mechanical uses,[571] digital services objected to any sort of verification process. In opposing an audit right, DiMA argued that the required statements of account already provide for a method of "self-auditing," and that auditing requirements would be burdensome and frustrate the value of the license itself.[572] In addition, due to the challenges of accounting for digital uses under different licensing schemes, DiMA believed auditing would cause even good-faith actors to appear noncompliant.[573]

A few parties offered specific proposals for an audit right under section 115. NMPA and HFA suggested amending section 115 to include a duty to exchange and update usage data on a continuous basis.[574] David Lowery suggested a system whereby the Copyright Office could investigate licensees that were not compliant with their duties under section 115.[575]

Administrative Issues

Publishers, songwriters, and licensing administrators emphasized the problem of noncompliant statutory licensees.[576] The required notices to obtain a statutory license are frequently deficient,[577] and licensees regularly fail to timely and accurately pay and report usage.[578] Due to the involuntary nature of the license, publishers and songwriters cannot easily avoid these risks, as "[n]othing in the Section 115 license scheme requires

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[571] RIAA Second Notice Comments at 19 (noting that major record companies "support the idea that where there is direct licensing, publishers/writers should have a direct audit right with respect to third parties that use their works").

[572] *See* DiMA First Notice Comments at 19-20.

[573] *Id.* at 21 ("For digital music services that rely on licenses under Section 115 as well as separate licenses for the public performance of musical works, it is often impossible to determine the appropriate deduction for musical work public performance royalties at the time that accountings under the Section 115 licenses are due. This is because the calculation of 'mechanical' royalty rates under Section 115 requires that public performance royalties be deducted; and public performance rates are often not determined—whether by 'interim agreement,' 'final agreement' or ratesetting proceeding—until long after the close of the month during which Section 115 royalties are due.").

[574] NMPA & HFA First Notice Comments at 9-10; *see also* Kohn First Notice Comments at 11.

[575] Lowery First Notice Comments at 3-4.

[576] *See, e.g.*, *id.* 1-4.

[577] Carapetyan Second Notice Comments at 1 (noting that there is "a bevy of legally deficient 'Notices of Intention' that force publishers into the involuntary role of teaching the fundamentals of copyright to the masses—which is neither practical nor fair—and often in the end the cost in effort and man-hours far exceeds the minuscule royalties for the use").

[578] Lowery First Notice Comments at 2.

any consideration of the creditworthiness or trustworthiness of the compulsory licensee."[579] Many found the recourse provided by statute—termination of the license and costly infringement lawsuits—ineffective.[580]

Publishers also complained about regulatory provisions that permit payment of royalties and service of NOIs on a single co-owner of a work, with that co-owner then under an obligation to account to the other co-owners. As one commenter explained, "[t]his practice effectively shifts to the copyright owner the accounting and payment obligations of the user."[581]

At the same time, a number of parties asserted that the complex nature of the statutory licensing scheme was unfair to licensees. Some pointed to the complexity of the section 115 royalty regulations for digital services—and the fine distinctions they draw among different types of services—as a source of confusion as to what royalties need to be paid.[582] Digital services also highlighted the one-sided risk of costly statutory damages should they fail to ascertain that a first use of a work has occurred (rendering the work eligible for statutory licensing) and timely serve an NOI on the copyright owner, even where such determination is difficult due to lack of sufficient data.[583]

d. Parties' Proposals

Elimination of Statutory License

Songwriters and publishers appear almost universally to favor the elimination of the section 115 statutory license, albeit with an appropriate phase-out period.[584] They assert that the statutory regime creates an artificial *status quo* that precludes a private market from developing.[585] Musical work owners predict that the elimination of a license would allow "a functioning licensing market . . . [to] flourish."[586]

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[579] *Id.* at 2-3; *see also* NMPA & HFA First Notice Comments at 15.

[580] *See, e.g.*, Castle Second Notice Comments at 3 ("[A] defaulter under the statutory license can lawfully continue sending NOIs for future licenses even if they have never paid a dime on past licenses—the only recourse a songwriter has in this case is termination and if that too is ignored, extraordinarily expensive federal copyright litigation.").

[581] IPAC First Notice Comment at 3; *see also* Rys First Notice Comments at 2.

[582] *See* DiMA First Notice Comments at 22 (observing differences between the royalty rate structures for some current rate categories).

[583] *Id.* at 21.

[584] *See, e.g.*, NMPA & HFA First Notice Comments at 8; NSAI Second Notice Comments at 7; IPAC First Notice Comments at 4.

[585] *See* ABKCO First Notice Comments at 1 ("The free market is stifled under Section 115 licensing requirements with government controlling rates which thereby limits and inhibits sector growth

Digital music services, however, assert that the section 115 license is both important and fair, as it "provides an *essential counter-balance to the unique market power of copyright rights owners* . . . by providing a mechanism for immediate license coverage, thereby negating the rights owner's prerogative to withhold the grant of a license."[587] Thus, some licensees view section 115 as a protection against monopoly power that allows the public to enjoy musical works while still compensating copyright owners.[588] Spotify argued that the free market is not stifled by the statutory license, but that section 115 instead acts as "an indispensable component to facilitating a vibrant marketplace for making millions of sound recordings available to the public on commercially reasonable terms."[589]

Blanket Licensing

In light of the widely perceived inefficiencies of song-by-song licensing of mechanical rights—particularly as compared to the collective approach of the PROs—a wide range of stakeholders suggested that a blanket system would be a superior means of licensing mechanical rights.[590] As RIAA noted, blanket licensing avoids the administrative costs associated with negotiating and managing large numbers of licenses of varying terms and provides a way for legitimate services to avoid infringement risk.[591] Similarly, the publisher ABKCO opined that blanket license agreements would facilitate the use of music and would help licensees fulfill notification and reporting obligations.[592] IPAC

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and innovation."); MMF & FAC Second Notice Comments at 14-15; RIAA Second Notice Comments at 4-5; Pipeline Project Second Notice Comments at 16.

[586] NMPA & HFA First Notice Comments at 7; *see also* IPAC First Notice Comments at 6.

[587] DiMA First Notice Comments at 19 (emphasis in original).

[588] Modern Works Music Publishing Second Notice Comments at 3 (explaining that section 115 is "an *antitrust provision* that accelerates the entry of musical works into the public sphere, while ensuring that copyright holders are paid.") (emphasis in original).

[589] Spotify First Notice Comments at 3.

[590] *See, e.g.*, NARAS First Notice Comments at 3-4; DiMA First Notice Comments at 16-17; IPAC First Notice Comments at 6-7; BMI First Notice Comments at 5; ASCAP First Notice Comments at 30-31. In 2006, the House Subcommittee on Courts, the Internet, and Intellectual Property considered SIRA, legislation that would have created a blanket license for digital uses under section 115. While SIRA enjoyed support from some key stakeholders and was approved by the subcommittee, it was not passed out of the full committee. *See Reforming Section 115 Hearing* at 4 (statement of Rep. Howard Coble) (detailing legislative history); Mitchell, *Reforming Section 115: Escape from the Byzantine World of Mechanical Licensing* at 1277 (describing support for SIRA).

[591] RIAA Second Notice Comments at 13.

[592] ABKCO First Notice Comments at 1-2.

suggested that blanket licensing could be implemented through the creation of one or more licensing agencies.[593]

To highlight the complexity of licensing in the modern music marketplace, RIAA described the experience of one of its members, which had released "a very successful album," and "had to obtain for that album 1481 licenses for the release of three physical products, the 92 digital products, the 27 songs across the 51 songwriters" with a total of "89 shares."[594] One of those shares "represented [a] 1.5 percent interest in a song, and there were two publishers for that."[595] According to the RIAA, apart from multiple songwriter interests, one of the reasons for this explosion in licensing complexity is the increased complexity of the releases themselves—whereas in the past a record label release consisted of "a disk and some liner notes," today it comprises multiple digital formats, different kinds of audiovisual presentations, and different kinds of music services.[596]

In light of its belief that these problems "cannot be solved by piecemeal efforts," RIAA proposed fundamentally restructuring performance and mechanical licensing for musical works.[597] Under the RIAA proposal, record labels would receive a compulsory blanket license covering all rights (performance, mechanical, and synch) necessary for what RIAA calls "modern music products," including audiovisual products like music videos, videos with album art or liner notes, and lyric videos.[598] The rate court and CRB would be eliminated. Instead, the record labels and publishers would agree upon splits of revenues received by the record labels from their sale and licensing of recorded music. The record companies would have sole responsibility to sell and license those products; those deals would be negotiated by the labels in the marketplace (except for uses falling under the section 112 and 114 licenses).[599] RIAA believed that its proposal would achieve fair market rates for publishers and songwriters while retaining the benefits of a collective licensing system, such as simplified licensing and lower administrative costs.[600]

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[593] IPAC First Notice Comments at 6-7.

[594] Tr. 25:11-16 (June 4, 2014) (Steven Marks, RIAA).

[595] *Id. at* 25:16-18.

[596] *Id. at* 24:04-26:18.

[597] RIAA First Notice Comments at 15-17.

[598] *Id.* at 16. RIAA made clear that its proposed blanket license would not cover other uses of musical works, like synch rights for movie, television, and advertising, performances within live venue, stand-alone lyrics, and sheet music. *Id.* at 17.

[599] *Id.* at 15-18.

[600] *Id.* at 18-22.

But publishers and songwriters vigorously resisted RIAA's proposal, arguing that it would merely shift control over musical works from songwriters and music publishers to record labels—since the labels would then be in charge of licensing decisions and royalty rates.[601] They also expressed concern about bringing audiovisual works or other rights currently outside of the compulsory system under a statutory blanket license.[602] NMPA characterized the RIAA's proposal as "seeking to expand the scope of the Sec. 115 compulsory license to authorize almost all forms of exploitation of a sound recording, including, among other things, record label created videos, and 'first use' rights."[603]

3. Sections 112 and 114

As compared to issues relating to the licensing of musical works, concerns regarding the section 112 and 114 statutory licenses were relatively modest.

a. Royalty Rates

Sound recording owners appear generally satisfied with the section 112 and 114 rates set under the willing buyer/willing seller standard.[604] A2IM, in particular, appreciates that the CRB's process treats all sound recordings the same for ratesetting purposes.[605]

CFA and Public Knowledge, however, assert that section 112 and 114 royalties are "much too high," pointing to the fact that Pandora had "yet to demonstrate sustained profitability."[606] DiMA similarly contended that the willing buyer/willing seller

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601 NMPA Second Notice Comments at 32-33; *see also* Tr. at 245:12-20 (June 24, 2014) (Peter Brodsky, Sony/ATV).

602 LaPolt Second Notice Comments at 14; NMPA Second Notice Comments at 32-35; NSAI Second Notice Comments at 8; *see also* Tr. at 214:14-20 (June 16, 2014) (John Barker, IPAC); Tr. at 246:21-247:09 (June 24, 2014) (Peter Brodsky, Sony/ATV).

603 NMPA Second Notice Comments at 32.

604 RIAA First Notice Comments at 32 ("All services operating under the statutory licenses should pay fair market royalties set under the willing buyer/willing seller standard."). In contrast, RIAA criticized the "below-market royalty rates" set under the section 801(b)(1) standard for grandfathered services. *Id.* at 31.

605 A2IM First Notice Comments at 3.

606 CFA & Public Knowledge First Notice Comments at 8. Pandora did report a modest profit in Q3, 2013, but its current strategy is focused on expansion. Romain Dillet, *Pandora Beats, Q3 2013 Revenue Up 60% to $120M, Net Income of $2.1M; Q4 Forecast Much Lower Than Expected*, TECHCRUNCH (Dec. 4, 2012), http://techcrunch.com/2012/12/04/pandoras-q3-2013/; PANDORA MEDIA, INC., QUARTERLY REPORT (FORM 10-Q) 21 (Oct. 28, 2014), http://investor.pandora.com/phoenix.zhtml?c=227956&p=irol-sec (click on Oct. 28, 2014 filing) ("[W]e expect to incur annual net losses on a U.S. GAAP basis in the near term because our current strategy is to leverage any improvements in gross profit by investing in broadening distribution channels, developing

standard yields rates that are "high and unsustainable" and that numerous services, including those operated by AOL, Yahoo!, East Village Radio, Turntable.fm, Loudcity, RadioParadise, and 3 Wk, have exited the business as a result.[607]

DiMA also criticized the CRB's imposition of per-performance rates for internet radio, suggesting that such a rate structure should not be applied "in circumstances where the higher usage does not equate to higher revenues for the digital music service provider."[608] DiMA and others additionally observed that Congress felt compelled to offer relief to internet radio services complaining of high rates under the willing buyer/willing seller standard by passing the Small Webcaster Settlement Act of 2002 and the Webcaster Settlement Acts of 2008 and 2009 to allow for negotiated alternatives to the CRB-set rates.[609]

b. Interactive/Noninteractive Divide

Stakeholders expressed a number of concerns regarding eligibility for the section 112 and 114 licenses.

As discussed above, interactive services are not eligible for the statutory licenses under sections 112 and 114, though in the Second Circuit's 2009 *Launch Media* decision, the court concluded that a custom radio service—one that relies on user feedback to play a personalized selection of music—is not an "interactive" service.[610] As a result, custom radio services such as Pandora are treated as noninteractive and operate under section 112 and 114 licenses.

Copyright owners expressed concern that "customized Internet radio has approached interactivity in every sense of the word except under the outdated requirements of the statutory definition."[611] RIAA similarly opined that *Launch Media* "all but extinguished voluntary licensing of personalized streaming services at a premium [above] the statutory rate."[612] Notably, however, sound recording owners did not necessarily favor

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innovative and scalable advertising products, increasing utilization of advertising inventory and building our sales force.").

607 DiMA First Notice Comments at 33 n.76.

608 *Id.* at 36.

609 *Id.* at 37; Educational Media Foundation ("EMF") First Notice Comments at 7-8; Sirius XM First Notice Comments at 14; Spotify First Notice Comments at 12.

610 *See* 17 U.S.C. § 114(d)(2)(A)(i); *Launch Media,* 578 F.3d 148.

611 ASCAP First Notice Comments at 44*; see also* BMI First Notice Comments at 22.

612 RIAA First Notice Comments at 34.

moving personalized services out of the statutory license.[613] Instead, they advocated for a "middle tier" of royalty rates for personalized radio services under the statutory license.[614]

Other participants argued for expansion of the statutory licensing framework to cover additional services.[615] For instance, A2IM favored "narrowing the definition of 'interactive service' to cover only those services that truly offer a full on-demand interactive experience."[616] SAG-AFTRA and AFM also supported such an expansion, as "[a]rtists will continue to benefit most fairly from [customized services] through receiving an equal share of the proceeds, paid to them directly and transparently by SoundExchange."[617]

In addition to the interactive/noninteractive distinction of section 114, concerns were raised about the sound recording performance complement—which limits the number of plays of a single featured artist or from a particular album in a three-hour period—as well as section 114's ban on the pre-announcement of songs.[618] Broadcasters said that these requirements frustrate simulcasting activities of terrestrial radio stations that do not adhere to these restrictions in their over-the-air broadcasts.[619] NAB contended that the sound recording performance complement "merely serve[s] as a bargaining chip for leverage in the negotiations with broadcasters, due solely to the undue burden such restrictions place on radio stations that seek to stream their broadcasts,"[620] and pointed out that record labels regularly grant broadcasters waivers of the restriction as evidence that the record labels do not need these provisions to protect their interests.[621] NPR noted the upstream effect of the limitation, explaining that because public radio has limited resources, it is forced to "create separate programming depending on the method by which it will be distributed."[622]

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613 *See id.* ("[A]t this juncture, we do not necessarily advocate excluding from the statutory license services that have been generally accepted as operating within the statutory license based on the *Launch* decision.").

614 ABKCO First Notice Comments at 3; s*ee also* RIAA First Notice Comments at 34.

615 Sirius XM First Notice Comments at 20-21.

616 A2IM First Notice Comments at 5.

617 SAG-AFTRA & AFM First Notice Comments at 6 (note however, that SAG-AFTRA & AFM also support increased rates if a service has increased functionality).

618 17 U.S.C. § 114(d)(1)(C)(iv), (d)(2)(B)-(C), (j)(13).

619 NAB First Notice Comments at 4-5; NPR First Notice Comments at 5; SRN Broadcasting First Notice Comments at 1.

620 NAB First Notice Comments at 4.

621 *Id.* at 5.

622 NPR First Notice Comments at 5.

c. Technical Limitations of Section 112

A number of digital services criticized technical limitations on the availability of the section 112 license that applies to the ephemeral (*i.e.*, server) copies needed to facilitate their transmissions.[623] For example, some licensees criticized the requirement that the licensee destroy such copies within six months' time as "unreasonable" and "archaic" and one that has no benefit for rightsholders.[624] NAB noted that this requirement is particularly illogical as server copies "are not meant to be temporary."[625] DiMA suggested that section 112 should be substantially updated to reflect modern realities of digital music services.[626] Others suggested that any ephemeral copies made in furtherance of a public performance should be exempted entirely.[627]

RIAA opposed a blanket exemption for ephemeral recordings, explaining that those recordings "have value" by providing services with "improved quality of service, operational efficiencies or other competitive advantages."[628] RIAA also observed that "[t]he current statutory scheme replicates marketplace agreements for sound recordings, in which licensees commonly acquire performance and related reproduction rights in a single transaction and pay a bundled royalty that covers both rights."[629]

d. Lack of Termination Provision

SoundExchange opined that while the section 112 and 114 licensing framework "generally works well," noncompliance with the statutory requirements—by irregular or inaccurate payments or missing or incomplete reporting—is "commonplace."[630] SoundExchange described its efforts to bring services into compliance, but also expressed its belief that the section 112 and 114 system needs "a clear mechanism for termination of statutory licenses for services that repeatedly fail to act in compliance with applicable requirements," such as the one that exists under section 115.[631]

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[623] "Ephemeral recordings are copies that are made and used by a transmitting organization to facilitate its transmitting activities." U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 144 (2001), *available at* http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf.

[624] CTIA First Notice Comments at 16-18; DiMA First Notice Comments at 35; DiMA Second Notice Comments at 18.

[625] NAB First Notice Comments at 7; Music Choice First Notice Comments at 13.

[626] DiMA Second Notice Comments at 18.

[627] *See, e.g.*, NAB First Notice Comments at 2; Sirius XM First Notice Comments at 9-10.

[628] RIAA Second Notice Comments at 31-32.

[629] *Id.* at 32.

[630] SoundExchange First Notice Comments at 2, 5.

[631] *Id.* at 5; *see also* 17 U.S.C. § 115(c)(6) (termination provision under section 115).

e. Royalty Distribution Process

Unlike section 114—which provides a statutory formula for the direct distribution of royalties by SoundExchange to artists, record labels and musicians—the related section 112 license contains no such requirement. Some submissions suggested that the royalties collected by SoundExchange as the designated agent under the section 112 license should be distributed to artists directly, as under section 114, rather than through record labels.[632] Music Choice commented that, "[d]ue to the terms of their agreements with the record companies and various record company accounting practices . . . the vast majority of recording artists never see a penny of the portion of the performance royalty allocated to the Section 112 license."[633]

In addition, section 114 currently does not allocate a share of royalties to record producers, so there is no statutory mandate for direct payment to producers. Instead, individual contracts between recording artists and producers provide for producer compensation, which may include a share of royalties.[634] SoundExchange has begun processing direct payment of the producer's share of performance royalties on a voluntary basis when it receives written authorization from the featured artist.[635] NARAS has proposed to make this process a "consistent and permanent" feature of section 114.[636]

4. Public and Noncommercial Broadcasting

As discussed above, the activities of public and noncommercial educational broadcasters are subject to two different statutory licenses as well as PRO licensing and ratesetting. Noncommercial broadcasters complain about the divergent licensing mechanisms for the various music rights they must acquire. Noncommercial religious broadcasters observed that, to clear musical works rights, they could be required to participate in a CRB proceeding under section 118 for over-the-air transmissions, two rate court proceedings under the consent decrees for digital transmissions of ASCAP and BMI works, and private negotiation for digital transmissions of SESAC works.[637] In addition,

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[632] *See* Music Choice First Notice Comments at 13; Resnick Second Notice Comments at 1.

[633] Music Choice First Notice Comments at 13*; see also* Resnick Second Notice Comments at 1.

[634] *See* NARAS First Notice Comments at 5.

[635] *2013 Letter of Direction*, SOUNDEXCHANGE (Apr. 14, 2013), https://www.soundexchange.com/wp-content/uploads/2013/05/Letter-of-Direction-04-14-13.pdf ("*2013 SoundExchange Letter of Direction*").

[636] *See* NARAS First Notice Comments at 5-6.

[637] NRBNMLC First Notice Comments at 14-15.

ascertaining the rate for digital performances of sound recordings requires participation in yet another CRB ratesetting proceeding under section 114.[638]

Noncommercial broadcasters thus seek to expand the section 118 license to encompass "all music elements."[639] Noncommercial religious broadcasters proposed, in particular, "[f]olding digital transmissions of musical works into the existing section 118 license applicable to broadcast transmissions."[640] NPR advocated for a further step: broadening the section 118 license to encompass "all known and yet to be created distribution methods and technologies," including physical products and permanent digital downloads.[641]

Finally, noncommercial broadcasters seek to ensure that the policy-oriented 801(b)(1) ratesetting standard will apply to any expanded version of the section 118 license.[642]

5. Concerns Regarding CRB Procedures

As with the rate courts, many stakeholders expressed concern about the CRB ratesetting process—many of which are governed by detailed statutory provisions[643]—including specific concerns regarding discovery procedures, the settlement process, and bifurcated proceedings.

a. Inefficiencies and Expense

Copyright owners and licensees together complained about the inefficiency and high cost of proceedings before the CRB.[644] RIAA and SoundExchange suggested that one way to reduce costs would be to simplify the rate standards and move to a

[638] EMF First Notice Comments at 8-9 (noting reasons noncommercial broadcasters are unlikely to settle in section 114 proceedings).

[639] NPR First Notice Comments at 7.

[640] NRBNMLC First Notice Comments at 15.

[641] NPR First Notice Comments at 7; *see also* Public Television Coalition ("PTC") First Notice Comments at 11.

[642] *See* NRBNMLC First Notice Comments at 16. While the 801(b)(1) "reasonable terms and rates" standard currently applies under section 118, sound recording uses under section 114(d) are subject to the willing buyer/willing seller standard. 17 U.S.C. §§ 114(d), 801(b)(1); Noncommercial Educational Broadcasting Compulsory License, 63 Fed. Reg. 49,823, 49,824 (Sept. 18, 1998) (noting the rate standard for section 118 is "reasonable terms and rates" with no further statutory criteria, but the legislative history of section 118 indicated that "the rate should reflect the fair value of the copyrighted material").

[643] *See* 17 U.S.C. § 801 *et seq.*

[644] *See, e.g.*, ASCAP First Notice Comments at 24 n.31; Music Choice First Notice Comments at 29-31; RIAA First Notice Comments at 36; Sirius XM First Notice Comments at 17.

straightforward willing buyer/willing seller rate standard across the board.[645] SoundExchange noted that "[r]elative to a streamlined fair market value standard, every specific factor included in a rate standard increases cost and decreases predictability."[646]

Stakeholders also pointed to the bifurcated ratesetting procedures contemplated by statute—which references separate direct and rebuttal phases of ratesetting hearings[647]—as a significant and costly inefficiency,[648] creating a "'two ships passing in the night' quality to the proceedings."[649] There was broad support for eliminating the bifurcated nature of trials before the CRB because "[b]ifurcation offers no advantages or efficiencies in discovery, comprehension of complex issues, savings in judicial resources, or elimination of duplicative presentations of evidence."[650]

Another shortfall of the system is that the rate adjustment process occurs only once every five years. Parties representing both copyright owners and music users found the process slow and insufficiently responsive to new and developing technologies and services.[651] Because ratesetting occurs only on a periodic basis, copyright owners and users must attempt to predict and accommodate each type of service that might arise in the upcoming five-year period.[652] For instance, as RIAA recounted, "[t]he Section 115 rate-setting process . . . resulted in a rate schedule with 17 different rate categories, and in which publishers and songwriters can receive varying percentages of the relevant content royalty pool" based on those categories, causing the administration of payments to be "exceedingly complex."[653]

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[645] *See, e.g.,* RIAA First Notice Comments at 36; SoundExchange First Notice Comments at 6-8.

[646] SoundExchange Second Notice Comments at 10; *see also* RIAA Second Notice Comments at 43 (noting a single-factor rate standard as a possible streamlining measure).

[647] 17 U.S.C. § 803(b)(6)(C).

[648] NAB First Notice Comments at 19 & n.11; Sirius XM First Notice Comments at 17.

[649] Music Choice First Notice Comments at 30; *see* Sirius XM First Notice Comments at 17 (same).

[650] NAB First Notice Comments at 20.

[651] *See* BMI First Notice Comments at 27; DiMA First Notice Comments at 23; RIAA First Notice Comments at 45; Tr. at 256:02-06 (June 16, 2014) (Jason Rys, Wixen Music Publishing).

[652] Kohn First Notice Comments at 14 (referencing the "unnecessarily complex set of individual rate regimes for the various uses contemplated by Section 114 by various kinds of defined transmitters").

[653] RIAA First Notice Comments at 24*; see also id.* at 11-12 (further noting frustrations with mechanical royalty ratesetting).

b. Settlement Obstacles

In theory, Congress designed the CRB procedures to facilitate and encourage settlement rather than administrative ratesetting by the CRB. Several stakeholders, however, noted practical and procedural hurdles they have encountered in finalizing settlements.

The most common stakeholder plea was to modify the CRB process so the Judges would act quickly on any settlement.[654] Stakeholders complained that even where a settlement is reached, the CRB has delayed ruling on the settlement,[655] sometimes adopting the settlement only after the proceedings were concluded.[656] RIAA also observed that delay of settlement has frustrated the business plans of services.[657] Music Choice concurred that delays during the voluntary negotiation period leave inadequate time for parties to conduct rate proceedings.[658]

To address these issues, SoundExchange proposed bypassing CRB approval of settlements by granting the section 112 and 114 designated agent (*i.e.*, SoundExchange) the authority to enter into opt-in settlement agreements for a statutory license.[659] It further suggested that the CRB could be required to adopt a negotiated settlement even if it would not fully resolve a case.[660] SoundExchange also surmised that parties may be reluctant to settle because the negotiated rate may be used as a benchmark or otherwise in rate determinations, and suggested that parties be permitted to designate settlements as non-precedential.[661]

c. Discovery Process

Music services criticized the discovery process that applies to ratesetting proceedings before the CRB on two grounds. First, they observed that because the statute specifies that discovery occurs only *after* the submission of the parties' direct cases—contrary to the ordinary practice in civil litigation—"parties are required to assume what they will

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[654] *See, e.g.*, Tr. at 141:16-21 (June 16, 2014) (Tegan Kossowicz, UMG) ("With respect to an earlier mention of the implementation of CRB settlements, they should be expedited when possible, and that doesn't just pertain to both these sections, but as well as other proceedings that we may have in the future on licensing.").

[655] Tr. at 99:16-100:03 (June 16, 2014) (Brad Prendergast, SoundExchange); Tr. at 129:17-130:03 (June 23, 2014) (Steven Marks, RIAA).

[656] SoundExchange First Notice Comments at 9 n.12; Tr. at 122:15-22 (June 23, 2014) (Colin Rushing, SoundExchange).

[657] RIAA First Notice Comments at 24-25.

[658] Music Choice First Notice Comments at 30.

[659] SoundExchange First Notice Comments at 9-10.

[660] *Id.* at 9.

[661] *Id.* at 10.

develop during discovery and hope that relevant information will be voluntarily revealed by their opponent in the opponent's written case."[662] Licensees believe that this process puts them at a disadvantage, because much of the information regarding benchmark rates is held by copyright owners.[663] In addition, the statutory procedures limit discovery to documents directly related to the direct statements.[664] Licensees suggested that this rule allows copyright owners to behave strategically in their own direct statement and thus limit discovery.[665]

Music providers also complained about the statutory limits on discovery.[666] While recognizing the hypothetical benefits of a streamlined discovery process, some observed that there are no actual cost savings and the restrictions are not fair.[667] According to licensees, the 60-day discovery window is too short,[668] and the statutory limit of 25 interrogatories and 10 depositions for all parties on each side is insufficient.[669] Other discovery-related suggestions included adoption of a standardized blanket protective order that would be implemented for "non-public, commercially-sensitive information produced in discovery and submitted as evidence."[670] NAB also supported use of the Federal Rules of Civil Procedure and Federal Rules of Evidence, with slight modifications, for CRB proceedings.[671]

In response to these concerns about discovery, copyright owners argued that the commenting parties "did not identify any instance in which the Judges believed the

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[662] DiMA First Notice Comments at 38.

[663] *See id.* at 38-39; Music Choice First Notice Comments at 29-30; Sirius XM First Notice Comments at 15-16; Tr. at 104:10-105:12 (June 16, 2014) (Gary R. Greenstein, Wilson Sonsini Goodrich & Rosati).

[664] 17 U.S.C. § 803(b)(6)(C)(v).

[665] Music Choice First Notice Comments at 29; Sirius XM First Notice Comments at 16.

[666] *See* 17 U.S.C. § 803(b)(6).

[667] Music Choice First Notice Comments at 29; Tr. at 208:19-209:07 (June 4, 2014) (Lee Knife, DiMA).

[668] DiMA First Notice Comments at 38; *see also* NAB First Notice Comments at 20 (supporting longer discovery periods); Sirius XM First Notice Comments at 16-17 (same).

[669] DiMA First Notice Comments at 38-39; *see also* Music Choice First Notice Comments at 30 ("[G]iven the number of witnesses and the number of participants in most proceedings, the Copyright Act's limitation on depositions to ten per side (spread between direct and rebuttal discovery) is clearly insufficient.").

[670] NAB First Notice Comments at 3; Music Choice First Notice Comments at 31 ("The cost of participation in rate proceedings should not include the risk that confidential business information may be publicly disclosed. A standardized blanket protective order, similar to that employed by the Trademark Trial and Appeals Board, would be helpful.").

[671] NAB First Notice Comments at 21.

current procedures prevented a full record from being developed,"[672] and added that "open-ended discovery" would add to the complication, expense, or inefficiency of proceedings.[673] At the same time, copyright owners agreed that conducting discovery "up front" could be "helpful," along with eliminating the bifurcated nature of CRB proceedings.[674]

C. Licensing Efficiency and Transparency

1. Music Data

a. Lack of Reliable Public Data

Based on the record in this proceeding, there can be little doubt that the current music licensing landscape is severely hampered by the lack of publicly accessible, authoritative identification and ownership data.[675] There are several facets to this problem.

To begin with, there is a lack of comprehensive and reliable ownership data, particularly for musical works. As RIAA noted, "it is difficult to identify and keep track of musical work ownership due to changes when musical works and catalogs change hands."[676] Further complicating the situation is that the rights to musical works are often split among multiple songwriters, with differing publishers and PROs, making musical work data harder to track and maintain.[677]

In addition, digital music files often do not include the standard identifiers for the copyrighted works the files embody—*i.e.*, the ISRC for the sound recording and the ISWC for the underlying musical work.[678] Even when the file includes the ISRC, as is

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[672] SoundExchange Second Notice Comments at 10.

[673] Tr. at 115:20-116:07 (June 4, 2014) (Steven Marks, RIAA); *see* SoundExchange Second Notice Comments at 10.

[674] Tr. at 107:19-108:22 (June 4, 2014) (Steven Marks, RIAA); *see* RIAA Second Notice Comments at 43 (favoring "earlier disclosure of a focused set of critical information").

[675] *See, e.g.*, RIAA First Notice Comments at 17, 20, 22; NMPA & HFA First Notice Comments at 10-12; Peter Menell First Notice Comments at 2; Public Knowledge & CFA First Notice Comments at 28; RMLC First Notice Comments at 7-9; TMLC First Notice Comments at 16; Spotify First Notice Comments at 11; IPAC Second Notice Comments at 2; *Music Licensing Hearings* at 71-72 (statement of Jim Griffin, OneHouse LLC).

[676] RIAA First Notice Comments at 46.

[677] *See* Spotify First Notice Comments at 4.

[678] DiMA Second Notice Comments at 6 ("Neither ISRC Codes nor ISWC Codes are applied to all works, nor are they applied uniformly or correctly, even when they are attached to work."); *but compare* Tr. at 382:20-22 (June 23, 2014) (Andrea Finkelstein, SME) ("I would say for the majors, everything that is in digital release has an ISRC associated."), *with* MMF & FAC Second Notice

now commonplace for new releases, the ISWC for the underlying musical work is often not yet assigned at the time of initial release.[679] And even after an ISWC has been obtained by the musical work owner, there is no comprehensive, publicly accessible database that can be used to match the ISRC to the ISWC.[680] Google noted that requiring licensors to supply data helps to "identify exactly what it is they are licensing . . . both from a deal implementation standpoint as well as a deal valuation standpoint," adding that "those sort of data requirements . . . work their way back up the chain, to the creators."[681]

Beyond the ISRC and ISWC, there is also a lack of universal and uniform data to identify songwriters and recording artists associated with individual works. While a global identifier for creators—the ISNI—has been certified by ISO to replace older systems employed by the PROs and others, it is not yet widely used.[682]

These shortcomings cause serious inefficiencies. Licensees expend significant effort attempting to identify particular sound recordings and the musical works they embody, as well as tracking down their copyright owners. Because there is no centralized data resource, stakeholders devote "significant resources to maintaining redundant and often inconsistent databases of musical work ownership and split information."[683] Digital services noted that the lack of an authoritative source of data exposes even well-intentioned actors to potential statutory damages for "inadvertently distributing works without requisite authorization."[684] According to DiMA, this risk is inequitable because copyright owners inadequately identify themselves and their works.[685]

Comments at 29 ("Contrary to oral testimony to the New York Roundtable in June, the [ISRC] has not, in our experience, achieved the penetration that is seen with ISWC.").

679 *See* Tr. at 336:17-19 (June 23, 2014) (Andrea Finkelstein, SME) ("No, we don't have ISWCs, and we certainly don't have them at that point [when a sound recording is sent to a digital service provider].").

680 CCIA Second Notice Comments at 2 ("[A]lthough Industry Standard Recording Codes (ISRCs) have existed for more than two decades, there is still not a recorded database of them."); Tr. at 345:05-06 (June 23, 2014) (Andrea Finkelstein, SME) ("There is [an ISRC database] cooking at SoundExchange.").

681 Tr. at 53:09-17 (June 23, 2014) (Waleed Diab, Google/YouTube).

682 *See* Pipeline Project Second Notice Comments at 5; Tr. at 516:02-09 (June 23, 2014) (Bob Kohn, Kohn on Music Licensing); Tr. at 558:11-14 (June 23, 2014) (Lynn Lummel, ASCAP); *see also* ISNI, http://www.isni.org (last visited Jan. 30, 2015).

683 RIAA Second Notice Comments at 32; *see also* NMPA & HFA First Notice Comments at 10-11.

684 Menell First Notice Comments at 2.

685 DiMA First Notice Comments at 17, 29.

Commenters also referenced the recent *Pandora* rate court decision, in which the court found that withdrawing publishers did not supply catalog data that would have allowed Pandora to pull their songs from its service.[686] Some were troubled by this tactic, and urged that, if this type of publisher withdrawal is allowed, the withdrawing publisher must be required to "provide immediate transparency as to the musical works that are no longer subject to license."[687]

On the licensor side of the equation, the lack of reliable data means that royalty payments may be delayed, misdirected, or never made.[688] SoundExchange highlighted in particular the problems caused when digital services fail to include standard identifiers in their reports of usage under the section 112 and 114 statutory licenses. It explained that basic data elements—featured artist name, track title, album name, and label name—"simply are not sufficient to distinguish unambiguously among the tens of millions of recordings actively being commercialized today."[689] Instead, "standard identifiers are the only practicable way to identify and accurately account for usage of all those recordings."[690]

RIAA similarly noted that "[a] flourishing musical work licensing marketplace requires both that potential licensees can get licensed and that royalties flow properly to music publishers and songwriters," and that "reliable and accessible information is critical to making that happen."[691] NMPA agreed, saying that a "database where we know the rights" would be valuable.[692] Flawed or missing data is not a problem unique to major labels or famous artists, and A2IM commented that inaccurate data is "especially problematic for the independent label community" because it is harder to identify lesser-known artists without accurate data.[693]

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[686] *Pandora Ratesetting*, 6 F. Supp. 3d at 358-60.

[687] Spotify First Notice Comments at 11.

[688] RIAA First Notice Comments at 46; *Music Licensing Hearings* at 74-75 (statement of Jim Griffin, OneHouse LLC).

[689] SoundExchange First Notice Comments at 25.

[690] *Id.*

[691] RIAA Second Notice Comments at 17; *see also Music Licensing Hearings* at 75 (statement of Jim Griffin, OneHouse LLC) ("[A]bsent the use of [global universal identifiers] money disappears along its path to its intended receiver. Where does that money go? To pools of unattributed income, divided through market share formulas at the organizations that collect the money.").

[692] Tr. 38:05-08 (June 4, 2014) (Brittany Schaffer, NMPA/Loeb & Loeb).

[693] A2IM Second Notice Comments at 2.

b. Parties' Views

In light of the concerns identified above, there appears to be widespread agreement that authoritative and comprehensive data related to the identity and ownership of works would substantially enhance transparency in the music licensing system, reduce transaction costs, and facilitate direct licensing through private negotiation in the open market.[694] There is, however, less harmony about the best way to achieve this goal.

Some suggested that the government should play a central role. DiMA, for example, proposed that the Copyright Office create and maintain a music database, while others called for the Office to identify and publicize data standards, and facilitate or require submission of such data in the registration or recordation process.[695] Others conceived of quasi-governmental solutions. FMC stated that Congress might consider creating a "nonprofit to oversee the development of a global registry database (or databases) that could be overseen by government, in cooperation with international bodies."[696] Several licensees suggested ASCAP and BMI should be required to provide better and more usable repertoire data.[697] Some proposed more market-based solutions, such as data expert Jim Griffin's proposal to emulate the registration system for websites, whereby the government would engage in standards-setting to encourage the creation of profit-seeking private registries, similar to domain name registries like GoDaddy.[698]

Others groups—principally representing copyright owners—believed that government involvement was unnecessary. In NMPA's view, if the market for creative works were unregulated and free of governmental price controls (including the section 115 license), "transactional hubs, syndication platforms and other supply chain management platforms" would develop to match buyers to sellers and to allocate and distribute revenues.[699] For their part, the PROs highlighted their online repertoire databases and efforts such as MusicMark to enhance access to reliable repertoire data.[700] The PROs

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694 DiMA Second Notice Comments at 3-4, 7; Tr. at 381:08-11(June 23, 2014) (Waleed Diab, Google/YouTube).

695 DiMA Second Notice Comments at 5; *see* Sirius XM First Notice Comments at 6-7; SoundExchange Second Notice Comments at 6; A2IM Second Notice Comments at 2; *see also* CCIA Second Notice Comments at 3.

696 FMC First Notice Comments at 22; *see* Public Knowledge & CFA First Notice Comments at 28.

697 NAB Second Notice Comments at 2; CTIA First Notice Comments at 7; DiMA Second Notice Comments at 6-7.

698 *Music Licensing Hearings* at 72 (statement of Jim Griffin, OneHouse LLC).

699 NMPA & HFA Second Notice Comments at 3.

700 ASCAP Second Notice Comments at 12-13 (citing "ASCAP's searchable database, named ASCAP Clearance Express or ACE, at http://www.ascap.com/ace"); BMI Second Notice Comments at 9 (citing BMI's extensive searchable repertoire database at http//www.bmi.com).

acknowledged that their plans do not include making all of their data available to the public, however, stressing that they face significant confidentiality concerns.[701]

RIAA noted that assignment of ISRCs and ISWCs could be better coordinated (*e.g.,* by having the record company first recording a new song assign the ISRC and ISWC in tandem to ensure that the ISWC will be available to relevant stakeholders upon a song's release).[702] Stakeholders generally shared the view that such solutions are worth exploring.[703]

Both SoundExchange and RIAA observed that there are fewer problems with sound recording than musical work data.[704] According to them, sound recording identification and ownership information is generally available from product packaging, or from publicly available internet sources such as allmusic.com and discogs.com.[705] Additionally, digital services generally receive metadata from record companies and distributors providing music files.[706] RIAA pointed out that, unlike musical works, ownership of sound recordings is rarely divided among multiple co-owners, and record companies owning commercially significant recordings are less numerous than music publishers, with less frequent changes in ownership.[707]

SoundExchange additionally explained that it maintains robust identification and ownership information, including ISRCs for approximately 14 million sound recordings.[708] SoundExchange is actively exploring means by which it might provide statutory licensees with access to its database for statement of account purposes. For example, SoundExchange may offer music services the capability to search for ISRCs or supply music services with ISRCs that are missing from their reports of use.[709]

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[701] *Id.* at 5; ASCAP Second Notice Comments at 7-8.

[702] *See, e.g.*, RIAA Second Notice Comments at 35-36; Tr. at 346:01-349:13 (June 23, 2014) (Lynn Lummel, ASCAP; Andrea Finkelstein, SME; Jacqueline Charlesworth & Sarang Damle, U.S. Copyright Office) (discussing assignment of ISRC in relation to ISWC).

[703] *See, e.g.*, Pipeline Project Second Notice Comments at 9; DiMA Second Notice Comments at 6-8; RIAA Second Notice Comments at 35-36.

[704] *Id.* at 33; SoundExchange Second Notice Comments at 4.

[705] RIAA Second Notice Comments at 33.

[706] SoundExchange Second Notice Comments at 4; RIAA Second Notice Comments at 33; Tr. at 336:02-12 (June 23, 2014) (Andrea Finkelstein, SME; Sarang Damle, U.S. Copyright Office) (describing metadata delivered by record companies).

[707] RIAA Second Notice Comments at 33.

[708] SoundExchange Second Notice Comments at 4-5.

[709] *Id.* at 5.

SoundExchange and RIAA together emphasized that licensees operating under the section 112 and 114 licenses should use available identifying information, particularly ISRCs, when reporting usage to SoundExchange.[710] Such an obligation would increase automatic matching of reported usage to known repertoire and facilitate accurate manual matching when necessary, thus enhancing the data maintained by SoundExchange.[711] Both parties noted that adoption of such a requirement would encourage broader use of the ISRC standard.[712]

2. Usage and Payment Transparency

Incomplete or inaccurate data frustrates the ability of creators and sellers of music to track how music is used and what payments are made. Even when accurate data is available, however, stakeholders had concerns about the effectiveness of music usage and payment tracking for payment allocation and about the lack of audit rights for certain licenses. At bottom, the issue in the music industry is that participants want reassurance that they are being treated fairly by other actors.[713]

a. Advances and Equity Deals

There was a growing concern that payments received by record companies and music publishers from new digital music services as part of direct deals are not being shared fairly with songwriters and recording artists.[714] SAG-AFTRA and AFM warned that while direct licensing deals between digital music services and record labels or publishers may result in more compensation from licensees, direct deals may actually result in lower payments to artists than under the statutory licensing scheme.[715]

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[710] *Id.*; RIAA Second Notice Comments at 35.

[711] SoundExchange Second Notice Comments at 5.

[712] *Id.*; RIAA Second Notice Comments at 35. These parties noted that the CRB is currently considering updates to the relevant notice and recordkeeping regulations.

[713] Tr. at 86:01-03 (June 4, 2014) (Brittany Schaffer, NMPA/Loeb & Loeb LLP) (explaining that "there's a lack of trust between the record companies and the publishers"); Tr. at 77:15-17 (June 16, 2014) (Eric D. Bull, Create Law) (noting that "there's such distrust because of the amount of the money that is going to be exchanged"); Tr. at 14:03-05 (June 17, 2014) (Garry Schyman, SCL) ("[W]e really don't trust a publisher who is not in a position to tell us what we are entitled to.").

[714] Resnick Second Notice Comments at 2 ("Spotify alone is reported to have paid hundreds of millions in dollars in upfront and non-recoupable payments for the privilege of licensing major label catalogues.").

[715] SAG-AFTRA & AFM First Notice Comments at 7; SAG-AFTRA & AFM Second Notice Comments at 2 ("Whatever the individual royalty artist's share, it will not be paid directly, it will be subject to recoupment, and it will only be verifiable (if at all) through a complex and expensive individual audit under the royalty contract.").

A major objection to direct licensing is that labels and publishers do not necessarily share advance payments of royalties—in particular, unrecouped advances or "breakage" monies—with creators.[716] Advance payments of royalties can be significant; Google, for instance, reportedly paid more than $400 million to WMG under a recent three-year deal to license the label's music for YouTube and its subscription offerings.[717] In many cases, if an advance is not fully recouped (*i.e.*, fully applied to royalties due) by the end of the license term, the excess fees are retained by the label or publisher rather than returned. The question is whether these funds are accounted for and paid out by the label or publisher to its artists or songwriters.

Some record labels and publishers may share unrecouped advances with performers and writers, but the practice is not universal.[718] And while well-established musicians may occasionally negotiate a right to collect on breakage,[719] others are not as successful.[720] Negotiating for these payments can be difficult, as artists and songwriters are not necessarily aware of deal terms. For example, SGA commented that without the testimony of an executive representing DMX in a BMI rate court proceeding, the songwriting community would never have known of a $2.4 million advance paid by DMX to Sony/ATV.[721]

Similarly suspect for creators are equity deals between major labels and digital services. It has been reported, for instance, that the major labels collectively acquired an 18% ownership interest in Spotify.[722] Referencing Spotify, as well as YouTube and Musicmaker, Perry Resnick, who conducts music audits, commented that "[m]any deals are not done unless the major labels receive a share of equity in the licensee, which also lowers the royalty rates paid for specific recordings, sometimes down to zero."[723] There

[716] *See* A2IM Second Notice Comments at 5-6 (defining breakage as "excess revenue that cannot be attributed to specific recordings or performances and, therefore, is not required to be shared with artists, songwriters or the actual sound recording copyright owner"); Resnick Second Notice Comments at 2 ("[E]xcess payments are not shared with recording artists.").

[717] Karp, *Artists Press for Their Share*.

[718] For example, Martin Bandier of Sony/ATV has stated that his company does not share extra advance money because "there [isn't] much to share." Karp, *Artists Press for Their Share*.

[719] A2IM Second Notice Comments at 6; Tr. at 143:08-11 (June 23, 2014) (Richard Bengloff, A2IM).

[720] Tr. at 109:13-110:03 (June 5, 2014) (Robert Meitus, Meitus Gelbert Rose LLP).

[721] SGA Second Notice Comments at 14-15 (Sony/ATV was also paid $300,000 for administrative expenses).

[722] *See* Lindvall, *Behind the Music: The Real Reason Why the Major Labels Love Spotify*.

[723] Resnick Second Notice Comments at 2.

seems to be no reliable practice, however, under which artists and songwriters are compensated for such equity arrangements.[724]

b. PRO Distributions

PROs create value by licensing, administering, and enforcing music creators' public performance rights. Yet some songwriters voiced concerns that part of this value is lost through inaccurate payment allocation. PROs frequently use sampling surveys to estimate how many times a song has been performed during a payment period, and rely upon those estimates to allocate royalties among their members.[725]

An alternative, and more comprehensive, form of measurement is census reporting, whereby licensees account for each use of a musical work (*e.g.*, each individual stream) to the collecting entity. Census reporting is more common for digital services, where it is easier to track individual performances.[726] ASCAP relies upon census data only when it is "economically feasible" to process.[727] For many uses—including terrestrial radio uses and some digital uses—ASCAP uses a sample survey.[728] BMI similarly relies upon extrapolated data to pay royalties in many instances.[729] Information concerning ASCAP's and BMI's distribution practices is publicly available on their websites.[730]

Some musicians and publishers commented that increased use of census data instead of surveys would result in more accurate payments by PROs to their members under blanket licenses. For instance, Music Services stated that survey-based distribution, particularly for radio and live performances, is "antiquated" and that "[m]any

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724 Karp, *Artists Press for Their Share*.

725 According to one source, "[m]ost performance data is drawn from broadcast sources, under the assumption that the music being performed over radio and television is roughly the same as the music being performed in cafes, hotels, sports arenas, . . . restaurants, and nightclubs." KOHN at 1281.

726 *See* NMPA & HFA First Notice Comments at 9. For instance, SoundExchange pays almost entirely on a census basis, and does not generally use sampling. *See* SoundExchange Second Notice Comments at 7.

727 *ASCAP Payment System: Keeping Track of Performances*, ASCAP, http://www.ascap.com/members/payment/keepingtrack.aspx (last visited Jan. 30, 2014).

728 *Payment System: The ASCAP Surveys*, ASCAP, http://www.ascap.com/members/payment/surveys.aspx (last visited Jan. 30, 2014).

729 *Royalty Policy Manual*, BMI, http://www.bmi.com/creators/royalty_print/detail (last visited Jan. 16, 2015).

730 *ASCAP's Survey and Distribution System: Rules & Policies*, ASCAP (June 2014), http://www.ascap.com/~/media/files/pdf/members/payment/drd.pdf; *Royalty Policy Manual*, BMI, http://www.bmi.com/creators/royalty_print/detail (last visited Jan. 16, 2015).

publishers and writers believe they are not receiving their fair share of the PRO pot."[731] Other participants observed that under a sampling system, musicians who do not have "mainstream" songs on the radio are underpaid.[732] Under this view, since sampling is more likely to identify hit songs, the PRO will likely undercount performances of works by emerging or fringe musicians.

In response, a representative from ASCAP sympathized, stating "ideally, yes, I wish everyone would get paid for every performance," but noted the administrative impracticality of identifying every use.[733] Others echoed this sentiment, commenting that even if uses could be precisely tracked, some would be so small that they would not be payable.[734] Nonetheless, ASCAP notes that "[a]s new technologies make surveying a given medium such as broadcast radio economically efficient, we implement those technologies to move closer to a full census."[735] For its part, BMI commented that there is competition between PROs for members and the market will sufficiently drive distribution methodologies.[736]

Despite these concerns, songwriters generally expressed confidence in the PROs.[737] The PROs are seen as relatively transparent[738] and protecting the writers' share of performance royalties.[739] SGA noted that "licensing through the PROs . . . has benefited and given protection to the community of American music creators for over one hundred years" by "provid[ing] music creators with the crucial assurance that an important source of revenue will be paid directly to them by the PRO."[740] Similarly, in NSAI's estimation, "ASCAP and BMI essentially act as not-for-profit collection arms for songwriters and composers."[741]

c. "Pass-Through" Licensing

As noted above, under section 115, compulsory licensees can authorize third-party streaming services to transmit downloads and streams of musical works. Songwriters

[731] Tr. at 261:20-262:03 (June 5, 2014) (Phil Perkins, Music Services).

[732] Tr. at 22:14-25:19 (June 5, 2014) (Royal Wade Kimes, Wonderment Records); *see* Simpson First Notice Comments at 2.

[733] Tr. at 28:17-29:02 (June 5, 2014) (Sam Mosenkis, ASCAP).

[734] Modern Works Music Publishing Second Notice Comments at 6-7.

[735] ASCAP Second Notice Comments at 17.

[736] BMI Second Notice Comments at 15.

[737] Council of Music Creators First Notice Comments at 2-3.

[738] SCL First Notice Comments at 11.

[739] Music Choice First Notice Comments at 20.

[740] SGA First Notice Comments at 7.

[741] NSAI Second Notice Comments at 4.

and publishers complain vigorously about this system.[742] SGA pointed out that pass-through licensing "creates a situation in which the creators and owners of musical compositions have no privity of contract with online music distribution giants such as Apple iTunes, and must therefore rely on sometimes adversarial record company 'intermediaries' for the monitoring and payment of royalties earned via online download usage."[743] Another commenter explained that "pass-through licensing, where record labels can license mechanical rights directly on publishers' behalf and without publishers' input, leaves songwriters with no clue as to whether or not they are properly paid."[744]

Stakeholders appear largely to agree that the pass-through approach—which mimics the traditional physical model, where record labels ship product to stores and report sales back to publishers—is unnecessary in the digital environment, since it is feasible for music owners to have a direct relationship with consumer-facing distributors. Significantly, even RIAA, a presumed beneficiary of the section 115 pass-through license, appears to favor the end of this pass-through licensing: "The major record companies generally support in principle the elimination of pass-through licensing . . . within the context of a structure that makes it unnecessary."[745]

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742 ASCAP and BMI also express displeasure with the analogous "through-to-the-audience" licenses required under the ASCAP and BMI consent decrees, where a party that procures a license from the PRO is able to authorize transmissions by additional distributors. *See* ASCAP Consent Decree § V; BMI Consent Decree § IX. Originally conceived to allow networks to obtain licenses that extend to downstream broadcasts by affiliates, the concept has been extended to online services such as YouTube that allow their video content to be shared and embedded on third-party websites that may be generating revenue through advertisements or otherwise. ASCAP First Notice Comments at 19. Per ASCAP, "a through-to-the-audience license request can give unfettered permission to a huge number of users without the benefit of full remuneration to music creators." *Id*. at 20.

743 SGA First Notice Comments at 6-7. In recently promulgated regulations, the Copyright Office added a new requirement for section 115 licensees that requires them to break down royalty statements to indicate usage by third-party services, so copyright owners can at least see what is being reported to the section 115 licensee. 37 C.F.R. §§ 210.16-210.17.

744 LaPolt Second Notice Comments at 11; *see also* NMPA &HFA First Notice Comments at 12 ("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."); Kohn First Notice Comments at 9 ("Pass-through licenses, at least insofar as they apply to digital transmission, should be eliminated.").

745 RIAA Second Notice Comments at 19.

IV. Analysis and Recommendations

It may be the very power of music that has led to its disparate treatment under the law. The songs we enjoy in our early years resonate for the rest of our lives. Human beings have a deep psychological attachment to music that often seems to approach a sense of ownership; people want to possess and share the songs they love. Perhaps this passion is one of the reasons music has been subject to special statutory treatment under the law.

Regardless of what has animated our century-old embrace of government regulation of music, the Copyright Office believes that the time is ripe to question the existing paradigm and consider meaningful change. In recent years, we have seen piecemeal efforts to address particular issues through focused legislation: there have been bills directed to the lack of a terrestrial performance right for sound recordings, ratesetting inequities, and payment for pre-1972 sound recordings. Each has targeted a specific issue or issues within the existing system. In the current environment, however, these sorts of limited proposals—standing alone—seem unlikely to generate broad enough support to become law. It is for this reason, perhaps, that some members of Congress have recently indicated interest in a more holistic approach.[746]

How ambitious should any such approach be? As a number of commenters remarked during the course of this study, if we were to do it all again, we would never design the system that we have today. But as tempting as it may be to daydream about a new model built from scratch, such a course would seem to be logistically and politically unrealistic. We must take the world as we find it, and seek to shape something new from the material we have on hand.

In this section, based on the information and commentary gathered in the study, the Office analyzes critical areas of concern and—considering the record and merits of disparate viewpoints—suggests ways to reshape our music licensing system to better meet the demands of the digital era. Following a discussion of the role of government in the music marketplace, the Office outlines a series of interrelated changes that might be implemented to modernize our struggling system. The recommendations below seek to capitalize on the value that existing institutions and methods could continue to provide under an updated framework.

Rather than presenting a detailed plan, the Office's recommendations should be understood as high-level and preliminary in nature—more of a sketch than a completed picture. It is also important that the proposals be contemplated together, rather than in

[746] *See, e.g.*, Daryl P. Friedman, *MusicBus Gaining Speed as Members of Congress Climb On*, GRAMMY NEWS (June 18, 2014), http://www.grammy.com/blogs/musicbus-gaining-speed-as-members-of-congress-climb-on (noting support for omnibus legislation by Rep. Jerrold Nadler, Rep. Kevin McCarthy and Rep. Nancy Pelosi]).

isolation. The Office seeks to present a series of balanced tradeoffs among the interested parties to create a fairer, more efficient, and rational system for all.

A. Guiding Principles

The Copyright Office appreciates and agrees with the four grounding principles that were articulated by many during the course of this study, as discussed above. These are:

- Music creators should be fairly compensated for their contributions
- The licensing process should be more efficient
- Market participants should have access to authoritative data to identify and license sound recordings and musical works
- Usage and payment information should be transparent and accessible to rightsowners

As much as there may be consensus on these points, however, the opposite could be said of stakeholders' views as to how best to achieve them. Having considered the plethora of issues that plague our current licensing system—and how they might practically be addressed—the Office has identified some additional principles that it believes should also guide any process of reform. These are:

- Government licensing processes should aspire to treat like uses of music alike
- Government supervision should enable voluntary transactions while still supporting collective solutions
- Ratesetting and enforcement of antitrust laws should be separately managed and addressed
- A single, market-oriented ratesetting standard should apply to all music uses under statutory licenses

Each of these principles is explored below in the context of the Office's overall recommendations.

B. Licensing Parity and Fair Compensation

Questions of licensing parity and fair compensation are closely tied to the relative treatment of music rights and rightsholders under the law.[747] The Office believes that

[747] During the course of the study, the Office and others employed the term "platform parity" in referencing the concern that existing licensing policies have a disparate impact on different distribution platforms. The Office now adopts the broader term "licensing parity" in recognition

any overhaul of our music licensing system should strive to achieve greater consistency in the way it regulates (or does not regulate) analogous platforms and uses. In addition to rewarding those distribution models that are most resource-efficient and appealing to consumers, evenhanded treatment will encourage more equitable compensation for creators.

From today's vantage point, at least, the impact of our current system on different classes of copyright owners and users—favoring some while disadvantaging others—seems to be more the product of historical happenstance than conscious design. To the extent our policies require copyright owners to subsidize certain business models through reduced royalties, as copyright owners claim, this is not the result of a present-day judgment that it is a fair way to treat creators, or promotes the values of our copyright system. The same can be said of policies that impose higher royalty obligations on one business model over competing platforms.

The policy rationales that animated the creation of the section 115 compulsory license, the PRO consent decrees, and even the section 112 and 114 framework for digital performances, are now decades behind us. The Office believes that the current widespread perception that the system is outmoded and broken may provide an opportunity to review and rationalize the playing field.

1. Equitable Treatment of Rights and Uses

As suggested above, the Copyright Office believes that an important element of a robust and fair music marketplace is to treat equivalent uses of sound recordings and musical works—and competing platforms—alike, or as alike as can practically be achieved.

a. Musical Works Versus Sound Recordings

Which is more important, the song or the sound recording? "It all begins with a song," runs the oft-cited refrain;[748] but then again, the song is brought to life through a sound recording. While there is, of course, no definitive answer to this question, as reflected throughout this report, the law nonetheless treats sound recordings and musical works differently.

In the case of noninteractive streaming uses, sound recordings are subject to compulsory licensing at government-set rates. But apart from this, sound recordings are licensed by their owners in the free market.

of the fact that the current licensing framework also disparately impacts different classes of copyright owners and creators.

[748] NSAI, http://www.nashvillesongwriters.com (last visited Jan. 18, 2014).

As for musical works, while synch uses (including consumer-generated videos) are not subject to government oversight,[749] the other core segments of the market (mechanical reproduction and performance uses) are regulated. As indicated above, a recurring complaint from publishers and songwriters is that significantly higher rates are paid for sound recordings than for musical works in the online world—whether those rates are set by the CRB or by one of the rate courts. At least some of this disparity appears to arise from publishers' inability to negotiate free from government constraint where record companies can.

In keeping with the guiding philosophy that government should aspire to treat like uses of music alike, the Office believes this should change, at least in the digital realm. That is, where sound recording owners have the ability to negotiate digital rates in the open market, so should owners of musical works.

Although the path to enabling this type of parity is complicated by the divergent licensing frameworks for mechanical and performance rights on the musical work side, the Office's approach would offer a free market alternative to musical work owners, in the form of an opt-out right, in the most significant areas where sound recording owners enjoy unfettered digital rights—namely, interactive streaming uses and downloads. And where sound recording owners are subject to statutory ratesetting—*i.e.*, in the case of noninteractive streaming—musical works would remain regulated. To further promote uniformity of approach, as discussed below, the Office is recommending that all music ratesetting activities—whether on the sound recording or musical work side—take place before the CRB.

The Office believes that treating analogous uses alike in the digital environment is more likely to yield equitable rates as between sound recordings and musical works—or will at least make that goal more attainable.[750] This does not mean that the Office assumes

[749] While synch uses by consumer video sites such as YouTube are not subject to compulsory licensing, the degree of copyright owner control with respect to sites featuring user-posted content is complicated by the safe harbor provisions of section 512, which limit such sites' liability for hosting the content.

[750] While the same argument can of course be made with respect to physical formats such as CDs and vinyl records—where labels also have the freedom to negotiate and publishers do not—in pursuing issues of fair compensation, stakeholders appear overwhelmingly to be concerned with digital, rather than physical, uses. Likely this is because they are looking to the future, and the future is digital. In addition, even though section 115 applies to both digital and physical uses, the licensing situation for physical goods is somewhat distinguishable. Most physical goods are in album format, and thus generate significantly higher mechanical revenues by virtue of their inclusion of multiple songs. Additionally, because the first use of a musical work is not subject to compulsory licensing, publishers have the right to demand a higher than statutory rate when licensing the original recording—at least in theory; for reasons that are not entirely clear, it appears that publishers almost never exercise this option. *See* RIAA First Notice Comments at 16

that the rates for sound recordings and musical works necessarily should be equal. Rather, the goal is to encourage evenhanded consideration of both rates by a single body, under a common standard, to achieve a fair result.

The benefits of parallel treatment would not be limited to licensing at government-set rates. Where a music publisher had chosen to opt out of the statutory license to negotiate a direct deal, both the publisher and the sound recording owner would have the same ability to make their case to the licensee. The licensee would then be in a position to assess the value of each right and proceed accordingly, as happens in the synch market today.

Finally, such an approach would also allow for the possibility of achieving an all-in rate—and simplified rate structure—covering both sound recordings and musical works for noninteractive uses under the section 112 and 114 licenses (including terrestrial radio, which the Office proposes be brought under those licenses, as discussed below).[751] As suggested by the record labels, it might be possible for labels and publishers to agree to a royalty split as between them—or have the split set in an initial phase of a CRB proceeding—and then proceed together as allies in litigating the rates to be paid by statutory licensees.[752]

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n.31 (stating that "the system should recognize the reality that songwriters and publishers have always chosen to license first uses at the same royalty rates as other recordings and allow that to happen by means of the same business processes."); *see also* Tr. at 251:07-252:04 (June 4, 2014) (Brittany Schaffer, NMPA/Loeb & Loeb LLP) (explaining that standard record agreement provisions, such as controlled composition clauses, often prevent publishers and songwriters from negotiating first use rates higher than the compulsory rate). Unlike in the digital realm, once the original recording is released by the record company, it is not nearly as common for third parties to seek a mechanical license to reproduce and distribute that same recording in a physical format. For these reasons—as well as the scant record before the Office concerning physical product—the Office believes that the question of whether the proposed opt-out right should extend to physical uses is perhaps best left for future consideration.

[751] Both digital music services and record companies have urged the Office to consider such an approach. DiMA First Notice Comments at 25 (noting that "[i]n an ideal world, services that require a combination of musical work public performance rights, as well as reproduction and distribution rights under Section 115, would be able to acquire such rights from a single licensing source under a single statutory license and pay a single royalty to a common agent"); Spotify First Notice Comments at 10 (stating that "[a] licensing regime in which public performance rights and mechanical reproduction rights could be obtained from a single source or pursuant to a single license is an interesting idea and could in theory lead to efficiencies."); RIAA First Notice Comments at 16-17 (supporting single blanket license covering all rights in a song).

[752] If such an approach were adopted, some thought would need to be given as to whether and how a separate settlement would be accommodated on the part of the sound recording owners or musical work owners once the ratesetting aspect of the proceeding was underway.

b. Terrestrial Radio

In the case of terrestrial radio, federal law exempts what is currently a 17 billion dollar industry[753] from paying those who contribute the sound recordings that are responsible for its success.[754] Apart from being inequitable to rightsholders—including by curtailing the reciprocal flow of such royalties into the United States—the exemption of terrestrial radio from royalty obligations harms competing satellite and internet radio providers who must pay for the use of sound recordings. In a world that is more and more about performance and less about record sales, the inability to obtain a return from terrestrial radio increases the pressure on paying sources. The market-distorting impact of the terrestrial radio exemption probably cannot be overstated.

The Office has long supported the creation of a full sound recording performance right, advocating for Congress to expand the existing right so it is commensurate with the performance right afforded to other classes of works under federal copyright law.[755] As one of the few remaining industrialized countries that does not recognize a terrestrial radio performance right, the United States stands in stark contrast to peer nations.[756] In her recent testimony before Congress, the Register of Copyrights described the

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[753] According to figures from the Radio Advertising Bureau, radio revenues have increased each year since 2009, when revenues were $16,029,000,000, to 2013, when revenues totaled $17,649,000,000—an increase of nearly 10%. *RAB Revenue Releases*, RADIO ADVERTISING BUREAU, http://www.rab.com/public/pr/rev-pr.cfm?search=2013&section=press (click on "Annual Radio Revenue Trends") (last visited Jan. 22, 2015).

[754] Although the Copyright Act exempts terrestrial performances of sound recordings, following recent judicial decisions in California and New York—which interpreted those states' laws as supporting a right of public performance to sound recording owners—it is not clear that over-the-air broadcasters enjoy a complete exemption under state law. *See Flo & Eddie v. Sirius XM CA*, 2014 U.S. Dist. LEXIS 139053; *Capitol Records, LLC v. Sirius XM Radio Inc.*, No. BC520981 (order regarding jury instruction); *Flo & Eddie v. Sirius XM NY*, 2014 U.S. Dist. LEXIS 166492. Although those cases were brought against digital providers, the courts' reasoning does not appear to be limited to digital performance rights.

[755] *See, e.g.*, *Performance Rights Act Hearing* (statement of Marybeth Peters, Register of Copyrights); *Ensuring Artists Fair Compensation Hearing* (statement of Marybeth Peters, Register of Copyrights); *Internet Streaming of Radio Hearing* at 8-22 (statement of David O. Carson, General Counsel, U.S. Copyright Office); PERFORMANCE RIGHTS REPORT.

[756] *See Public Performance Right for Sound Recordings*, FUTURE OF MUSIC COALITION (Nov. 5, 2013) https://www.futureofmusic.org/article/fact-sheet/public-performance-right-sound-recordings; A2IM First Notice Comments at 8; Modern Works Music Publishing First Notice Comments at 7; SoundExchange First Notice Comments at 16-17. Supporters of a more complete terrestrial sound recording performance right point out that the U.S. position on this is "in contrast to nearly every developed nation on the planet [with] notable exceptions includ[ing] Iran and North Korea." FMC First Notice Comments at 14; *see also The Register's Call for Updates Hearing* at 3 (statement of Rep. Melvin L. Watt).

terrestrial performance right issue as "ripe for resolution,"[757] recommending that any congressional efforts to update the Copyright Act include a legislative answer.[758]

Radio broadcasters argue that a sound recording performance royalty would unfairly impose a "tariff" to subsidize the recording industry at the expense of broadcasters—their opinion, the limited performance right and lack of royalties in terrestrial radio have not impacted the "growth or supremacy of the United States recording industry."[759] This argument would seem to ring hollow, however, given the current challenges faced by that industry.

Radio broadcasters also point to the promotional effect of traditional airplay on sales of sound recordings as a reason for maintaining the status quo. Undoubtedly, sound recording owners recognize value in radio airplay, in particular for new releases.[760] But any such value must be considered and weighed in the context of the overall earnings of the broadcast industry. Significantly, as consumer preferences shift away from music ownership, the potential for sales is becoming less relevant, and the promotional value of radio less apparent.

In this regard, the creation of a terrestrial sound recording performance right need not overlook or negate the question of promotional value, because this factor can be taken into account by a ratesetting authority, or in private negotiations, to arrive at an appropriate royalty rate. Such an approach would appear to be a rational solution because it seems fair to assume that a willing buyer and willing seller would do the same.[761]

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[757] *The Register's Call for Updates Hearing* at 7 (statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office); Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J. L. & ARTS 315, 320-21 (2013).

[758] *The Register's Call for Updates Hearing* at 63 (statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office).

[759] NAB First Notice Comments at 29.

[760] Although the practice of "payola"—whereby record companies pay radio stations to play certain recordings—has been banned, labels still devote resources to encouraging broadcasters to perform their songs. *See* GAO REPORT at 50 (explaining that although "payola" has been formally outlawed unless the station announces any arrangements to play songs in exchange for consideration, it is common industry practice for record companies to employ independent promoters).

[761] Interestingly, despite the lack of legal recognition for such a right, there has been forward movement on this issue in the private marketplace. Media conglomerate iHeartMedia (formerly Clear Channel)—which offers both terrestrial and streamed radio—has entered into voluntary license agreements with WMG and a number of smaller record labels that cover both digital and terrestrial performance rights (with the digital rates apparently more favorable to iHeartMedia than those established by the CRB). *See* Christman, *Here's Why Warner Music's Deal with Clear*

c. Pre-1972 Sound Recordings

Another area where the law diverges in the way it treats sound recordings and musical works is the lack of federal protection for pre-1972 sound recordings, many of which remain commercially valuable. This, too, impedes a fair marketplace. Satellite and internet radio services appear to rely heavily on pre-1972 recordings in curating their playlists, presumably because (at least until recent court rulings) these selections have been viewed as free from copyright liability on the sound recording side.[762] At the same time, the owners of the musical works embodied in these sound recordings are paid for the same uses.

The Office is of the view that pre-1972 recordings should be brought under the protection of federal copyright law. Such a change would serve the interests of licensing parity by eliminating another market distortion. In addition, it would allow for a federal compensation mechanism for the artists responsible for pre-1972 works.

In 2009, Congress instructed the Office to conduct a study on the "desirability and means" of extending federal copyright protection to pre-1972 sound recordings.[763] After considering input from stakeholders, the Office concluded that pre-1972 sound recordings should be brought under federal copyright law with the same rights, exceptions, and limitations as sound recordings created on or after February 15, 1972.[764] In the Office's view, full federalization of pre-1972 sound recordings (with special provisions to address ownership issues, terms of protection, and registration) would improve the certainty and consistency of copyright law, encourage more preservation

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Channel Could be Groundbreaking for the Future of the U.S. Music Biz (Analysis); Sisario, *Clear Channel-Warner Music Deal Rewrites the Rules on Royalties*. Reportedly, iHeartMedia was motivated to do this by it desire to have a more predictable cost structure to grow the digital side of its business. *Id.* Such a step may point to the potential for broader industry compromise on this issue.

[762] Tr. at 183:07-18 (June 24, 2014) (Jim Mahoney, A2IM) ("One only need to turn on Sirius XM and see the many stations that programmed fully with pre-1972 copyright songs, recordings and conclude that they still have value to listeners. They still want to hear those songs a lot. To programmers who program multiple stations there's a 40's station, a 50's station, a 60's station. There's classic rock, all the pre-1972 sound recordings. So, the public still values them, corporations still value them. They should still maintain a value for the recording artists.").

[763] Specifically, Congress directed the Office to discuss: "(1) the effect that federal protection would have with respect to the preservation of pre-1972 sound recordings; (2) the effect that federal protection would have with respect to providing public access to the recordings; and (3) the impact that federal protection would have on the economic interests of right holders of the recordings" and to provide appropriate recommendations. PRE-1972 SOUND RECORDINGS REPORT at vii.

[764] *Id.* at viii.

and access activities, and provide the owners of pre-1972 sound recordings with the benefits of any future amendments to the Copyright Act.[765]

The Office has not changed its mind. Indeed, since the Office issued its 2011 report, there have been significant developments under both California and New York state law which underscore the need for a unified federal approach to sound recordings. As a result of lawsuits brought by pre-1972 sound recording owners against Sirius XM and Pandora, there have been trial court decisions in California and New York upholding claims that performances of the plaintiffs' sound recordings in those jurisdictions are protected under applicable state law.[766] Subject to any further judicial developments, this means that the defendant services need to obtain licenses from sound recording owners to perform the recordings. But because the requirement to do so is based on state, rather than federal law, users may not rely upon the section 112 and 114 licenses for this purpose.

The legal question of state protection of pre-1972 sound recording performance rights will undoubtedly continue to percolate in other states as well.[767] In addition, there is the significant related question of whether and how the pre-1972 rulings may be applied to performances by terrestrial broadcasters, which of course currently enjoy an exemption under federal law. This aspect of the story has yet to unfold.

In the last Congress, SoundExchange, joined by others, pursued legislation known as the RESPECT Act that would expand the jurisdiction of that organization to collect royalties for pre-1972 performances and provide a safe harbor from state liability for paying services.[768] But this proposed amendment to federal law would not offer the full panoply of federal copyright protection to pre-1972 rightsowners, nor would it allow for application of the DMCA harbors or rights-balancing exceptions such as fair use. In addition, there are important policy considerations relating to the preservation of older works and access to "out-of-print" recordings still subject to state protection that the RESPECT Act does not address. For these reasons, while the Copyright Office recognizes the potential value of enacting a relatively expedient fix to make sure older artists get paid and to eliminate liability concerns of digital services seeking to exploit

[765] *Id.* at ix-x.

[766] *See Flo & Eddie v. Sirius XM CA*, 2014 U.S. Dist. LEXIS 139053; *Capitol Records, LLC v. Sirius XM Radio Inc.*, No. BC520981 (order regarding jury instructions); *Flo & Eddie v. Sirius XM NY*, 2014 U.S. Dist. LEXIS 166492, *reconsideration denied*, 2014 U.S. Dist. LEXIS 174907.

[767] Paul Resnikoff, *What the pre-1972 Decision Really Means for the Future of Radio . . . .*, DIGITAL MUSIC NEWS (Oct. 13, 2014), http://www.digitalmusicnews.com/permalink/2014/10/13/pre-1972-decision-really-means-future-radio-2 (noting pending litigation by Flo & Eddie (of the band The Turtles) against Sirius XM in Florida, in addition to suits in California and New York).

[768] RESPECT Act, H.R. 4772 § 2.

pre-1972 recordings, it continues to believe that full federalization remains the best alternative.

2. Consistent Ratesetting Standards

Where the government has stepped in to establish rates for the use of music, it has likewise acted in an inconsistent fashion. While in some cases the law provides that the ratesetting authority should attempt to emulate the free market, in other cases it imposes a more policy-oriented approach.[769]

In this regard, the ratesetting standards under the section 112 and 114 licenses have been a persistent source of unhappiness for both music owners and users. This is hardly surprising, as these licenses prescribe different rate standards for competing platforms—internet radio versus satellite radio—thus allowing both sides to complain.

Satellite radio and "pre-existing" subscription services (such as those provided through cable television) are able to benefit from the four-factor section 801(b)(1) test, which allows the CRB to ponder broader concerns than what negotiating parties might consider in the marketplace—for example, whether a contemplated rate will result in "disruptive impact on the structure of the industries involved and on generally prevailing industry practices."[770] Many interpret the section 801(b)(1) language as enabling the ratesetting body to protect the vested interests of licensees by establishing rates lower than what would (at least theoretically) prevail in the free market.

Rates for the reproduction and distribution of musical works in digital and physical formats are also set under the more policy-oriented 801(b)(1) standard. This is a significant point of contention for music publishers and songwriters, who have been lobbying for legislation to substitute the willing buyer/willing seller standard.[771]

By contrast, rates paid by internet radio services are set by the CRB according to a "willing buyer/willing seller" rate standard. Most perceive the willing buyer/willing seller standard to be more market-oriented in its approach.[772] But internet radio providers have twice taken their case to Congress to override the rates set by the CRB

[769] *See* "Existing Ratesetting Framework" chart, Appendix D., for a depiction of the current ratesetting standards and bodies.

[770] 17 U.S.C. § 801(b)(1)(D).

[771] *See* SEA, H.R. 4079.

[772] *See* EMF First Notice Comments at 6, 8 n.14 (noting negotiated agreements are rare for webcasters, but noncommercial rates were successfully negotiated before a final decision in Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 Fed. Reg. 13,026 (Mar. 9, 2011)).

under that rubric,[773] and Congress has given them the opportunity to negotiate substitute agreements with SoundExchange.[774]

As for public performance rights in musical works, by virtue of the consent decrees, ASCAP and BMI are subject to a "reasonable fee" approach, which seeks to approximate hypothetical "fair market value."[775] Though the term "reasonable fee" is not defined in either consent decree, each places the burden of proof on the PRO to establish that its proposed rates are reasonable.[776] The PROs attempt to meet this burden by offering negotiated rates as benchmarks, which economic evidence may or may not be accepted by the court after considering its relevance—often through the lens of quasi-antitrust analysis.[777]

While there are those who might argue that the particular wording of a discretionary rate standard will not have much impact on a results-oriented tribunal, there is at least some evidence to the contrary. For example, in 2008, in establishing rates for satellite radio services, the CRB found it "appropriate to adopt a rate . . . that is lower than the upper boundary most strongly indicated by marketplace data," stating that they did so "in order to satisfy 801(b) policy considerations related to the minimization of disruption that are not adequately addressed by the benchmark market data alone."[778] In any event, there appears to be a shared perception among many industry participants—both those that chafe at the section 801(b)(1) standard and those that like it—that the standard yields lower rates.[779]

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[773] Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (2002) (codified as amended at 17 U.S.C. § 114(f) (2010)); Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974 (2008) (codified as amended at 17 U.S.C. § 114(f) (2010)).

[774] 17 U.S.C. § 114(f)(3)(B).

[775] *Pandora Ratesetting*, 6 F. Supp. 3d at 353-54*; see also BMI v. DMX, Inc.*, 726 F. Supp. 2d 355, 356 (S.D.N.Y. 2010) (citing "well-established" reasonable fee approach to determine fair market value).

[776] *BMI v. DMX*, 683 F.3d at 45 n.14 (noting in both the ASCAP and BMI consent decree, the burden of proof is on the PRO to establish the reasonableness of the fee it seeks).

[777] *United States v. BMI*, 316 F. 3d 189, 194 (2d Cir. 2003) ("This determination [of whether a rate is reasonable] is often facilitated by the use of a benchmark—that is, reasoning by analogy to an agreement reached after arms' length negotiation between similarly situated parties."); *see ASCAP v. MobiTV*, 681 F. 3d at 82 ("In [setting a rate], the rate-setting court must take into account the fact that ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music.").

[778] Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 4080, 4097 (Jan. 24, 2008).

[779] *See, e.g.*, DiMA First Notice Comments at 33-34 (noting relatively higher rates under the willing buyer/willing seller standard); NMPA & HFA First Notice Comments at 27 ("Pandora . . . paid

The Office believes that all government ratesetting processes should be conducted under a single standard, especially since the original justifications for differential treatment of particular uses and business models appear to have fallen away. There is no longer a threatened piano roll monopoly, and satellite radio is a mature business. Further, however that rate standard is formulated—*i.e.,* whether it is articulated as "willing buyer/willing seller" or "fair market value"—it should be designed to achieve to the greatest extent possible the rates that would be negotiated in an unconstrained market. To the extent that it enumerates specific factors, they should be ones that might reasonably be considered by copyright proprietors and licensees in the real world. In the Office's view, there is no policy justification to demand that music creators subsidize those who seek to profit from their works.

Under such a unified standard, the CRB or other ratesetting body would be encouraged to consider all potentially useful benchmarks—including for analogous uses of related rights (*e.g*., fees paid for the comparable use of sound recordings when considering musical work rates[780])—in conducting its analysis. But again, it should take into account only those factors that might be expected to influence parties who negotiated rates in the open market. These might include, for example, the substitutional impact of one model on other sources of revenue, or whether a service may promote sales of sound recordings or musical works through other channels.[781] But upon arriving at rates believed to reflect what would be agreed in the open market, those rates would not be discounted on the basis of abstract policy concerns such as "disruptive" impact on

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."); Spotify First Notice Comments at 7.

[780] *But see* Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24,084, 24,094-95 (May 1, 2007) (musical work benchmark rejected as being "flawed" for sound recordings because the sellers are different and selling different rights, use of the benchmark would ignore the different investments and incentives of the each seller, and the record contained ample empirical evidence that the markets are not necessarily equivalent); *Pandora Ratesetting*, 6 F. Supp. 3d at 333, 366-67 (court declined to use royalty rates for sound recordings as a benchmark, explaining, "[t]he disparity between rates for the public performance of compositions versus sound recordings does not exist for most of ASCAP's revenue streams since . . . the need to acquire sound recording licenses only applies to services who conduct digital audio transmissions[,]" for those digital audio transmissions, whose rates are set by the CRB, there is a "statutory prohibition on considering sound recording rates in setting a rate for a license for public performance of a musical work" and otherwise "the record is devoid of any principled explanation given . . . why the rate for sound recording rights should dictate any change in the rate for composition rights.").

[781] As expressed in section 114, the willing buyer/willing seller standard includes consideration of several specific factors, including these. *See* 17 U.S.C. § 114(f)(2)(B).

prevailing industry practices or solicitude for existing business models notwithstanding their competitive viability in the marketplace.

C. Role of Government in Music Licensing

Government regulation of music has focused on the interrelated concerns of access, pricing and competition. As noted above, section 115—the first compulsory license in our copyright law—was enacted to prevent a single piano roll company from exercising exclusive control over song copyrights. The PRO consent decrees are the result of the government's attempt to balance the efficiencies of collective licensing with concerns about anticompetitive conduct. More recently, Congress chose to extend the public performance right for digital uses of sound recordings on the condition that certain of those uses would be subject to compulsory licensing under sections 112 and 114 of the Copyright Act, thus further extending the practice of regulatory oversight.

As a result of these policy determinations, an administrative tribunal, the CRB, sets the fees paid for the reproduction and distribution of musical works, as well as the royalties due for radio-style digital performance of sound recordings. Two federal judges in New York City are responsible for establishing the fees for the public performance of musical works across traditional and digital platforms. For better or worse, these decades-old regimes are deeply embedded in our licensing infrastructure.[782]

Viewed in the abstract, it is almost hard to believe that the U.S. government sets prices for music. In today's world, there is virtually no equivalent for this type of federal intervention—at least outside of the copyright arena.[783] The closest example is the retransmission by cable and satellite providers of copyrighted television programming (including the music embodied in that programming), which is also subject to compulsory licensing under the Copyright Act and government-set rates.[784] But

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[782] Notably, in the deliberations leading to the adoption of the 1976 Act, then Register of Copyrights Abraham L. Kaminstein recommended elimination of the section 115 compulsory license, concluding that the underlying concerns about a publisher monopoly were no longer relevant. *See* GENERAL REVISION OF COPYRIGHT REPORT at 36. Publishers did not ultimately pursue that opportunity, however, instead agreeing to maintain the compulsory license in exchange for a statutory rate hike from 2 to 2.75 cents per use. *See Music Licensing Reform Hearing* (statement of Marybeth Peters, Register of Copyrights); S. REP. NO. 94-473, at 88-92.

[783] Outside of the copyright context, rare instances of government price-fixing involve commodities, not differentiated goods. The Federal Energy Regulatory Commission conducts a ratesetting process for interstate transmission of electricity and natural gas, *see* 16 U.S.C. §§ 824d, 824e, 15 U.S.C. §§ 717c, 717d, and the United States Department of Agriculture issues federal milk marketing orders that set minimum (not maximum) prices for the sale of milk in most regions of the United States, *see* 7 U.S.C. § 608c(5).

[784] 17 U.S.C. §§ 111, 119, 122; *see also* U.S. COPYRIGHT OFFICE, SATELLITE TELEVISION EXTENSION AND LOCALISM ACT: § 302 REPORT 129-40 (2011), *available at* http://www.copyright.gov/reports/

retransmission rights represent a much more limited segment of the overall revenues for the television industry than do the core music markets subject to government ratesetting, and even there, broadcasters are permitted separately to negotiate non-government-controlled fees for access to the signals that carry the copyrighted works.[785]

1. Antitrust Considerations

As explained above in discussing the section 115 statutory license and PRO consent decrees, much of the rationale—indeed, the original rationale—for government regulation of the music marketplace revolves around antitrust concerns. The government has long wanted to ensure that the market is not unduly influenced by monopoly power. Thus, Congress' uneasiness with the dominant position of the Aeolian piano roll company in 1909 led it to enact a compulsory license for musical works so others could compete with that company.

Concerns about potential monopoly effects are heightened when would-be competitors decide on the prices to be charged for products or products are required to be purchased together, as is the case when musical works are licensed by multiple owners on a blanket basis through ASCAP or BMI. The government, including the Supreme Court, has acknowledged the social benefits of this type of collective blanket licensing, and has endorsed it under a "rule of reason" approach rather than finding it per se unlawful.[786] But the government has also, since the World War II era, subjected ASCAP and BMI to extensive regulation under their respective consent decrees.

It is worth noting that the longevity of these two decrees represents a rather extreme exception to the modern DOJ guidelines which, since 1979, have required that such decrees terminate, generally after a period of no longer than ten years.[787] More recently, in March 2014, the DOJ announced a policy to facilitate the "fast track" review and termination of most perpetual or "legacy" decrees.[788] Under that policy, the DOJ will

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section302-report.pdf ("STELA REPORT") (recommending ways in which the cable and satellite compulsory retransmission licenses might be phased out).

[785] *See* 47 U.S.C. § 325.

[786] *BMI v. CBS,* 441 U.S. at 23-25 (holding that the blanket license should be subject to rule of reason analysis and remanding to lower courts to apply that analysis); *CBS v. ASCAP*, 620 F.2d at 932 (on remand from Supreme Court, sustaining blanket license under rule of reason analysis because CBS had failed to prove the non-availability of alternatives to the blanket license); *Buffalo Broad. v. ASCAP*, 744 F.2d at 926-32 (sustaining blanket license under rule of reason analysis in context of local television stations*).*

[787] U.S. DOJ, ANTITRUST DIV., ANTITRUST DIV. MANUAL III 146-47 (5th ed. 2014), *available at* http:// www. justice.gov/atr/public/divisionmanual/atrdivman.pdf.

[788] *Id.* (explaining that the DOJ's adoption of a policy that favors sunset provisions was "based on a judgment that perpetual decrees were not in the public interest"). In addition to policy

"advise courts that pre-1980 'legacy' decrees, except in limited circumstances, are presumptively no longer in the public interest."[789] The DOJ has suggested, however, that among those "limited circumstances" is "when there is a long-standing reliance by industry participants on the decree."[790] The revised DOJ policy would thus appear to exclude the PRO decrees.

The word "monopoly" came up many times in the written and oral presentations of participants in this study in discussing the continuing significance of the decrees and antitrust oversight. But it is important to understand that there are two distinct types of "monopoly" being referenced, and each requires separate analysis.

The first type of "monopoly" refers to alleged anticompetitive practices on the part of the PROs, and also sometimes of the major publishers and record labels with significant market share. Here the concern is that licensees—for example, a television network or online service—have insufficient leverage to negotiate appropriate licensing fees with the licensor.[791] Excessive market power is the linchpin of antitrust analysis, whether in a government-initiated enforcement action or private litigation;[792] typically, however—and as discussed below in connection with the *Pandora* litigation—the remedies for civil

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concerns, there may be some interesting due process questions concerning the length of the consent decrees.

789 Press Release, U.S. DOJ, Antitrust Div., Antitrust Division Announces New Streamlined Procedure for Parties Seeking to Modify or Terminate Old Settlements and Litigated Judgments (Mar. 28, 2014), *available at* http://www.justice.gov/atr/public/press_releases/2014/304744.pdf (noting that "[s]ince 1980, there have been significant changes in markets and technology and substantial changes in antitrust law").

790 *Id.*

791 Interestingly, the Office heard considerably less about the market power of large technology companies or other dominant distributors of music and whether that poses similar concerns. *But see, e.g.*, MMF & FAC Second Notice Comments at 21-22 (noting the "market power of a few tech giants").

792 *See* U.S. DOJ & FTC, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 110 (2007), *available at* http://www.justice.gov/atr/public/hearings/ip/222655.pdf ("ANTITRUST ENFORCEMENT AND IP RIGHTS REPORT") ("Whether the legal analysis applied to intellectual property bundling is some form of the per se rule or the more searching rule of reason, a plaintiff will have to establish that a defendant has market power in the tying product."); *cf. Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 42-43 (2006) (explaining the following about tying arrangement involving patented products: "While some such arrangements are still unlawful, such as those that are the product of a true monopoly or a market wide conspiracy, . . . that conclusion must be supported by proof of power in the relevant market rather than by a mere presumption thereof."); *see also* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 2 (4th ed. 2011) ("An important goal of antitrust law-arguably its only goal—is to ensure that markets are competitive.").

antitrust violations do not involve long-term government price controls. Such remedies instead tend to focus on injunctive relief to address the particular anticompetitive behavior in question and/or the payment of one-time fines.[793]

The second type of monopoly referenced by participants is a wholly different one, namely, the limited "monopoly" in an individual work that is conferred by virtue of the exclusive rights granted under the Copyright Act. Even though it is not a product of collective activity, these exclusive rights probably play no less of a significant role in debates about music licensing. Many licensees—for example, large online providers—believe they must have access to complete, or virtually complete, catalogs of sound recordings and musical works in order to compete in the marketplace. A compulsory license—at least in theory—can make that possible.

But compulsory licensing removes choice and control from copyright owners who seek to protect and maximize the value of their assets. An increasingly vocal number of copyright owners believe they should be able to withhold their works from low-paying or otherwise objectionable digital services, in part because such services may cannibalize sales or higher-paying subscription models. Taylor Swift's widely publicized decision to pull her catalog from the leading streaming provider Spotify because she did not want her songs available on Spotify's free tier of service has been widely reported, and other artists appear to be following suit.[794] Similarly, artist manager Irving Azoff of GMR has reportedly threatened YouTube with a billion-dollar lawsuit if they do not remove his clients' repertoire from their site.[795] In order to take such action—and demand higher

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[793] *See, e.g.*, Farrell Malone & J. Gregory Sidak, *Should Antitrust Consent Decrees Regulate Post-Merger Pricing?*, 3 J. COMPETITION L. & ECON. 471, 477 (2007) (explaining that, in expressing its preference for structural remedies over conduct remedies in situations involving anticompetitive merger, the DOJ "explicitly criticizes price agreements as a component of consent decrees" and that the "[DOJ] disfavors using consent decrees to fix a price or an allowable range of prices for the post-merger firm"); *see also* HERBERT HOVENKAMP, MARK D. JANIS, MARK A. LEMLEY & CHRISTOPHER R. LESLIE, IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW 22-62 (2d ed. Supp. 2013) ("As a general matter, antitrust should not favor solutions that turn the federal courts into price control agencies.").

[794] Dickey, *Taylor Swift on* 1989*, Spotify, Her Next Tour and Female Role Model (*quoting Taylor Swift: "I think that people should feel that there is a value to what musicians have created, and that's that.") *see* Mitchell Peters, *Big Machine's Scott Borchetta Explains Why Taylor Swift Was Removed From Spotify*, BILLBOARD (Nov. 8, 2014), http://www.billboard.com/articles/news/6312143/big-machine-scott-borchetta-explains-taylor-swift-1989-removal-from-spotify-nikki-sixx (quoting Big Machine Label Group CEO Scott Borchetta: "We determined that her fan base is so in on her, let's pull everything off of Spotify, and any other service that doesn't offer a premium service . . . Now if you are a premium subscriber to Beats or Rdio or any of the other services that don't offer just a free-only, then you will find her catalogue."); Bogursky, *Taylor Swift, Garth Brooks and other artists lead the fight against Spotify*.

[795] Gardner, *Pharrell Williams' Lawyer to YouTube: Remove Our Songs or Face $1 Billion Lawsuit*.

compensation—the use cannot be subject to mandatory licensing.[796] But for those under a compulsory license or a consent decree, it is not possible to say no.

In this regard, it is interesting to compare music to other types of copyrighted works, for example, television shows and movies. Like music, a particular television show or movie may not be a fully satisfying substitute for another—or a substitute at all. But consumers do not expect to be able to access every television show through Hulu, or every movie through Netflix. It is understood that different services can and will offer different content.

Even within the music universe, the law treats sound recordings and musical works differently with respect to the right to say no. We seem to accept the fact that a licensee offering downloads or interactive streaming will need to negotiate deals with major and independent record labels, or forgo the content. On the musical work side, however, government policy has subjected these same uses to government-mandated licensing.

Even given greater latitude to make licensing decisions, it would seem that musical work owners would be strongly incentivized to license services that they believed would pay a reasonable return. This seems to be true of the record labels, which have authorized a wide range of download and interactive music services outside of a mandatory licensing regime.[797] But the labels are not required to license services that show little promise or value. Why is this demanded of music publishers and songwriters?

The Office believes that the question of whether music copyright owners should be able to choose whether to agree to a license is an especially critical one. Understandably, those seeking permission to use music appreciate the security of compulsory licensing processes and certainty of government-set rates—as buyers of content likely would in any context.[798] But modern competition law does not view the rights enjoyed by copyright owners as intrinsically anathema to efficient markets. As the DOJ itself has explained, "antitrust doctrine does not presume the existence of market power from the mere presence of an intellectual property right."[799]

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[796] Notably, Swift's sound recordings are not subject to compulsory licensing when used for interactive services, and GMR's clients—who are not represented by ACSCAP or BMI—have asserted rights not covered by the consent decrees.

[797] RIAA First Notice Comments at 30 n.43; *see also Find a Music Service*, WHYMUSICMATTERS.COM, http://whymusicmatters.com/find-music (last visited Feb. 2, 2015) (listing licensed music services).

[798] For example, in a 2011 study conducted by the Copyright Office, cable and satellite operators operating under the section 111, 119 and 122 compulsory licenses expressed strong opposition to the possibility of phasing them out. STELA REPORT at 8.

[799] ANTITRUST ENFORCEMENT AND IP RIGHTS REPORT at 2.

As a general matter, the Office believes that certain aspects of our compulsory licensing processes can and should be relaxed. But this does not mean that antitrust concerns should be overlooked. Many pertinent considerations have been raised in the DOJ's parallel consideration of the ASCAP and BMI consent decrees. The Office strongly endorses that review, and—in light of the significant impact of the decrees in today's performance-driven music market—hopes it will result in a productive reconsideration of the 75-year-old decrees. At the same time, the Office observes that it is Congress, not the DOJ, that has the ability to address the full range of issues that encumber our music licensing system, which go far beyond the consent decrees.

2. The PROs and the Consent Decrees

Since the first part of the twentieth century, ASCAP and BMI have provided critical services to songwriters and music publishers on the one hand, and myriad licensees on the other, in facilitating the licensing of public performance rights in musical works. SESAC, though smaller, has also played an important role in this area, administering performance rights for a select group of clients. More recently, GMR has come onto the scene as a fourth contender in the performance rights arena with an impressive client roster. Each of these organizations offers repertoire-wide—or "blanket"—licenses for the musical works they represent, with the four together essentially representing the entire spectrum of musical works available for licensing in the U.S., including many foreign works. Blanket licenses are available for a wide range of uses, including terrestrial, satellite, and internet radio, on-demand music streaming services, website and television uses, the performance of recorded music in bars, restaurants, and other commercial establishments, and live performances as well.

As detailed above, both ASCAP and BMI, unlike their smaller competitors SESAC and GMR, are subject to continuing consent decrees. The decrees, overseen by federal district courts in New York City (typically referred to as the "rate courts"), were last updated before the rise of licensed digital music services—in the case of BMI, in 1994, and in the case of ASCAP, in 2001. The consent decrees impose significant government-mandated constraints on the manner in which ASCAP and BMI may operate. Among other things, ASCAP and BMI are required to grant a license to any user who requests one, without payment of royalties until a royalty rate is set by negotiation or following litigation before the rate court. Under its decree, ASCAP may not issue mechanical licenses for the reproduction or distribution of musical works; while the BMI consent decree is silent on this point, BMI has not itself issued mechanical licenses. Except to the extent a licensee seeks a narrower license—such as a "per-program" license or a blanket license with "carveouts" for directly licensed works—ASCAP and BMI are required to license all works in their repertoire.

a. *Pandora* Analysis

Publisher Withdrawals

In 2013, as part of pending ratesetting litigation with the internet radio service Pandora, both the ASCAP and BMI rate courts—applying slightly different logic—interpreted the consent decrees as prohibiting music publishers from withdrawing authorization to license their songs for particular types of uses.[800] Major music publishers had sought to withdraw their "new media" (*i.e.*, online and mobile usage)[801] rights from the PROs in an effort to negotiate with Pandora directly to achieve higher rates than what they believed they would otherwise be awarded in court.[802]

Following their decisions to withdrawal, EMI agreed to a rate equivalent to the existing ASCAP rate of 1.85% for services like Pandora (but without deductions for ASCAP's fees); Sony/ATV negotiated for a prorated share of an industrywide rate of 5% (which translated to a 2.28% implied rate for ASCAP); and UMG obtained a prorated share of 7.5% (or a 3.42% ASCAP rate).[803] Subsequently, however, the two rate courts held that these publishers could not selectively withdraw specific rights from ASCAP or BMI to be negotiated independently. Instead, the publishers had to be "all in" or "all out."[804]

In the wake of these decisions, the three publishers who had sought to withdraw, (now two, as Sony/ATV has since become affiliated with EMI), are, for the moment, back "in," and ASCAP and BMI have petitioned the DOJ to modify their decrees to allow these sorts of partial withdrawals by their publisher members. With the petitions pending, however, both Sony/ATV and UMPG—which together represent some 50% of the music publishing market[805]—have made it clear that they may well choose to withdraw *all* rights from the PROs in the future.

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[800] *In re Pandora*, 2013 WL 5211927, at *11; *BMI v. Pandora*, 2013 WL 6697788, at *5.

[801] "New media" services are those available by means of the internet, a wireless mobile telecommunications network, and/or a computer network. *In re Pandora*, 2013 WL 5211927, at *2; *BMI v. Pandora*, 2013 WL 6697788, at *2.

[802] To some degree, the move to withdraw was also likely spurred by technological evolution. Unlike traditional media such as broadcast radio stations, digital providers are equipped to track and report each use of a musical work (for example, each time a song is streamed to an individual subscriber) and thus provide full census reporting to a copyright owner. When such census reporting is available, there is no need for an intermediary organization such as a PRO to survey or sample the service to allocate royalty payments among songwriters; a publisher has the means to allocate the royalties itself. Thus, it is more feasible for the publisher to self-administer a directly negotiated license.

[803] *Pandora Ratesetting*, 6 F. Supp. 3d at 330, 339-40, 355.

[804] *In re Pandora*, 2013 WL 5211927, at *11; *BMI v. Pandora*, 2013 WL 6697788, at *5.

[805] Christman, *First-Quarter Music Publishing Rankings: SONGS Surges Again*.

The specter of across-the-board withdrawal by the major publishers from ASCAP and BMI is concerning to many in the music sector. The three major publishers—Sony/ATV, UMPG, and Warner/Chappell—together represent approximately 63% of the U.S. music publishing market,[806] and the songwriters they represent (as well as the publishers themselves) currently license the vast majority of their performance rights through the PROs.[807] The Office agrees that the full withdrawal of leading publishers from ASCAP and BMI would likely significantly disrupt the music market by fundamentally altering the licensing and payment process for the public performance of musical works without an established framework to replace it, at least in the short run.

On the user side, as might be predicted, many strongly prefer the government-supervised PRO system over the unregulated negotiation of rights, and oppose the movement toward withdrawal. While many licensees—such as commercial radio and television stations represented by RMLC and TMLC—are successful in negotiating (rather than litigating) rates with ASCAP and BMI under the current regime, it is reassuring to them to know that they can turn to a federal court if they view it as a better option. Like the radio and television sectors, digital services, including Pandora (whose recent rate court litigation is discussed below), also strongly favor government oversight of music publishers' licensing practices.

Notably, although SESAC is not subject to a consent decree, television and radio licensees recently sued that organization in separate actions for alleged anticompetitive licensing practices.[808] SESAC settled the television case by agreeing to reimburse the television station plaintiffs almost $60 million in licensing fees[809] (the radio case remains pending). Without opining on their merits, the Office observes that these cases illustrate the importance and corrective potential of private enforcement actions outside of the consent decree environment.

Concerns about the impact of large publisher withdrawals are not limited to the user side. Songwriters, too, are apprehensive. According to longstanding industry practice, songwriters are paid their "writer's share" of performance royalties directly by the PROs; these monies do not flow through the publishers. In a world of direct licensing, publishers would not be required to adhere to established standards for the reporting and payment of royalties, such as those employed by ASCAP and BMI. Songwriters

[806] *See id.*

[807] *See* Sisario, *Pandora Suit May Upend Century-Old Royalty Plan*.

[808] *See Meredith Corp.*, 1 F. Supp. 3d 180; *RMLC v. SESAC*, 29 F. Supp. 3d 487.

[809] *See* Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement 1-2, *Meredith Corp. v. SESAC, LLC.*, 1 F. Supp. 3d 180 (S.D.N.Y. 2014) (No. 09-cv-9177); *Meredith Corp. v. SESAC, LLC*, No. 09-cv-9177 (S.D.N.Y. Oct. 31, 2014) (order granting preliminary approval of settlement).

worry that direct licensing could thus result in a system with much less accountability and transparency than they currently enjoy under the PROs.

There is a particular concern about publishers' treatment of advance payments and licensing fees by music services, as such monies may not be accounted for by the publisher in a transparent fashion. This, in turn, raises a question in songwriters' minds as to whether withdrawal would exacerbate this problem.[810] In addition, apart from any contractual issues in relation to American songwriters, non-U.S. writers who assign their rights exclusively to their local societies—which in turn enter into contractual relationships with ASCAP and BMI to collect royalties on their behalf in the United States—do not see how they can properly be subject to U.S. publisher withdrawal.[811] On top of all this, a precipitous decline in overall royalty throughput would almost certainly result in markedly increased—and perhaps prohibitive—administrative costs for those who remained affiliated with ASCAP and BMI.

An interesting question is whether significantly decreased market shares on the part of ASCAP and BMI due to major publisher withdrawals would, paradoxically, obviate the need for ongoing government control of those organizations. From a practical perspective, one might question why ASCAP and BMI would remain subject to significant government controls if larger market competitors (*i.e.*, the major publishers) were not subject to such supervision. We assume that the DOJ may address this issue in its forthcoming analysis.

Rate Decision

Following the rulings on withdrawal, the ASCAP court, in a lengthy opinion, proceeded to determine a "reasonable fee" of 1.85% for Pandora, applying a "hypothetical" "fair market value" standard.[812] In so doing, the court was dismissive of the publishers' frustrations with the rate court process and their "envy" of the much higher rates being paid by Pandora to sound recording owners (over 50% of revenues versus the publishers' combined market share of 4%)[813]—which sound recording rates in any event the court could not consider as a result of the statutory bar in section 114(i).[814]

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810 *See, e.g.*, SGA First Notice Comments at 8-9.

811 MMF & FAC Second Notice Comments at 46 (reproducing the "MMF Public response to the Sony/ATV Statement").

812 *Pandora Ratesetting*, 6 F. Supp. 3d at 353-54, 372.

813 *Id.* at 333, 366.

814 17 U.S.C. § 114(i) provides that "[l]icense fees payable for the public performance of sound recordings . . . shall not be taken into account in any . . . proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works."

The court sharply criticized Sony/ATV's and UMPG's efforts to negotiate higher rates with Pandora outside of the confines of the consent decree that could then serve as benchmarks in the rate court proceeding. Finding the publishers' tactics objectionable—especially in light of the fact that Pandora could face large-scale copyright liability if it failed to conclude licenses—it rejected the outside agreements as suitable benchmarks.[815] Among other things, the court took issue with Sony/ATV's and UMPG's failure to provide lists of the compositions they owned to Pandora so Pandora could remove their respective works from its service if necessary.[816]

While the court's opinion suggests that Sony/ATV and UMPG may have engaged in anticompetitive behavior by "purposefully set[ting] out" to "create higher benchmarks," and also expressed concern about the publishers' "coordinated" behavior in withdrawing new media rights—as well as their aggressive negotiation strategies—the court ultimately concluded that it had "no need to explore which if any of [their] actions was wrongful or legitimate."[817] In this regard, while it was not the only aspect of the publishers' conduct that troubled the court, it is hard to see how the mere desire to seek higher royalty rates could constitute an antitrust violation—or the fact that the CEO of Sony/ATV appeared in a news article "in shirt sleeves with a large cigar in his mouth" to boast of the higher rate he had negotiated with Pandora.[818]

Undoubtedly, the *Pandora* court believed itself to be carrying out the purpose of the ASCAP decree, and the decree, of course, is meant to address antitrust concerns. But the opinion is notable for its focus on the behavior of a handful of actors instead of an empirically based economic analysis of the proper rate for Pandora. For example, rejecting ASCAP's arguments that the court should consider Pandora's commercial success as part of its inquiry, the court opined that "market share or revenue metrics are poor foundations on which to construct a reasonable fee."[819] Yet it seems that these factors might well be considered by parties in an actual market negotiation.

Additionally, even assuming for the sake of argument that Sony/ATV's and UMPG's negotiation tactics had unequivocally been found by the court to cross the line from forceful negotiations to anticompetitive conduct, it must be remembered that the rate set by the court applies not only to those companies, but to all other publisher and songwriter members of ASCAP as well. Such a court-ordered rate is also likely to heavily influence the market for the other PROs, and hence the industry as a whole. A question arises, then, as to whether the court's repudiation of specific conduct on the

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[815] *Pandora Ratesetting*, 6 F. Supp. 3d at 360-61

[816] *Id.* at 345-46, 361.

[817] *Id.* at 357-58.

[818] *Id.* at 347.

[819] *Id.* at 369.

part of some by rejecting the possibility of a higher rate represents a fair outcome for the rest of the industry.

Availability of Song Data

As a general matter, the Office concurs with the apparent view of the *Pandora* court that a service should be able to ascertain what works are covered under a license so as to permit the service to remove unauthorized works if necessary. Infringement liability should not arise from a game of "gotcha." Since the *Pandora* decision, it appears that both Sony/ATV and UMPG have made efforts to make their song data available to licensees.[820] In addition to such voluntary efforts, the Office believes that government policies should strongly incentivize the public availability of song ownership data for works in the marketplace, a topic that is addressed in more depth below.

b. PRO Ratesetting Process

This above section reviews the *Pandora* decision in some detail because it illuminates an important policy concern: namely, whether we should continue to blend antitrust oversight with industry rate proceedings as envisioned under the consent decrees. In the *Pandora* litigation, this approach appears to have yielded a mixture of competition and ratesetting considerations, without a satisfying analysis of either. The Office is of the view that allegations of anticompetitive conduct are worthy of evaluation (and, if appropriate, remedial action) separate and apart from the question of a fair rate—and vice versa. Each of these two critical policy objectives merits government attention in its own right.[821]

The Office therefore proposes that the ratesetting aspects of PRO oversight be separated from whatever government supervision is determined still to be necessary to address antitrust concerns.

Migrate to Copyright Royalty Board

Assuming PRO ratesetting is separated from any ongoing antitrust oversight, the Office proposes that the function of establishing rates be migrated to the CRB.[822] Industry

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[820] *See* Ed Christman, *Sony/ATV Makes Organized Catalog Available Online*, BILLBOARD (July 16, 2014), http://www.billboard.com/biz/articles/news/publishing/6157855/sonyatv-makes-organized-catalog-available-online; Ed Christman, *UMPG to Make Entire Database Easier for Licensees*, BILLBOARD (June 27, 2014), http://www.billboard.com/biz/articles/news/publishing/6140985/umpg-to-make-entire-database-easier-for-licensees.

[821] *See* EPSTEIN at 36 (concluding that "there is no comparative advantage in using a judicial body as opposed to some administrative agency" for ratesetting).

[822] ASCAP and BMI also seek to have rate disputes decided outside of federal court. Both have recommended some sort of system of (apparently private) arbitration without providing much detail. ASCAP First Notice Comments at 4, 23-24 (recommending "expedited private

ratesetting is, of course, a primary function of the CRB, and the CRB has the benefit of experience assessing a broader spectrum of rate-related questions than the federal rates courts. Significantly, the CRB sets rates on the sound recording side as well as for musical works. It also has in-house economic expertise. While, as discussed below, interested parties appear to agree that the statutory framework governing the CRB's procedures could stand some improvement, on the whole it seems only logical to consolidate music ratesetting proceedings in a single specialized tribunal.

In offering the suggestion that the CRB assume responsibility for the rates applicable to the public performance of musical works, the Office does not mean to suggest that the CRB should not question the legitimacy of particular benchmarks if there is reason to do so (as the CRB in fact routinely does in ratesetting proceedings). But the ultimate aim of the proceeding should be a fair rate for the industry as a whole, rather than the enforcement of antitrust policy. The Office believes that a process focused on industry economics rather than antitrust analysis offers a more auspicious framework to establish broadly applicable rates.

Under the Office's proposal, discussed in more detail below, the CRB, like the rate courts, would step in to set a rate only when it could not be agreed as between the relevant parties. Such ratesetting activities would not need to occur on a five-year schedule, as under the current CRB system, but would be commenced on an as-needed basis, like today's proceedings before the ASCAP and BMI rate courts. Additional parties seeking to resolve the same rate issue could be offered the opportunity to join the proceeding. Assuming the experience were similar to that of the rate courts, the vast majority of rates would be agreed voluntarily rather than litigated.

Assuming the ratesetting authority for the public performance of musical works were transferred from the rate courts to the CRB, a question arises as to whether the separation of ratesetting and antitrust responsibilities would provide the occasion to sunset the decrees and adopt a more modern approach to antitrust oversight in this area. Under a more flexible approach, the DOJ would investigate and address potential anticompetitive behavior on an as-needed basis, rather than continue to impose presumptive restrictions under the consent decrees. As noted above, private

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arbitration"); *Music Licensing Hearings* at 52(statement of Michael O'Neill, CEO, BMI) ("We believe that replacing the current rate court with arbitration in New York under the American Arbitration Association rules would be a faster, less expensive, and a more market-responsive mechanism for all parties to obtain fair, market-value rate decisions."). For the reasons discussed above, the Office believes the CRB is the logical venue to determine public performance rates. As an added benefit, the CRB does not depend upon the payment of private arbitration fees (a significant factor in the demise of the CARPs that preceded the CRB). *See* H.R. REP. NO. 108-408, at 21, 99-100. At the same time, based on stakeholders' input, the Office is recommending certain changes to the CRB system, which are outlined below.

enforcement actions, as well, could play a role in policing alleged misconduct. We leave such questions of antitrust policy for the DOJ to answer.

Section 114(i)

Regardless of whether PRO ratesetting is migrated to the CRB, as further discussed below, the Copyright Office endorses the proposal—embodied in the proposed SEA legislation[823]—that the prohibition in 114(i) that currently prevents ratesetting tribunals from considering sound recording performance royalties be eliminated. Originally designed as a protective measure to benefit songwriters and publishers, it appears to be having the opposite effect. Contrary to the suggestion of the *Pandora* court,[824] the Office does not understand why, absent such a restriction, it might not be relevant to consider sound recording royalties in establishing a fair rate for the use of musical works should a ratesetting authority be so inclined.[825]

Interim Fees

Under the consent decrees, anyone who applies for a license receives one. There is no requirement of immediate payment. As discussed above, an applicant has the right to perform musical works in a PRO's repertoire pending the completion of negotiations or rate court proceedings resulting in an interim or final fee.[826] Since the consent decrees do not provide for immediate and concurrent payment for uses made during these periods—and do not establish a timeframe for the commencement of a rate court proceeding—an applicant is able to publicly perform a PRO's catalog of works for an indefinite period without paying.[827] Needless to say, commercial entities do not typically receive a steady supply of product for months or years based on a mere letter request. But such is the case with music.

The problem is exacerbated by the substantial burden and expense of litigating a rate in federal court—a contingency both sides seek to avoid. Licensees may pay nothing or greatly reduced fees for years as negotiations drag on, while still enjoying all of the benefits of a license. The Office agrees with those commenters who have suggested that this system—under which services may launch and continue to operate without an agreed rate—significantly increases the leverage of licensees at the expense of the PROs

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823 SEA, H.R. 4079; SEA, S. 2321, 113th Cong. (2014).

824 *Pandora Ratesetting*, 6 F. Supp. 3d at 366-67.

825 The Office does not believe that the fact that the limitation was originally proposed by musical work owners, even if ill-conceived, is a sufficient basis to determine it should continue in effect.

826 *See* ASCAP Consent Decree § IX.E; BMI Consent Decree § XIV.A.

827 ASCAP First Notice Comments at 15-16; BMI First Notice Comments at 16-17.

and their members.[828] Because the licensee already has access to the works it needs, there is no urgency to agree to a rate.

Once again, the Office does not see why music is treated differently from the goods of other suppliers in the marketplace. A fair and rational system should require licensees to pay at least an interim rate from the inception of their service, subject to a true-up when a final rate is negotiated with the PRO or established by the ratesetting authority.

Notably, both the ASCAP and BMI consent decrees include a process for the rate court to set interim rates. In practice, however, it seems that this option—which, at least for BMI, entails up to four months of discovery and motion practice[829]—is not commonly exercised. Likely this is due to parties' reluctance to undertake the considerable burden and expense of federal court litigation, especially when the result is only a temporary one.[830]

The Office is of the view that to the extent a licensing entity is required to grant a license upon request, there should be a viable (not merely theoretical) mechanism—for example, a brief, single-day hearing before the ratesetting authority (*e.g.*, the CRB)—to set an interim royalty rate without undue burden or expense. While nothing is ever as simple as it seems, the Office believes that a workable system should be feasible. For example, a licensee could be required to share a written description of the material aspects of its proposed service, after which both parties would proffer lists of relevant rates already in effect, which together would serve as guidance for the decisionmaker. It should not be necessary to have an elaborate procedure when the temporary rate can be adjusted retroactively. In addition to being more equitable for music owners, the Office believes requiring licensees to pay an interim rate would provide greater incentive to resolve rates through voluntary negotiations at the outset.

c. Partial Withdrawal of Rights

A primary focus of the commentary to the Copyright Office—and to the DOJ in its review of the consent decrees—is music publishers' ability (or inability) to withdraw specific categories of licensing rights from their authorizations to the PROs. The

[828] *See also, e.g.*, MMF & FAC Second Notice Comments at 10 ("As far as we know most of the societies in the EU require potential licensees to provide important financial and operational data (and in the case of a startup, their business projections, and projected user numbers) when making their application. To us this seems sound common sense and, coupled with an ability by societies to require an interim payment, would rebalance the negotiating process more fairly.").

[829] *See* BMI Antitrust Consent Decree Review Comments at 20-21. The ASCAP consent decree requires that the court set an interim rate within 90 days of a request. *See* ASCAP Antitrust Consent Decree Review Comments at 12.

[830] *See* ASCAP Antitrust Consent Decree Review Comments at 14 n.20; BMI Antitrust Consent Decree Review Comments at 21.

purpose of such withdrawals would be to allow music owners to negotiate in the marketplace for the exploitation of their songs—or, if not satisfied with the price offered, to withhold their songs from particular services. This has an analog in much of the discussion surrounding section 115, another area where publishers and songwriters seek the ability to escape from mandatory licensing.

As noted above, except in the case of internet radio providers that qualify for the section 112 and 114 statutory licenses, record companies are free to negotiate with potential licensees in the open market. But for music publishers, it is the exception rather than the norm, as the licensing of both mechanical and performance licenses is largely subject to government mandate.

There is substantial evidence to support the view that government-regulated licensing processes imposed on publishers and songwriters have resulted in depressed rates, at least in comparison to noncompulsory rates for the same uses on the sound recording side. Setting aside efficiency concerns, the Office does not see a principled reason why sound recording owners are permitted to negotiate interactive streaming rates directly while musical work owners are not. The Office is therefore sympathetic to the publishers' position that they should be permitted to withdrawal certain rights from the PROs to permit market negotiations. The Office believes that partial withdrawal—in the form of a limited right to "opt out"—should be made available to those who want it. This view is reinforced by the possibility of wholesale defections by major (and perhaps other) publishers from ASCAP and BMI if government controls are not relaxed, and the potential chaos that would likely follow.

Any such opt-out process would need to be carefully managed to ensure licensees did not face undue burdens in the licensing process as a result. At least for now, the Office believes that withdrawal of performance rights should be limited to digital rights equivalent to those that the record labels are free to negotiate outside of section 112 and 114—essentially, interactive streaming rights for new media services. In the case of such a partial withdrawal, the publisher would be free to pursue a direct deal for the rights in question (or, if not satisfied with a licensee's offer, withhold songs from the service in question).

Publishers who chose to opt out would need publicly to identify the particular uses subject to withdrawal, the licensing organization from which they were being withdrawn, each of the affected works, where a direct license might be sought, and other pertinent information.[831] As discussed below, it is the Office's recommendation that a non-profit general music rights organization ("GMRO") be designated by the Copyright Office to receive, maintain and offer access to this information. The Office additionally proposes that the current PROs be permitted to expand to become to become music

[831] The proposed opt-out right would be by publisher, not by individual work.

rights organizations ("MROs") that would be capable of administering not just performance rights but mechanical and perhaps other musical work rights as well.[832]

While the publisher would presumably choose to be paid directly by the licensee under any resulting outside licensing arrangement rather than through an MRO, in order to ensure songwriters' confidence in the accounting and payment process, the Office believes that songwriters affiliated with that publisher should retain the option of receiving their writer's share of royalties directly from the licensee through their chosen MRO.[833]

Finally, to the extent publishers failed to affiliate with an MRO, their performance rights would fall under the default licensing authority of the GMRO, which, as described below, would collect royalties and distribute them to publisher claimants. The combination of direct deals, MRO-issued licenses, and the GMRO backstop would allow licensees to secure full licensing coverage for necessary performance rights.

d. Bundled Licensing

During the study, industry stakeholders broadly supported increased bundling of rights to facilitate greater licensing efficiency. On the sound recording side of the equation, this does not appear to be much of an issue. To the extent noninteractive services procure licenses under section 112 and 114, they obtain both digital performance rights and the reproduction rights (*e.g.*, server copy rights) needed to engage in the streaming process. When services negotiate licenses outside of the statutory scheme, the labels are free to bundle all necessary rights together.

On the musical work side, however, the story is different. Licenses for the reproductions necessary to support an interactive streaming service are issued under section 115, whereas licenses for the streamed performances of the works are obtained from the PROs. In 2008, following a lengthy Copyright Office administrative proceeding and industrywide settlement, the CRB adopted regulations that effectively establish bundled rates for various types of streaming activities, under which the total cost of licensees' PRO performance licenses is deducted from the overall percentage rate applicable to the relevant service under section 115.[834] But while the royalty rate problem may have been

[832] As discussed above, the concept of MROs was proposed by former Register Marybeth Peters in testimony before Congress in 2005. *Copyright Office Views on Music Licensing Reform Hearing* at 21-36 (statement of Marybeth Peters, Register of Copyrights).

[833] This option could also help to alleviate concerns about the status of non-U.S. writers affiliated with foreign PROs if the U.S. publisher of their works chooses to pursue partial withdrawal.

[834] *See* Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. at 4531-32 (setting forth the CRB's proposed regulations that established the rates and terms for the use of musical works in limited downloads, interactive streaming and incidental digital phonorecord deliveries); *see also* Compulsory License for Making and Distributing Phonorecords,

addressed, an interactive service must still obtain separate mechanical and performance licenses and report complex accounting information under these two different licensing regimes (song-by-song licensing under section 115 versus blanket licensing by the PROs).

In 2005, former Register of Copyrights Marybeth Peters proposed moving from a dualistic approach for the licensing of musical works for mechanical and performance purposes to a system of integrated music rights organizations, or MROs.[835] At the time—when mechanical royalties represented a more significant income stream then they do today—music publishers and songwriters expressed considerable skepticism about such a bundled approach.[836] Today, in an era where mechanical royalties are becoming more marginal, Register Peters' proposal appears prescient, and enjoys support among publishers, songwriters and—not surprisingly—digital licensees.[837] It now seems apparent that the government should pursue appropriate changes to our legal framework to encourage bundled licensing, which could eliminate redundant resources on the part of both licensors and licensees.

As touched upon above, the most obvious step in this regard would be to allow existing music licensing organizations to expand to fill this role—the PROs would be permitted to take on mechanical licensing, and mechanical licensing entities such as HFA or MRI could integrate performance rights into their businesses. To satisfy reporting and payment obligations under songwriter or other agreements that distinguish between these rights, some sort of allocation of income as between the two rights would likely be required. This perhaps could be addressed by the CRB in establishing bundled rates (as under the section 112 and 114 licenses), or by the individual MROs in administering negotiated licenses.[838]

Including Digital Phonorecord Deliveries, 73 Fed. Reg. 66,173, 66,180 (adopting rule that permitted server and other copies necessary to certain streaming processes to be licensed under section 115).

[835] *See Copyright Office Views on Music Licensing Reform Hearing* at 6 (statement of Marybeth Peters, Register of Copyrights).

[836] *See, e.g.*, *id.* at 62 (statement of NMPA) ("[W]e believe the Copyright Office proposal is fatally flawed and would be harmful to songwriters and music publishers.").

[837] Such a unified licensing model has been in effect for 17 years in the United Kingdom. *Our History*, PRSFORMUSIC, http://www.prsformusic.com/aboutus/ourorganisation/ourhistory/Pages/default.aspx (last visited Jan. 22, 2015).

[838] The U.K.'s unified licensing system may provide a helpful model in this regard. PRS for Music was created by joining together the U.K. Performing Right Society ("PRS") and the Mechanical Copyright Protection Society ("MCPS"). For royalties received under its unified licenses, the PRS for Music distribution committee determines various splits between PRS and MCPS depending upon the type of use, which allocations are subject to ratification by the PRS and MCPS boards.

3. Mechanical Licensing and Section 115

As sales of CDs continue to slip away, mechanical licensing revenues for the reproduction and distribution of musical works under section 115—once the primary source of income for publishers and songwriters—likewise continue to decline.[839] Although sales of digital downloads through services like Apple iTunes have bolstered mechanical royalties in recent years, even DPD sales have fallen off with the rise of streaming services such as Spotify. Even so, mechanical revenues still currently represent about 23% of income for musical works (as compared to 52% generated by performances, 20% by synch uses, and 5% by other uses).[840] Of the mechanical share, a small amount is generated by the server and other reproductions of musical works required for online providers to operate interactive streaming services which, as noted above, also pay performance royalties.

Commenting parties have focused on two primary areas of concern with respect to the 106-year old compulsory license embodied in section 115. The first, put forth by music publishers and songwriters, is that the compulsory license does not permit them to control the use of their works or seek higher royalties. Relatedly, rightsowners also complain about the lack of an audit right under section 115 and practical inability to enforce reporting or payment obligations against recalcitrant licensees.

The second overarching concern with respect to section 115 is its song-by-song licensing requirement, which dates back to the original incarnation of the compulsory license in 1909. Song-by-song licensing is viewed by music users as an administratively daunting—if not sisyphean—task in a world where online providers seek licenses for millions of works.

a. Free Market Negotiation Versus Collective Administration

One of the most challenging issues to arise in this study has been whether musical work owners should be liberated from the section 115 compulsory licensing regime. Citing

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PRS Distribution Policy Rules, PRSFORMUSIC, http://www.prsformusic.com/creators/memberresources/Documents/Distribution%20policy/Distribution%20Policy%20Rules%20as%20at%20November%202014.pdf (last visited Jan. 22, 2015). Out of those splits, 100% of mechanical royalties are paid to the publisher, while performance royalties are split 50/50 between writer and publisher unless an alternate division of royalties is specified. *Music Registration Policy*, PRSFORMUSIC, http://www.prsformusic.com/creators/memberresources/how_it_works/musicregpolicy/Pages/musicregpolicy.aspx (last visited Jan. 22, 2015).

[839] *See* ASCAP Second Notice Comments at 23.

[840] Ed Christman, *NMPA Puts U.S. Publishing Revenues at $2.2 Billion Annually*, BILLBOARD (June 11, 2014), http://www.billboard.com/biz/articles/news/publishing/6114215/nmpa-puts-us-publishing- revenues-at-22-billion-annually.

the significantly higher rates paid to sound recording owners for uses where musical work owners are regulated and sound recording owners are not—and the contrasting example of the unregulated synch licensing market, where in many cases licensing fees are evenly apportioned—music publishers and songwriters have made a convincing case that government regulation likely yields rates below those they would enjoy in a free market. Motivated by concerns similar to those raised in connection with the consent decrees, many musical work owners would like to see an end to section 115. The Office—which, as noted, believes that compulsory licensing should exist only when clearly needed to address a market failure—is sympathetic to these claims.

On the other hand, in comparison to the record industry—where three major companies can issue licenses for much of the most sought-after content, with independent labels representing the balance[841]—U.S. musical work ownership is more diffusely distributed over a greater number of entities and self-published songwriters.[842] Unlike sound recordings—which are typically wholly owned by an individual label—many musical works are controlled by two, three or even more publishers. Notwithstanding the default rules of joint copyright ownership, publishers and songwriters frequently have understandings that they are not free to license each other's respective shares.[843] And there are millions of musical works in the marketplace. Spotify, for instance, reports that it offers some 30 million songs on its service.[844]

Understandably, as described above, digital music providers are intensely opposed to a system that would require individual licensing negotiations with thousands of musical work owners. Even publisher proponents of the proposal to sunset section 115 do not

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[841] Although three record companies dominate, independent record labels enhance the market with a rich variety of content, including well-known hit recordings. A2IM First Notice Comments at 1 ("Billboard Magazine, using Nielsen SoundScan data, identified the Independent music label sector as 34.6 percent of the music industry's U.S. recorded music sales market in 2013."). Many independent labels are represented by organizations that aggregate repertoire for collective licensing, such as the U.K.-based Merlin, which issues licenses to digital services such as YouTube and Spotify on a global basis. *Merlin Strikes Licensing Deal with YouTube*, MERLIN (Oct. 19, 2011), http://www.merlinnetwork.org/news/post/merlin-strikes-licensing-deal-with-youtube.

[842] In recent years, as with recorded music, there has been significant consolidation in the music publishing industry, such that the three major publishers now represent some 63% of the market—approaching the record company figure of 65%. *See* Christman, *First-Quarter Music Publishing Rankings: SONGS Surges Again*; Bruce Houghton, *Indie Labels Now Control 34.6% Of U.S. Market*, HypeBot (Jan. 16, 2014), http://www.hypebot.com/hypebot/2014/01/indie-labels-now-control-346-of-us-market.html.

[843] *See, e.g*, PASSMAN at 304-05 (explaining that "[t]rue co-administration" deals, in which all parties retain the right to administer their own share of a composition, are among the most common arrangements for songs co-owned by publishers of approximately equal status).

[844] *Information,* SPOTIFY, https://press.spotify.com/us/information/ (last visited Jan. 22, 2015).

deny that it would be extraordinarily difficult for services to negotiate with myriad small copyright owners for all of the mechanical licenses they seek, and concede that there must be some sort of collective system to facilitate licensing from smaller rightsowners.[845] But apart from the optimistic view that should section 115 be retired, new entities will spring forth to meet this need, there is little detail concerning how a collective solution would reliably be implemented.

The difficulty, then, is how to reconcile the competing values of free market negotiation and collective management of rights. Each represents an express goal of reform: fair compensation to creators, on the one hand, and licensing efficiency, on the other. A middle path may provide the best answer.

Publisher Opt-Out Right

The Office believes that rather than eliminating section 115 altogether, section 115 should instead become the basis of a more flexible collective licensing system that will presumptively cover all mechanical uses except to the extent individual rightsowners choose to opt out. At least initially, the mechanical opt-out right would extend to the uses that could be withdrawn from blanket performance licenses—that is, to interactive streaming rights—and, in addition, to downloading activities[846] (which, by judicial interpretation, do not implicate the public performance right[847]). To reiterate, these are uses where sound recording owners operate in the free market but publishers do not.[848]

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[845] IPAC First Notice Comments at 6 ("Owners of musical works are sympathetic to those entities that need an efficient process by which to obtain licenses for musical works. In that regard, IPAC supports the creation of one or more licensing agencies to negotiate fair market license rates and grant licenses on behalf of the copyright owners of the musical works on a blanket license or individual song basis."); NMPA First Notice Comments at 18 ("Compulsory licensing is not needed to achieve the efficiency of bundled licenses . . . 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.").

[846] The category of downloads includes both permanent downloads and limited downloads. While permanent downloads are available to the purchaser indefinitely, limited downloads can be accessed for only a limited period of time or limited number of plays. 37 C.F.R. § 385.11. Download uses also include ringtones, for which a separate rate has been established under section 115. 37 C.F.R. § 385.3; *see also* Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. at 64,316 (setting forth the Copyright Office's 2006 Memorandum Opinion concluding ringtones qualify as DPDs).

[847] *See United States v. ASCAP*, 627 F.3d 64, 68 (2d. Cir. 2010) (holding that downloading a digital music file over the internet does not constitute a public performance of the work embodied in that file); *In re Cellco Partnership*, 663 F. Supp. 2d 363, 374 (S.D.N.Y. 2009) (holding that downloading a ringtone to a cellular phone does not in and of itself constitute a public performance of a musical work). Also note that musical work owners do not collect mechanical

Full Market Coverage

As envisioned by the Office, the collective system would comprise MROs (as noted, with the ability to represent both performance and mechanical rights) acting on behalf of their respective publisher members; individual publishers (including self-published songwriters) representing their own mechanical licensing interests who had exercised their opt-out right; and the GMRO. Unless they had a direct deal in place, publishers would be paid through their chosen MRO. The GMRO would collect for works (or shares of works) not covered by a direct deal or represented by an MRO—including works with unknown owners—and attempt to locate and pay the relevant rightsholders. Licensees could thus achieve end-to-end coverage through the combination of MROs, direct licensors, and the GMRO.

As in the case of those seeking to withdraw specific performance uses from mandatory licensing, publishers who wished to opt out from one or more of the categories of mechanical licensing would need to identify the uses in question and provide this information (via their MRO if applicable) to the GMRO, along with identification of their works, licensing contact information, and other relevant data.[849] They would then be free to negotiate directly with, and be paid directly by, the licensee.[850] Absent provision of a notice that the publisher was exercising its right to opt out, that publisher's works would be licensed through its MRO.[851]

royalties for noninteractive streaming uses subject to section 112 and 114 statutory licensing. *See* NMPA First Notice Comments at 24; Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. at 4513.

[848] Although physical products, such as CDs and vinyl records, also fall into this category, stakeholder concerns have focused far less on the physical marketplace, which (despite a recent increase in the niche market of vinyl records) continues to decline. As noted above, the Office believes that the question of opt-out rights for physical product could be deferred for future consideration.

[849] As noted above, at least for the time being, the Office believes that opt-out rights for publishers should be by publisher, not by individual work. Thus, opt-out publishers would be responsible for their entire catalog.

[850] In contrast to performance rights, songwriter agreements do not assume that the writer's share of mechanical royalties will flow through a PRO. Accordingly, while it may be a matter worthy of further discussion, the Office is not now suggesting that songwriters should have the right to redirect their mechanical shares through a chosen MRO.

[851] Some publishers could opt out only to find that the licensee declined to pursue individual negotiations with them. For this reason, it seems it would be useful to have some sort of mechanism for such a rightsowner to reverse its opt-out and return to the collective system if it wished.

Cover Recordings

Section 115 permits digital services and others to reproduce and distribute copies of musical works embodied in existing recordings, provided that the user is also authorized to use the recording.[852] Another dimension of section 115 is that it can be used for permission to make new, "cover" recordings of songs, so long as the new version does not change the basic melody or "fundamental character" of the work.[853]

While the ability to make a cover recording has long been a feature of the law, it is not without controversy, especially among recording artists who write their own works. While some artist songwriters may view imitation as flattery, others do not appreciate that they are unable to prevent the re-recording of their songs by others. Many music creators seek more control over their works. As some artists see it, "[a]pproval is by far the most important right that an artist possesses."[854]

With respect to cover recordings, the Office recommends an approach whereby those who seek to re-record songs could still obtain a license to do so, including in physical formats. But the dissemination of such recordings for interactive new media uses, as well as in the form of downloads, would be subject to the publisher's ability to opt out of the compulsory regime. Thus, a publisher's choice to negotiate interactive streaming and DPD rights for its catalog of songs would include the ability to authorize the dissemination of cover recordings by those means. Or, put another way, where the

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[852] 17 U.S.C. § 115(a)(1).

[853] *Id.* § 115(a)(2).

[854] *See, e.g.*, Dina LaPolt and Steven Tyler, Comments Submitted to the Department of Commerce's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy, at 2 (Feb. 10, 2014), *available at* http:// www.uspto.gov/ip/global/copyrights/lapolt_and_tyler_comment_paper_02-10-14.pdf (objecting to a compulsory remix license). This perspective was voiced by a number of prominent artists in response to a suggestion to consider a new licensing framework for remixes that has been put forth by USPTO and NTIA as part of the "Green Paper" process of the Internet Policy Task Force. *See* GREEN PAPER; Steve Knopper, *Don Henley, Steven Tyler Condemn Potential Copyright Law Change*, ROLLING STONE (Feb. 13, 2014), http://www.rollingstone.com/music/news/don-henley-steven-tyler-condemn-potential-copyright-law-change-20140213. The Green Paper suggestion—motivated by a desire to facilitate the reuse of creative works—would extend to music. *See* GREEN PAPER at 28-29 (citing concerns about music sampling). Various commenters addressed the Green Paper suggestion in their comments to the Copyright Office. Because it is not a Copyright Office initiative, this report does not address the remix issue other than to note that, based on the comments submitted to the Office, it appears to have drawn opposition within the music community. *See, e.g.*, CCC Second Notice Comments at 3; LaPolt First Notice Comments at 15; NMPA & HFA Second Notice Comments at 37-38. *But see* Menell First Notice Comments at 3 (advocating for the creation of a compulsory license for remixes). The Office hopes that this report will prove useful to the USPTO and NTIA in their evaluation of the remix issue as it relates to music.

publisher had opted out, someone who produced a cover recording would need to obtain a voluntary license to post the song on an interactive streaming or download service (just as would someone who wished to offer streams or downloads of the original recording of that work).

Audiovisual Uses

In their comments, the record companies explain that because consumers now access music on computers, phones and other devices with screens, they expect to see something when a song is playing—whether it is a video, album cover, or lyrics. The labels' observation corresponds to the fact that for music fans of today, YouTube—with a billion users a month—is "the largest service in terms of listening to music."[855]

The record companies urge that the licensing system for musical works needs to be updated to respond to the consumer desire for more—and more innovative—audiovisual content. To illustrate the point, the labels cite a recent record release—involving a variety of distinct consumer products—that necessitated over 1,400 individual licenses.[856]

The combination of music with visual content requires a synchronization license—and synch rights are not subject to government oversight. Section 115 is limited to audio-only uses of musical works. While not proposing a specific approach, the labels would like to see section 115 replaced with an updated blanket system that would extend to consumer audiovisual products.[857] In their view, such a change would facilitate many common synch transactions, such as the licensing of music videos to online services and incorporation of music in user-posted videos.

In the eyes of music publishers and songwriters, however, the labels' suggestion represents a dramatic and unacceptable expansion of the compulsory system. This reaction is perhaps not terribly surprising in light of the publishers' present desire to phase out mandatory audio-only licensing under section 115.[858]

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[855] Tr. at 155:16-17 (June 4, 2014) (Steven Marks, RIAA); *see also* Glenn Chapman, *YouTube debuts subscription music service*, YAHOO NEWS (Nov. 12, 2014) http://news.yahoo.com/youtube-debuts-subscription-music-video-190223540.html ("YouTube is the world's biggest online source of free streaming music and the site has about a billion users a month.").

[856] RIAA First Notice Comments at 10 ("The record company responsible for one current, successful release obtained 1481 licenses for the project.").

[857] The labels are not proposing to extend any synch licensing solution to uses in "third-party created product[s]," such as in advertisements and television, which have always required individualized negotiations with both labels and publishers. *See id.* at 17.

[858] *See* NMPA Second Notice Comments at 32-33 ("The RIAA rationalizes this approach by claiming a total abdication of approval rights by musical work owners combined with expanding

The Office is sympathetic to the labels' concerns, but cannot at this time recommend that consumer synch uses be incorporated into a government-supervised licensing regime. As may be apparent from much of the foregoing discussion, once a compulsory license is implemented it becomes deeply embedded in industry practices and—even when its original rationale is lost in time—is difficult to undo. That alone should counsel caution in all but the most manifest instances of market failure.

Here, the Office does not observe such a failure and believes there is even some reason to be optimistic about private market solutions. First, in the case of new releases, the labels presumably have some ability (and leverage) to work through audiovisual licensing issues by virtue of their role with respect to the creation of music videos, album art, etc. Notably, in the RIAA's own example of "a single album project" requiring over a thousand licenses, it seems that licenses were obtained.[859]

Additionally, over the last decade, labels and publishers have entered into a series of NDMAs to facilitate the labels' licensing of music videos and other products from music publishers.[860] And in another significant development, YouTube, has developed a robust licensing program and entered into voluntary agreements that enable large and small labels and publishers to claim and monetize their content.[861] Taken together, these

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the scope of formats authorized under Sec. 115 would promote greater efficiency and would simplify the music licensing process. With an Orwellian spin, they promote the idea that musical work owners would be enriched if they are, ultimately, disempowered in the digital music marketplace."); NSAI Second Notice Comments at 8 ("While the concept of a more efficient licensing system is something everyone agrees on, the RIAA proposal would basically eliminate the ability of music publishers or self-published songwriters and composers to initiate or directly negotiate their own agreements."). Interestingly, just a few years ago, the publishers were of a somewhat different mindset, with NMPA advocating for a blanket-style license to cover synch uses by YouTube and similar services: "If we don't . . . figure out a way to do mass synchronizations, we are going to miss out on many business opportunities that could provide solutions to the declining fortunes of the whole music industry." David Israelite, *David Israelite, NMPA President's Guest Post: Why Music Publishers Must Adopt Blanket Licensing*, BILLBOARD (June 24, 2011), http://www.billboard.com/biz/articles/news/publishing/1177339/david-israelite-nmpa-presidents-guest-post-why-music-publishers.

[859] RIAA First Notice Comments at 6, 10.

[860] For example, in 2012 NMPA negotiated a licensing framework with UMG to permit independent publishers to grant UMG the synch rights necessary to stream videos containing their works on VEVO and YouTube. *See* NMPA Second Notice Comments at 33; Butler, *UMG/NMPA Broker Model License Agreement*; Christman, *NMPA Inks Deal With Universal Music Group Over VEVO, YouTube Videos*.

[861] In this regard, however, it is worth noting that independent publishers had to pursue an infringement action against YouTube before YouTube presented them with a licensing offer under

examples suggest that the market appears to be responding to the need for licensing of audiovisual uses by consumers and that there is probably no pressing need for government intervention.

b. Shift to Blanket Licensing

Regardless of its scope or whether it includes an opt-out right, the Office believes that section 115 should be updated to better meet the needs of the digital age. Congress attempted to do this in 2006 with the proposed SIRA legislation, which would have created a blanket mechanical license for digital uses. Although that bill got as far as passing the relevant House subcommittee,[862] it faced a degree of resistance from certain industry participants and ultimately foundered.

Based on stakeholders' sentiments, however—especially those of the digital services—the time seems ripe to revisit the concept of blanket mechanical licensing. Users have made a strong case in pointing out the inefficiencies of a system that requires multiple licensees to ascertain song-by-song licensing information and maintain it in redundant databases. At the same time, they have repeatedly expressed a willingness to pay royalties in cases where they are unable to track down licensing information for particular songs in order to mitigate their potential liability for unmatched works.[863]

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a settlement negotiated by NMPA. *See Football Ass'n Premier League v. YouTube*, 633 F. Supp. 2d 159.

[862] *See* SIRA, H.R. 5553. In 2006, the House Judiciary Committee's Subcommittee on Courts, the Internet, and Intellectual Property forwarded SIRA to the full Judiciary Committee by unanimous voice vote. *See H.R. 5553*, CONGRESS.GOV (June 8, 2006), https://www.congress.gov/bill/109th-congress/house-bill/5553.

[863] Notably, section 115 has, since its inception, provided a mechanism to file a notice of intent to use a musical work with the Copyright Office if the owner of the work cannot be found in Copyright Office records. *See* 17 U.S.C. § 115(b)(1). Under section 115, no royalties are required to be collected by the Office in connection with these filings. *See id.* It is the Office's understanding, however, that this provision does little to ameliorate concerns of digital services in light of the filing fees that the Office must charge to administer such song-by-song notices, which may number in the thousands or perhaps even the millions for a large service. *See* DiMA First Notice Comments at 20 ("[T]o the extent that a service chooses to file statutory license notices with the Copyright Office for the many musical works for which the relevant rightsowners cannot be identified, the costs can be overwhelming given the volume of works at issue."). Under its current fee schedule, the Office charges a fee of $75 for a notice of intention covering a single title, and for notices incorporating additional titles, a fee of $20 per 10 additional titles submitted on paper, and $10 per 100 additional titles submitted electronically. 37 C.F.R. § 201.3(e). Moreover, due to IT constraints within the Library of Congress, the Office is still not able to accept such submissions in bulk electronic form.

But while considerably more user-friendly for licensees, blanket licensing cannot be viewed as a panacea. It does not cure the problem of bad or missing data, or the inability to match sound recordings with the musical works they embody. In any situation where a licensed transaction takes place, in order for a royalty to be paid to the rightsowner, there must be a link between the work used and the owner of that work. Especially in the case of lesser known works, it can be challenging to match a sound recording with the musical work it embodies, and that musical work to its owner.

Today, under section 115, the burden of identifying the song and its owners is on the licensee (or sometimes a third-party agent retained by the licensee); the link is made in the song-specific license that issues. Blanket licensing merely kicks this responsibility obligation down the road for another actor to address. Under a blanket system, the obligation to make the match between the exploited work and its owner falls on the licensing organization—for example, the PRO—which must identify the use and connect it to the owner.

Nonetheless, the Office believes that on the whole, the benefits of a blanket licensing approach clearly outweigh the conceded challenges of matching reported uses with copyright owners. Throughout this study, the Office has heard consistent praise for the efficiencies of blanket licensing by SoundExchange and the PROs, and widespread frustration with the song-by-song process required under section 115—including from publishers who find themselves burdened with deficient notices and accountings.

Ultimately, it is in the interest of music owners as well as licensees to improve the licensing process so it is not an obstacle for paying services. To further facilitate the rights clearance process and eliminate user concerns about liability to unknown rightsowners, the Office believes that mechanical licensing, like performance licensing, should be offered on a blanket basis by those that administer it. This would mean that a licensee would need only to file a single notice to obtain a repertoire-wide performance and mechanical license from a particular licensing entity. Song-by-song licensing is widely perceived as a daunting requirement for new services and an administrative drag on the licensing system as a whole. The move to a blanket system would allow marketplace entrants to launch their services—and begin paying royalties—more quickly.

c. Ratesetting

As explained above, the Office supports integration of mechanical with performance rights administration to simplify the licensing process, especially where both rights are implicated, as in the case of interactive streaming.[864] Even if both rights are not

[864] Although publishers traditionally have not sought royalties for the server and other reproductions necessary to facilitate noninteractive streaming, it would probably be helpful to clarify the law to provide that any necessary mechanical rights were covered as part of a bundled

implicated—as in the case of DPD licensing—it would still appear to make sense to combine licensing resources into unified MROs, especially in a world of declining mechanicals. In order to reap the rewards of a more unified licensing structure, the Office further recommends that the ratesetting procedures for mechanical and performance also be combined.

"As-Needed" Ratesetting

The CRB establishes mechanical rates for the various categories of use that fall under section 115.[865] The Office believes this responsibility should continue, though with an important modification: as is now the case with performance rights, rather than establish rates across the board every five years, the CRB should set rates for particular uses only on an as-needed basis when an MRO and licensee are unsuccessful in reaching agreement.

There are currently 17 distinct rate categories under the section 115 license,[866] each with its own specific rate. Under the current CRB regime, the parties are required to identify at the outset of the ratesetting proceeding every business model that may be relevant in the next five years so that a rate can be established for that use. As digital business models proliferate, so do the rates. The determination of government rates for a plethora of specific distribution models would seem to be an inefficient way to go about the ratesetting process. In the first place, new digital models spring up every day, so it is impossible to keep up with the changing marketplace prospectively. In addition, many of the rates required to be included in a global ratesetting process might be easily agreed by the parties without the need for government intervention—especially in the case of uses that are less economically significant.

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license. *Cf.* Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 73 Fed. Reg. at 66,180-81 ("[I]f phonorecords are delivered by a transmission service, then under the last sentence of 115(d) it is irrelevant whether the transmission that created the phonorecords is interactive or non-interactive.").

[865] A section 115 license is only available after phonorecords of the work in question have first been distributed to the public in the United States under the authority of the copyright owner. 17 U.S.C. § 115(a)(1). The Office is not recommending any change to this aspect of the statutory system, which permits musical work owners to control the so-called "first use" (or initial recording) of their works.

[866] These categories include: physical phonorecords and permanent digital downloads (*see* 37 C.F.R. § 385.3(a)); ringtones (*see* 37 C.F.R. § 385.3(b)); five compensation models for services offering interactive streams and limited downloads (*see* 37 C.F.R. § 385.13(a)); three types of promotional activities involving interactive streams and limited downloads (*see* 37 C.F.R. § 385.14(b)-(d)); mixed service bundles, music bundles, limited offerings, paid locker services, and purchased content locker services (*see* 37 C.F.R. § 385.23(a)); and free trial periods for certain service offerings (*see* 37 C.F.R. § 385.24).

Under the Office's approach, the CRB would be called upon to set a rate only in the case of an impasse between two parties. But to borrow from the existing CRB system, other interested parties (such as other MROs and other users) could choose to join the relevant proceeding, in which case those parties would be bound by the CRB-determined rate (except for publishers opting out of the MRO for the use in question.[867])

Use of Benchmarks

Throughout the study, there has been significant debate concerning the ratesetting standard that should be employed by the CRB—some supporting section 801(b)(1)'s four-factor test that applies to satellite radio and pre-existing subscription services under section 114, as well as mechanical uses under section 115, while others favor the willing buyer/willing seller standard that governs internet radio. As discussed above in connection with the issue of licensing parity, the Office believes that all music users should operate under a common standard, and that standard should aim to achieve market rates to the greatest extent possible.

But regardless of the rate standard invoked by the CRB (or for that matter, a rate court), a critical aspect of the ratesetting analysis is comparison of the requested rates with relevant market benchmarks, to the extent they exist. In the case of compulsory licensing, this is an elusive enterprise, since there are no freely negotiated licenses to inform the tribunal.

As noted above, the Office believes that all potentially informative benchmarks should be reviewed and evaluated in the ratesetting process. An advantage of the proposed opt-out system is that there would be a greater likelihood that actual market benchmarks would exist to inform the ratesetting tribunal. Even where rates remain subject to government oversight, the Office believes that copyright policy—and specifically the desire to fairly compensate creators—will be better served by a greater opportunity to establish rates with reference to real market transactions.[868]

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[867] Section 115 already recognizes that a voluntary agreement can supersede the statutory rate. 17 U.S.C. § 115(c)(3)(E)(i). As a practical matter, however, while voluntary rates for uses subject to mandatory licensing may be lower, they will not exceed the statutorily fixed rate because the user may always resort to the compulsory process.

[868] Of course, this was the concept pursued by the publishers who withdrew from ASCAP and BMI to negotiate separate rates with Pandora. There, as explained above, the court rejected two of the proffered benchmarks due to what it viewed as coercive conduct on the part of the publishers in the negotiation process. The CRB, too, is free to reject benchmarks that it perceives to be unreasonable or otherwise without merit. *Music Choice v. Copyright Royalty Board*, Nos. 13-1174, 13-1183, 2014 WL 7234800, at *7 (D.C. Cir. Dec. 19, 2014) ("The [CRJs] were within their broad discretion to discount [SoundExchange's proposed] benchmarks and look elsewhere for guidance," as the CRJs' "mandate to issue determinations . . . does not hamstring the Judges when neither party proposes reasonable or comparable benchmarks."). Copyright owners would

Interim Rates

There is no current process for establishing an interim rate under the section 115 license. As with performance rights, the Office believes there should be a simple and expeditious procedure available to have the CRB establish a temporary mechanical rate for a new user pending final resolution of the applicable royalty by agreement of the parties or through a ratesetting proceeding.

d. Audit Right

Publishers and songwriters have long complained about the lack of an audit right under section 115.[869] In addition to monthly statements of use, the statute provides that each licensee must provide to the copyright owner a cumulative annual statement that is certified by a CPA.[870] But section 115 confers no express right for a copyright owner to audit a licensee's statements.[871]

Although section 114 does not include such an express audit right, it does provide that the CRB shall "establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under [section 114], and under which records of such use shall be kept and made available by entities performing sound recordings."[872] Based on this authority, the CRB has promulgated regulations to permit audits of royalty payments of statutory licensees by SoundExchange.[873] Notably, there is parallel language in section 115, though it is limited to reporting in connection with the making of DPDs, and no equivalent royalty verification rules have been promulgated by the CRB under that provision.[874]

Regardless of any other potential adjustments to section 115, the Office believes that the mechanical licensing system should be amended to provide for an express audit right

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of course need to ensure that they proceeded carefully and independently in their dealings with licensees so as not to undermine the value of their agreements for ratesetting purposes.

[869] *See, e.g.*, Castle First Notice Comments at 2-3; NMPA & HFA First Notice Comments at 14-15.

[870] In a notable departure from the terms of section 115, HFA, which licenses mechanical rights on behalf of numerous publishers, does not rely upon the submission of certified annual statements but instead conducts royalty examinations of significant licensees to verify their payments.

[871] By contrast, the section 111 and 119 cable and satellite compulsory licenses, as well as the Audio Home Recording Act ("AHRA"), provide for a royalty verification process for the benefit of copyright owners. *See* 17 U.S.C. §§ 111(d)(6) (cable licensees); 119(b)(2) (satellite licensees); 1003(c)(2) (manufacturers of digital audio recording devices and media).

[872] 17 U.S.C. § 114(f)(4)(A).

[873] 37 C.F.R. §§ 380.6, 380.15, 380.25.

[874] 17 U.S.C. § 115(c)(3)(D).

covering the full range of uses under section 115, with the particular logistics of the audit process to be implemented by regulation.[875]

The Office was not made aware during the study of any audit issue in relation to the PROs.[876] But the Office notes that in any updated system, it would be critical for copyright owners to be able to verify not just mechanical royalties but performance income as well (which could be combined under a bundled license). Audit activities could perhaps be coordinated through the GMRO; once an audit was noticed by one MRO, others could choose to participate in the audit process, sharing in its costs and any recovery.[877] This type of coordinated audit process has been implemented under the cable and satellite licenses as well as under the AHRA.[878]

e. Sunset of Existing Section 115 Licenses

PRO licenses typically have an initial term of up to five years.[879] A licensee may therefore need to renegotiate its license with one or more PROs every several years. For this reason, while specific details would undoubtedly need to be addressed, existing

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[875] In light of the Office's primary responsibility under the existing section 115 framework for determining the requirements for statements of account, it may be sensible to assign rulemaking responsibility for audits of these statements to the Office rather than the CRB. *See* 17 U.S.C. § 115(c)(5); 17 U.S.C. § 803(c)(3) (CRBs may specify recordkeeping requirements as part of a ratesetting determination); *see also* Division of Authority Between the Copyright Royalty Judges and the Register of Copyrights under the Section 115 Statutory License, 73 Fed. Reg. 48,396 (Aug. 19, 2008) (explaining responsibilities of the Office versus the CRB in this area).

[876] It appears that currently, PROs do not have any significant audit rights, compelling them to accept "payments at best-effort levels and face value, but not necessarily accurate." Derek Crownover, *Small Music Publishers Face Uphill Battle*, THE TENNESSEAN (Aug. 14, 2014), http://www.tennessean.com/story/money/industries/music/2014/08/15/small-music-publishers-face-uphill-battle/14075783/. In fact, the ASCAP consent decree merely suggests that ASCAP "may require its . . . licensees to provide ASCAP with all information reasonably necessary to administer the per-program or per-segment license," while the BMI consent decree has no such requirement. ASCAP Consent Decree § VIII.C; BMI Consent Decree.

[877] Publishers who had negotiated direct licenses with digital providers would be responsible for managing their own audits in keeping with their individual contracts.

[878] *See* 37 C.F.R. § 201.30 (setting forth the procedure for verification of statements of account submitted by cable operators and satellite carriers).

[879] *See* ASCAP Consent Decree § IV.D (ASCAP is prohibited from "[g]ranting any license to any music user for rights of public performance in excess of five years' duration."). This restriction is not found in the BMI Consent Decree, although the Office understands that BMI's licensing practices tend to track ASCAP's in this regard, perhaps due to the fact that "the DOJ often takes the view that BMI and ASCAP should operate under similar rules." BMI First Notice Comments at 16. It is the Office's further understanding that such licenses may be subject to automatic extensions unless terminated by either the PRO or licensee.

PRO licenses would not appear to present an obstacle to implementing the changes proposed here. A license granted under section 115, on the other hand, does not have an end date. A question therefore arises as to how the millions of existing section 115 licenses would be retired.

The Office believes there is an answer to this question—as, apparently, do the digital companies who have advocated for a new blanket system (as well as the publishers that have advocated for an end to section 115 altogether). Significantly, the rates and terms in a section 115 license do not continue in perpetuity but instead are adjusted every five years in accordance with the CRB's statutory schedule.[880] Thus, there can be no expectation on the part of a licensee that particular rates or terms will continue beyond the five-year statutory period.

In sunsetting the song-by-song licensing system, there would need to be a period of transition, of course, during which the user would apply for licenses from the several MROs. Assuming, however, that that period of transition were tied to the then-applicable rate period, the changeover should not harm any legitimate expectation concerning rates.

4. Section 112 and 114 Licenses

One of the few things that seems to be working reasonably well in our licensing system is the statutory license regime under sections 112 and 114, which permits qualifying digital services to engage in noninteractive streaming activities at a CRB-determined (or otherwise agreed) rate. The section 112 and 114 licenses—administered by SoundExchange, a nonprofit entity designated by the CRB—cover both internet and satellite radio providers and certain subscription music services. Although the differing ratesetting standards for these licenses—as well as some of the rates established under those standards—have been a source of controversy, from the record in this study, the licensing framework itself is generally well regarded.

Recording artists, as well as backup musicians and vocalists, appreciate the fact that they are paid their respective shares of royalties for digital performances under the statutory formula administered by SoundExchange.[881] SoundExchange deducts a modest

[880] Notably, because HFA licenses incorporate the key aspects of section 115, they too are subject to the periodic statutory rate adjustments.

[881] Section 114 provides that 45% of royalties are to be paid to the featured artist, 2.5% to the union that represents nonfeatured musicians, and 2.5% to the union for nonfeatured vocalists, with the remaining 50% paid to the owner of the sound recording, typically a record label. 17 U.S.C. § 114(g)(2).

administrative fee from distributed royalties—currently approximately 4.5%—to offset its costs of operations.[882]

SoundExchange engages in significant efforts to locate and register artists whose royalties it is holding. By regulation, unattributed royalties that remain unclaimed after a period of at least three years may be used to help defray SoundExchange's ongoing administrative expenses.[883] In recent years, the pool of unclaimed royalties that are three or more years old has ranged as high as $31 million dollars.[884] By comparison, however, SoundExchange's annual distributions totaled $773 million in 2014.[885]

a. Scope of Licenses

Notwithstanding the comparatively positive reviews of the section 112 and 114 licenses, there are a few ways in which some have suggested they should be tweaked.

Adjust to Include Terrestrial

In contrast to the general sentiments of musical work owners, some independent record labels and artists—who may be more challenged in negotiating with music services than their larger counterparts, and also like being paid through SoundExchange—have suggested that the section 112 and 114 compulsory licenses be expanded to cover interactive streaming in addition to noninteractive models.[886] Digital providers, too, would welcome such a change.[887]

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[882] SoundExchange First Notice Comments at 4.

[883] 37 C.F.R. § 380.8.

[884] Press Release, SoundExchange, SoundExchange Releases List of Recording Artists and Record Labels with Unclaimed Digital Performance Royalties (Aug. 15, 2012), http://www.soundexchange.com/pr/soundexchange-releases-list-of-recording-artists-and-record-labels-with-unclaimed-digital-performance-royalties/. SoundExchange recently reallocated $9.3 million from its unclaimed royalty pool to its administrative fund. Glenn Peoples, *SoundExchange Finally Releases Old, Unclaimed Royalties*, BILLBOARD (Jan. 31, 2014), http://www.billboard.com/biz/articles/news/5893782/soundexchange-finally-releases-old-unclaimed-royalties.

[885] *See* Glenn Peoples, *SoundExchange Paid Out a Whopping $773 Million in 2014*, BILLBOARD (Jan. 29, 2015), http://www.billboard.com/articles/business/6457827/soundexchange-digital-performance-royalty-distributions-2014.

[886] *See* FMC First Notice Comments at 11-12; Kohn First Notice Comments at 13-14; SAG-AFTRA & AFM First Notice Comments at 6; *see also* A2IM First Notice Comments at 5 (supporting a narrower definition of "interactive").

[887] *See* Tr. at 138:19-139:09 (June 4, 2014) (Lee Knife, DiMA) ("The idea that we [DiMA services] have to go to all of these different people, depending on whether you're interactive, you're noninteractive, whether you're downloading, whether you're streaming it and the download is available to be heard while it's downloading . . . most of my services want to or do engage in all

While the Office understands these points of view, it seems unlikely as a political matter that the major record labels could be persuaded to give up their current ability to negotiate such rates in the open market. Moreover, the Office does not perceive that the voluntary market for licensing of sound recording rights is not functioning.

That said, assuming Congress broadens the sound recording performance right to include terrestrial broadcasts, in keeping with the principle that analogous uses should be treated alike, it would seem only logical that terrestrial uses should be included under the section 112 and 114 licenses. The CRB would be in the best position to establish equitable rates to apply to both over-the-air and internet radio.

Qualifying Versus Nonqualifying Services

The section 112 and 114 licensing framework excludes interactive streaming and imposes additional technical requirements as well on those seeking a statutory licenses. While licensees complain about the constraints of section 114, on the other side of the coin, questions arise as to how much control a listener should be able to have over a customized radio playlist before the service is considered to be offering more of an on-demand than passive experience.

Section 114 defines an interactive service in relevant part as "one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not part of a program, which is selected by or on behalf of the recipient."[888] In 2009, the Second Circuit Court of Appeals held that the Launchcast music service—which did not offer on-demand streaming but customized its programming for recipients based on their individual ratings of songs—was not interactive within the meaning of this definition.[889] As a result of this precedent, internet radio services offering customized listening experiences are able to operate under the compulsory license regime.

Some question the Second Circuit's interpretation of the line between interactive and noninteractive streaming.[890] As articulated by the RIAA, "[t]he [*Launch Media*] decision has emboldened services to offer listeners an increasingly personalized listening experience under color of the statutory license, and all but extinguished voluntary

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of those different activities at once. We'd love to be able to just get a license for music and simply report what the type of use was and pay for it.").

[888] 17 U.S.C. § 114(j)(7).

[889] *Launch Media,* 578 F.3d at 164.

[890] *See* RIAA First Notice Comments at 33-34; SAG-AFTRA & AFM First Notice Comments at 5-6; *see also* NARAS First Notice Comments at 5; NAB First Notice Comments at 4; NRBMLC First Notice Comments at 24; NPR First Notice Comments at 5; SRN Broadcasting First Notice Comments at 1.

licensing of personalized streaming services at a premium to the statutory rate."[891] The RIAA's chief concern appears to be that the rate for customized radio is the same as that for completely nonpersonalized offerings.

While the Office has some reservations about the interpretation of section 114 by the *Launch Media* court—which seems somewhat in tension with the statutory language—there appears to be no overwhelming entreaty to remove custom radio from the statutory regime.[892] Within that regime, however, it may be appropriate to distinguish between custom and noncustom radio, as the substitutional effect of personalized radio on potentially competing interactive streaming services may be greater than that of services offering a completely noncustomized experience. While the issue could be addressed legislatively, such an approach would not appear to require statutory change, as the CRB has the discretion to set different rate tiers today when the record supports such an outcome.[893]

For their part, internet providers have criticized the constraints that section 114 imposes on services that seek to operate under the compulsory license.[894] These include the "sound recording performance complement," a restriction that limits the frequency with which songs from the same album or by the same artist may be played by the service.[895] There is also a statutory prohibition against announcing upcoming songs—a practice that is common in the terrestrial world, and therefore presents problems for online simulcasters.[896] Congress included these limitations in the section 114 license to mitigate the potential substitutional impact of noninteractive streaming on sales or other revenue streams.[897]

In the Office's view, these sorts of requirements fall into a category of relative fine-tuning of the license. But for the fact that they are laid out in the statute itself, their

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[891] RIAA First Notice Comments at 34.

[892] *See, e.g.*, *id.* ("While, at this juncture, we do not necessarily advocate excluding from the statutory license services that have been generally accepted as operating within the statutory license based on the [*Launch Media*] decision, we do think it is important, at a minimum, that services offering more functionality, such as personalization features, should pay higher rates.").

[893] *See* 17 U.S.C. § 114(f)(1)(A)-(2)(A) (rates and terms "shall distinguish among different types of . . . services in operation"); *id.* § 803(c)(3) (CRB's determination to be supported by written record).

[894] *See* NAB First Notice Comments at 4; NRBMLC First Notice Comments at 24; NPR First Notice Comments at 5; SRN Broadcasting First Notice Comments at 1.

[895] 17 U.S.C. § 114(j)(13).

[896] 17 U.S.C. § 114 (d)(2)(C)(ii). *See, e.g.,* NAB First Notice Comments at 4-5; NRBMLC First Notice Comments at 24; NPR First Notice Comments at 5; SRN Broadcasting First Notice Comments at 1.

[897] *See* H.R. REP. No. 104-274, at 13-15, 20-21.

particulars would seem to be more appropriately the province of regulation. As suggested below, the Office believes that in updating the music licensing system, Congress should commit more of its nuances to administrative oversight. The technical conditions for eligibility under the section 112 and 114 licenses would seem to fall into this category, as the effectiveness and impact of these provisions has likely changed, and will continue to change, over time.

Finally, some have suggested a modification of the provisions of section 112 and 114 that permit the making of server—or "ephemeral"—copies to facilitate licensed services. These parties seek to confirm that multiple server copies may be made and retained indefinitely by a licensed service.[898] Although the main provision at issue—17 U.S.C. § 112(e)—is less than a model of clarity,[899] the Office is not aware that the imprecision has resulted in any real-world disputes, and does not see this as an especially pressing issue.[900] Nonetheless, it would probably be worthwhile in any general update of section 112 and 114 to refine the statutory language with respect to the number and retention of server copies so as to eliminate any doubt as to the operation of the section 112 license.

b. Ratesetting

The embattled ratesetting standards for internet and satellite radio—section 801(b)(1) versus willing buyer/willing seller—are discussed at some length above in connection with overall questions of licensing parity. As explained there, the Office believes that government ratesetting processes for both sound recordings and music should be conducted under a single, market-oriented standard. Accordingly, in the Office's view,

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[898] CTIA First Notice Comments at 16-18; NAB First Notice Comments at 2, 7; Music Choice First Notice Comments at 11-13; DiMA Second Notice Comments at 18.

[899] Section 112(e) somewhat cryptically indicates that only a single phonorecord (*i.e.*, server copy) can be made "unless the terms and conditions of the statutory license allow for more." 17 U.S.C. § 112(e).

[900] A larger question may be whether the provisions of the section 112 license pertaining to the copies made to support section 114 services should be folded into section 114 to create a truly unified license covering both performances and necessary reproduction rights. As it currently stands, the CRB is obligated in the relevant ratesetting proceedings to set a separate (and in practice, essentially nominal) rate for the ephemeral uses. *See* 17 U.S.C. § 112(e)(3); *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220, 1225-26 (D.C. Cir. 2009) (remanding to the CRB to specify a royalty for the use of the ephemeral recordings); Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 75 Fed. Reg. 5513 (Feb. 3, 2010) (setting a separate rate for the 112(e) license). The proportion of royalties payable under section 112 is of some economic consequence, however, as unlike section 114 royalties—which are paid directly to performing artists and musicians as well as to record labels—section 112 royalties are paid only to sound recording owners. *See* Review of Copyright Royalty Judges Determination, 73 Fed. Reg. at 9146. Because it was not a focus of discussion during the study, the Office has not formed an opinion on this.

the section 112 and 114 rates currently set under the 801(b)(1) standard (*i.e.*, those applicable to satellite radio and pre-existing subscription services) should be migrated to the willing buyer/willing seller standard or some alternative formulation aimed at establishing rates equivalent to those that would be negotiated in the free market.[901] The Office further recommends that ratesetting should occur on an "as-needed" basis, as described above.

c. Producer Payments

The Office notes the further concern of some that the section 112 and 114 royalty allocations do not recognize the contributions of sound recording producers, who in many instances not only supervise, but also have significant creative input into, finished recordings. Despite the fact that many producers are creators of sound recordings in their own right, they are not among the parties entitled by statute to direct payment by SoundExchange.[902]

Compensation of producers is contractually based. They may be paid an up-front fee for their efforts and/or receive a share of the artist's future royalties.[903] In some cases, an artist may provide a letter of direction requesting SoundExchange to pay the producer's share of the artist royalties collected by SoundExchange, which SoundExchange will honor.[904] NARAS has suggested that this informal practice—which is not contemplated by the statutory payment mechanism set forth in section 114—be recognized through a legislative amendment. In NARAS' words, this will provide producers "the same fair, direct-payment option available to performers."[905]

Because the producer's share comes out of the featured artist's statutory entitlement, such recognition would not require a change in the current statutory allocation, but would merely clarify the authority of SoundExchange to honor a letter of direction.

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[901] Section 114 provides for an interim ratesetting process for new services. *See* 17 U.S.C. § 114(f)(2)(C) (allowing copyright owners or new services to initiate out-of-cycle proceeding). It does not provide for expedited proceedings, however. The Office did not hear much about the use or efficacy of this process in the course of its study, perhaps because it is rarely invoked. As discussed in connection with musical work performance and mechanical licenses, however, the Office believes it is important to have a cost-effective and expeditious interim ratesetting procedure, which could be implemented for the section 112 and 114 licenses as well under the Office's proposed system.

[902] These include sound recording owners, featured artists, and unions representing nonfeatured musicians and vocalists. 17 U.S.C. § 114(g)(2).

[903] PASSMAN at 121-126.

[904] *2013 SoundExchange Letter of Direction*.

[905] *See* NARAS First Notice Comments at 5-6.

Though it would be beneficial to hear more from artists on this issue,[906] the Office agrees that NARAS' proposal to confirm the existing practice through a technical amendment of the statute merits consideration.

d. Termination Provision

Unlike section 115, sections 112 and 114 do not include a right to terminate a licensee that fails to account for and pay royalties. This not only severely undermines the ability of SoundExchange to police noncompliant licenses, but also allows such licensees to continue to exploit valuable sound recordings without payment to their owners. As SoundExchange explains it:

> "Noncompliance with statutory license requirements is commonplace. For 2013, approximately a quarter of royalty payments were not made on time; two-thirds of licensees required to deliver reports of the recordings they used have not delivered at least one required report; and at least one quarter of such licensees have not delivered any such reports at all."[907]

SoundExchange observes that it tries to work with problem licensees to improve their compliance. But when such efforts prove unsuccessful, SoundExchange—and the copyright owners it represents—should have a remedy. The Office does not see a justification for continued licensing of a user that is not meeting its obligations. The Office therefore agrees with SoundExchange that the section 112 and 114 statutory licenses should be amended to include a termination provision akin to that in section 115.[908]

5. Public and Noncommercial Broadcasting

Public broadcasters—including noncommercial educational broadcasters—lament the inefficiencies and limitations of the statutory provisions in sections 114 and 118 that

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[906] Recording artists did not comment on this proposal in the course of the study.

[907] SoundExchange First Notice Comments at 5.

[908] Section 115 provides that:

> If the copyright owner does not receive the monthly payment and the monthly and annual statements of account when due, the owner may give written notice to the licensee that, unless the default is remedied within thirty days from the date of the notice, the compulsory license will be automatically terminated. Such termination renders either the making or the distribution, or both, of all phonorecords for which the royalty has not been paid, actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506.

17 U S.C. § 115(c)(6).

govern their use of music content.[909] The Office concurs that these provisions are unwieldy and believes that they should be reviewed and updated to better reflect Congress' desire to accommodate public broadcasting activities.[910]

Especially in light of the relatively low royalty rates paid by public broadcasters, it makes little sense to require them to engage in a multitude of negotiations and ratesetting proceedings in different fora—before the CRB under sections 112 and 114 for digital sound recording performance rights, before the CRB under section 118 for over-the-air musical work performance and associated reproduction rights, under the consent decrees for digital musical works performance rights covered by ASCAP and BMI, and through private negotiations for musical work performance and reproduction rights falling outside of the foregoing categories.[911] Instead, the Office suggests that the ratesetting processes applicable to public broadcasters be consolidated within a unified license structure under section 118 under the auspices of the CRB.[912] By separating out all noncommercial uses for consideration under a single framework, the royalty rates for public broadcasters would likely be much more efficiently resolved.[913]

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909 *See* EMF First Notice Comments at 5-15; NPR First Notice Comments at 4-7; NRBNMLC First Notice Comments at 14-22; PTC at 3-12.

910 *See, e.g.*, H.R. REP. NO. 94-1476, at 117 (noting "that encouragement and support of noncommercial broadcasting is in the public interest" and "that the nature of public broadcasting does warrant special treatment in certain areas").

911 *See generally* NRBNMLC First Notice Comments at 14-15.

912 *See* EMF First Notice Comments at 14-15. In so amending the section 118 license to cover both sound recording and public performance rights, it may be appropriate to expand the antitrust exemption currently contained in section 118 to facilitate collective negotiation of rights between noncommercial users and copyright owners for uses outside the statutory license as well. *See* PTC First Notice Comments at 11.

913 *Compare* NRBNMLC First Notice Comments at 14 (noting that "[f]or the last several license terms, religious broadcasters . . . have been able to agree upon rates and terms with ASCAP, BMI, and SESAC without the need for a rate-setting proceeding"), *with* EMF First Notice Comments at 8-9 (noting that the section 114 rulemaking joins both commercial and noncommercial entities, and that noncommercial entities "are rarely able to negotiated a pre-litigation settlement—forcing their participation in the CRB litigation process").

In establishing a unified license for public broadcast activities, the Office sees no need to depart from its view that, as with other statutory uses, the CRB should consider such rates under a generally applicable, market-based standard. Experience with the section 112 and 114 ratesetting process for noncommercial entities has shown, for example, that the willing buyer/willing seller standard can adequately account for the limited financial resources of, and other factors particular to, noncommercial users. *See* NRBNMLC First Notice Comments at 11-13 (noting that the CARP and CRB have consistently set lower rates for noncommercial broadcasters).

In reforming the section 118 license, Congress should ensure it appropriately facilitates digital transmissions by public broadcasters, including the streaming of archived programming.[914] But absent a significant change in congressional policy, the Office sees no need to expand the statutory license to include permanent uses such as downloads or physical products, as some noncommercial broadcasters have suggested.[915] The current statutory provisions for public broadcasting focus on performances in the course of over-the-air programming rather than the distribution of copyrighted works. Permanent uses by noncommercial entities—or even on-demand streaming of individual songs outside of the context of the original programming—could displace commercial sales, making it less clear that that special treatment is appropriate.

D. Licensing Efficiency and Transparency

There seems to be universal agreement among industry participants that accurate, comprehensive, and accessible licensing information, as well as transparent usage and payment data, are essential to a better functioning music licensing system.

1. Industry Data

a. Publicly Accessible Database

Some stakeholders have suggested that the government—for example, the Copyright Office—could undertake the task of creating and maintaining a comprehensive database of musical work and sound recording information, including a system of standard identifiers.[916] As appealing as such a vision may be, the Office believes that it would not be the best result for the twenty-first century marketplace to have the government start from scratch. The relevant universe of music data comprises tens of millions of musical works, sound recordings and information about them. Setting aside any legal impediments, as a practical matter, it would be extremely challenging for the government to gather, ingest, and standardize this ocean of information to be made available within a useful time frame. Any such database would be highly dynamic and require a constant flow of information from MROs, publishers and others concerning newly created works, transfers of ownership, and changes in licensing authority to be kept up to date. These are functions already performed in varying degrees by existing private organizations in collaboration with individual stakeholders.

In light of the above considerations, the Office believes that any solution to the music data problem should not compete with, but instead draw upon, existing industry resources. As a threshold matter, any centralized database should be closely tied to the

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[914] NRBNMLC First Notice Comments at 14.

[915] *See* NPR First Notice Comments at 7.

[916] ABKCO First Notice Comments at 4; DiMA Second Notice Comments at 5.

interests of the copyright owners and licensees it serves. That said, the government should establish incentives through the statutory licensing regime to encourage private actors to coordinate their efforts and contribute to a publicly accessible and authoritative database. In other words, there is a role for both the government and private sector alike.[917]

b. Adoption of Data Standards

The lack of unique and universally employed identifiers for the millions of musical works and sound recordings in the marketplace has been a topic of discussion—and source of discouragement—among industry participants for many years. As a result, there have been some laudable efforts within the industry to address the data problem by persuading market participants to adopt standard identifiers and messaging formats, with some amount of success. The DDEX messaging system appears to have emerged as a leading industry standard for the formatting and delivery of metadata relating to transactions involving digital music.[918] A more recent example of collaboration is the MusicMark initiative, which would rationalize and reconcile sometimes conflicting PRO song data among the American and Canadian PROs ASCAP, BMI, and SOCAN.[919]

But despite these efforts, so far, no comprehensive solution to the data issue has emerged.[920] In part, this appears to be a problem of coordinating private actors, many of whom are invested in, and understandably rely upon, their own data systems and do not wish to undermine these important assets. It is also a legacy problem, in that much of the data used today originated in the pre-digital era, when standardization and interoperability were not critical concerns. For example, the industry did not implement standard conventions for the treatment of artist or songwriter names. Some actors may

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[917] This does not mean that the Copyright Office should not itself seek to maintain more robust music data. To the extent it has the resources to modernize its systems to accommodate more comprehensive data, it should. For example, the copyright registration database could be modified to incorporate identifiers such as ISRCs and ISWCs. The Office's paper-based recordation system should be reengineered to become an electronic process so it is easier to record and research transfers of ownership. Both of these changes would help would-be licensees locate music owners. The Office has been reviewing these and other technology and data-driven questions in separate public processes. *See, e.g.*, BRAUNEIS; *see also* Maria Pallante, *Next Generation Copyright Office: What it Means and Why it Matters*, 61 J. Copyright Soc'y U.S.A. 213 (2014).

[918] *About DDEX*, DDEX, http://www.ddex.net/about-ddex (last visited Jan. 9. 2015).

[919] Tr. at 263:21-264:03 (June 24, 2014) (Stuart Rosen, BMI); *see also ASCAP, BMI and SOCAN Collaborate on MusicMark*, ASCAP (Apr. 2, 2014), http://www.ascap.com/playback/2014/04/action/ascap-bmi-socan-musicmark-collaboration.aspx.

[920] *PRS 'disappointed' at Global Repertoire Database collapse*, MUSIC ALLY.

see little short-term gain to be realized from the substantial investment of resources it would take to clean up and harmonize older records.

Some stakeholders advocate for an entirely new approach to tracking creative works and usage, suggesting that we should look to new technologies to attach unique identifiers to each different version of a song, each different recording of that song, each individual's interest in that song, and each individual use of that song.[921] One interesting proposal would rely on audio fingerprinting rather than just metadata to identify songs.[922] The Office hopes that these or other technological innovations may someday be deployed to the benefit of the music marketplace.

For now, though, the Office believes it is important to focus on what might be reasonably achieved in the near term—again taking into consideration and capitalizing upon industry practices as they exist today. To this end, the Office solicited comments on the most commonly used and useful identifiers, and received helpful guidance from a number of parties.[923] Based on these comments, it appears that the most critical and widely (though not universally) used identifiers are, in the case of musical works, the ISWC, and in the case of sound recordings, the ISRC. The Office believes these two identifiers should, over a period of time (*e.g.*, five years) become required elements within the proposed GMRO-managed database, as described below.

A more recent standard is the ISNI, which can be used to identify songwriters and recording artists, and is gaining acceptance in the industry. There appears to be general agreement that, as new users and uses continue to proliferate, and individual writers and artists seek to participate in the marketplace, it is of critical importance to be able to identify creators unambiguously.[924] ASCAP and BMI have already begun implementing use of ISNI.[925] This is another data standard that the Office believes should be encouraged and possibly made mandatory over a plausible time frame.

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921 *Music Licensing Hearings* at 71-72 (statement of Jim Griffin, OneHouse).

922 Tr. at 243:13-18 (June 17, 2014) (Helene Muddiman, CEO, Hollywood Elite Composers); *see also How Content ID Works*, GOOGLE, https://support.google.com/youtube/answer/2797370?hl=en (last visited Jan. 23, 2015).

923 Of particular assistance was the student submission from the Pipeline Project 2014, Belmont University's Mike Curb College of Music Business and Entertainment, which provided an insightful summary and analysis of relevant data standards based on a series of interviews the students conducted with music industry professionals. *See* Pipeline Project Second Notice Comments.

924 Kristin Thomson, *Metadata for Musicians*.

925 ASCAP Second Notice Comments at 8*; see also* Pipeline Project Second Notice Comments at 4-5.

The ISWC standard and the ISRC standard are internationally recognized, as is the ISNI. The ISWC, developed by CISAC, is assigned by individual qualified regional or local numbering agencies; in the U.S. and Canada, ASCAP is the appointed ISWC administrator.[926] The ISRC, administered by IFPI, is allocated by appointed regional agencies in each country; the U.S. ISRC agency is the RIAA.[927] The ISNI standard, launched with CISAC's participation, is meant to replace existing, disparate identification standards for individual creators.[928] ISNIs are assigned to U.S. authors by one or more designated private registration agencies.[929]

The Office's focus on the above standards does not mean that others are unimportant or irrelevant.[930] Legacy standards remain useful for particular entities,[931] and new standards may come into play. The possibility of identifying sound recordings and musical works through audio-based sampling technologies is especially intriguing. Based on the current state of affairs, however, the Office believes that the most realistic strategy to address the data issues plaguing the music industry at present would be to strongly incentivize the universal adoption and dissemination of at least the three data standards described above. Beyond this, as discussed below, it would make sense to provide for regulatory authority to allow for the consideration and adoption of additional data standards over time as appropriate.

2. Fair Reporting and Payment

a. Writer and Artist Shares

Throughout the study, a paramount concern of songwriters and recording artists is transparency in reporting and payment. As digital licensing deals multiply and increase in complexity, it can become quite difficult to follow the money. Songwriters and artists

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926 *Frequently Asked Questions*, ISWC INTERNATIONAL AGENCY, http://www.iswc.org/en/faq.html (last visited Jan. 23, 2015); Pipeline Project Second Notice Comments at 5.

927 *Obtaining Code*, USISRC.ORG, http://www.usisrc.org/about/obtaining_code.html (last visited Jan. 23, 2015); Pipeline Project Second Notice Comments at 6.

928 *See* Gatenby & MacEwan at 5-6.

929 The first U.S. registration agency is Bowker, an affiliate of the research and technology company ProQuest. *See id.*; *Bowker Becomes First ISNI Registration Agency in the U.S.*, BOWKER (June 21, 2012), http://www.bowker.com/en-US/aboutus/press_room/2012/pr_06212012a.shtml; Bowker, *Use of ISNI Is Growing Fast Among Authors, Says New Bowker Analysis*, YAHOO FINANCE (May 7, 2014), http://finance.yahoo.com/news/isni-growing-fast-among-authors-144800650.html.

930 As suggested below, additional standards that might be useful in either the short or longer term could be evaluated and potentially adopted by regulation.

931 For example, if IPIs and UPCs (discussed above) continue to be relevant in some contexts, and might be considered as potential additional data elements to be collected in the GMRO database.

want to ensure that they understand the royalty scheme, are able to track the use of their works, and are paid what they are owed.

In the case of performance royalties, such concerns are greatly diminished when the songwriter or artist is paid through a PRO or SoundExchange. PROs employ distribution rules that are generally known by their members,[932] while SoundExchange allocates royalties according to the statutory formula. In the case of a direct deal, however, the label or publisher is obligated only by the terms of the artist or songwriter agreement, which may not expressly address these issues.[933]

Of particular concern are the sometimes sizeable advances against future royalties that are paid by online services to major record labels and music publishers, and whether and how these are reported to and shared with artists and writers. Sometimes, if royalty obligations are less than anticipated, such an advance may not be fully recouped by the service during the licensing period, so there are leftover funds. In such a situation, there may be no clear understanding—or contractual provision—that addresses whether those funds should be paid out to the songwriter or artist, and if so, on what basis. A recent example of the advance issue cited by songwriters is a direct deal between the publisher Sony/ATV and DMX music service for public performance rights, in which Sony/ATV apparently received a large advance from the service—possibly in exchange for a lower royalty rate.[934] Songwriters worry that they are not able to monitor this type of arrangement to ensure that they receive their fair share of the total consideration paid for the use of their works.

Also concerning to music creators is the fact that labels and publishers are now known to take equity stakes in online services as part of their licensing arrangements. For example, the major labels together reportedly negotiated a nearly 18% stake in Spotify.[935]

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[932] *ASCAP's Survey and Distribution System: Rules & Policies*, ASCAP (June 2014), http://www.ascap.com/~/media/files/pdf/members/payment/drd.pdf; *Royalty Policy Manual*, BMI, http://www.bmi.com/creators/royalty_print (last visited Jan. 16, 2015). Although songwriters appear generally to have confidence that the PROs are reporting to them accurately, there are some writers who take issue with the distribution rules themselves. For example, ASCAP and BMI pay substantial bonuses for current hits, which reduce the royalty pool for "evergreen" titles. In addition, PROs rely on sampling techniques rather than census data to calculate royalties in many contexts, which some complain may cause less popular songs to be overlooked. Tr. at 22:11-27:01 (June 5, 2014) (Royal Wade Kimes, Wonderment Records) ("We do need a collective, ASCAP, BMI, somebody to collect the stuff, but we also need it to be distributed rightly.").

[933] Indeed, at least until recently, songwriter agreements with publishers simply assumed payment of the writer's share of performance royalties by a PRO. *See, e.g.*, Tr. at 71:13-72:03 (June 5, 2014) (Brittany Schaffer, NMPA/Loeb & Loeb LLP).

[934] MMF & FAC Second Notice Comments at 16-17, 47 n.70; SGA Second Notice Comments at 14-15, Exhibit 2 n.7.

[935] *See* Lindvall, *Behind the Music: The Real Reason Why the Major Labels Love Spotify*.

Questions arise as to how such equity deals are (or are not) reported to artists and songwriters, and whether the value received by the label or publisher impacts the royalties that are paid.[936] Again, the artist or songwriter contract may not address such issues.[937]

These concerns must be addressed as part of any updated licensing framework, especially one that allows publishers to opt out of the statutory licensing system and pursue direct deals. As mentioned above, under any such deal, songwriters should have the option of being paid their writer's share of performance royalties directly through their preferred MRO. That is, even if the music service is paying the publisher's royalties (including mechanicals) to the publisher directly, it would transmit a copy of its usage report and the writer's share of performance royalties to the MRO for the MRO to administer.[938] The Office trusts that such an approach could be acceptable to the publishers, since the major publishers who have been contemplating withdrawal from the PROs appear also to be considering the possibility of continuing administration of royalty distributions by the PROs under directly licensed deals.[939]

While there has been less focus on this issue in relation to SoundExchange—which is not facing a large-scale "withdrawal" problem[940]—the Office notes that the same principle

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[936] *See* A2IM Second Notice Comments at 5-7 (explaining that some of the largest digital music services have entered into direct licensing deals with record labels or publishers that include compensation in the form of advances or equity, but that such compensation is not necessarily shared with creators); SGA Second Notice Comments at 14-15.

[937] Notably, however, music publishers have addressed this issue in their negotiated streaming settlement under section 115, since adopted as regulation. 37 C.F.R. § 385. The definition of revenue to which the percentage royalty rate is applied in the streaming regulations requires record companies to account for "anything of value given for the identified rights to undertake the licensed activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or nonmonetary consideration . . ." *Id.* § 385.11, 385.21 (definition of "applicable consideration").

[938] To ensure the transparency of such a hybrid arrangement, the withdrawing publishers should make the material financial terms of their direct deals—the royalty rates, advances, and any other consideration from the licensee attributable to the use of the songwriter's work—available to their songwriters.

[939] *See Pandora Ratesetting*, 6 F. Supp. 3d at 337; *see also* Tr. at 38:06-08 (June 17, 2014) (David Kokakis, UMPG); BMI Second Notice Comments at 14 ("In the context of partial rights withdrawal, BMI can still assist publishers in providing certain royalty administration services for their direct licenses covering the withdrawn rights, with administration terms and fees as agreed to by the parties. BMI would continue to provide its customary licensing and distribution services to the publishers and songwriters with regard to all other aspects of the public performing right.").

[940] In this regard, however, it should be noted that there has recently been some direct licensing of noninteractive digital performance rights outside of SoundExchange. As mentioned above,

should apply there. To the extent record companies enter into direct licensing relationships with digital providers, artists and musicians should have the option of continuing to receive their share of royalties through that organization.

b. Best Practices for Transparency

More generally, issues surrounding transparency in reporting and payment by music publishers and record labels under songwriter and artist agreements are concerns that might be productively addressed through the consideration and adoption of best practices to ease friction in this area. In 2009, for instance, record labels and music publishers agreed to a series of voluntary changes to improve licensing practices and the flow of royalties under section 115, which have been memorialized in a continuing memorandum of understanding.[941] A similar effort might be undertaken to establish best practices to ensure transparency in label and publisher reporting and payment to creators. The Office hopes that major labels and publishers will consider engaging with artists and publishers in a voluntary fashion to make progress on these issues in the private realm.

E. An Updated Music Licensing System

As noted above, nearly ten years ago, music publishers and digital media companies appealed to Congress to pass SIRA, legislation that would have created a new collective licensing system under section 115 for the digital use of musical works. While SIRA was more limited in scope than what would seem to be called for today, it nonetheless featured some concepts that the Office believes could help to inform a more general overhaul of our licensing system.

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iHeartMedia has entered into licensing agreements with WMG and some independent labels for deals covering both terrestrial and internet radio. Christman, *Here's Why Warner Music's Deal with Clear Channel Could be Groundbreaking for the Future of the U.S. Music Biz (Analysis)*. Pandora recently struck a direct deal with Merlin, an entity that negotiates on behalf of independent record labels; under this arrangement, though, Pandora agreed to continue to pay artist royalties through SoundExchange. Glenn Peoples, *Pandora Signs First Direct Label Deal with Merlin*, BILLBOARD (Aug. 6, 2014), http://www.billboard.com/articles/business/6207058/pandora-label-deal-merlin.

[941] *See NMPA Late Fee Program*, NMPA LATE FEE SETTLEMENT.COM, http://www.nmpalatefeesettlement.com/index (last visited Jan. 22, 2015) (explaining the terms of the MOU in which record labels and music publishers (represented by RIAA and NMPA/HFA respectively) agreed to improve mechanical licensing practices and encourage prompt resolution of disputes); *see also Memorandum of Understanding (MOU 2)*, NMPA LATE FEE SETTLEMENT.COM, http://www.nmpalatefeesettlement.com/docs/mou2.pdf (last visited Jan. 22, 2015) (in which the record labels and music publishers extended the 2009 MOU through 2017).

First, SIRA recognized that it could be appropriate to allow more than one entity (referred to as a "designated agent") to administer licenses, so long as each such entity represented at least a certain prescribed share of the publishing market. Second, SIRA would have offered licensees the opportunity to obtain licenses on a blanket, rather than song-by-song, basis by serving notice on the designated agents. Third, SIRA recognized that one such agent (the "general designated agent") should serve as a default licensing entity for publishers that had not selected a different agent. And finally, SIRA provided for each designated agent to maintain a database listing ownership information for the musical works it administers.[942] While there was disagreement about the details of SIRA, these basic organizing principles were appealing to many.[943] The Office's proposal for an updated licensing framework also draws upon these concepts.

But even though SIRA may represent a good starting point, it is only that. As digital models have proliferated, the drawbacks of our current system have become more pronounced. The intervening decade has produced a greater sense of urgency concerning the strains on the current system.

Stakeholders focus in particular on the lack of reliable licensing data, which leads to inefficiencies and failures in the licensing process. The Office agrees with commenting parties that much of what is ailing our system would be greatly ameliorated if all those who needed it had access to authoritative data concerning the ownership of musical works and sound recordings. In addition, because digital services typically receive only track-based information for sound recordings that is not tied to the underlying musical work, there needs to be an efficient mechanism for licensees to associate the sound recordings they use with the musical works they embody.

1. MROs

Under the Office's proposal, except to the extent they chose to opt out of the blanket statutory system, publishers and songwriters would be obligated to license their public performance and mechanical rights through their MROs.[944] As explained above, an

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[942] SIRA, H.R. 5553.

[943] *See* HFA, *Legislative News: Section 115 Reform Act of 2006 (SIRA) Introduced*, SOUNDCHECK, June 2006, at 1, *available at* https://secure.harryfox.com/public/userfiles/file/Soundcheck/viewSoundCheck606.pdf ("While [DiMA, the NMPA, and the RIAA] have not reached complete agreement on all aspects of this legislation, we are optimistic that in the coming weeks we will work together with Chairman Smith and Representative Berman to ultimately pass historic legislation that will promote greater innovation and competition among digital music providers, deliver fair compensation to music creators and most importantly, greatly expand music choice and enjoyment for music fans.").

[944] Regardless of opt-out status, however, just as is the case today, a willing publisher could agree to a voluntary license with a willing licensee outside of the statutory regime. But in order to *require* the licensee to negotiate outside of the statutory process, the publisher would need to

MRO would have the ability to administer, and bundle, performance and mechanical rights on behalf of the publishers and songwriters it represented. It would also collect and distribute the royalties due under such licenses.[945]

An MRO could be any entity representing the musical works of publishers and songwriters with a market share in the mechanical and/or performance market above a certain minimum threshold, for example, 5%. Existing rights organizations, such as ASCAP, BMI, HFA and others, could thus qualify as MROs. Each MRO would enjoy an antitrust exemption to negotiate performance and mechanical licenses collectively on behalf of its members—as would licensee groups negotiating with the MROs—with the CRB available to establish a rate in case of a dispute.[946] But MROs could not coordinate with one another and, as discussed above, would be subject to at least routine antitrust oversight to guard against anticompetitive behavior. They would also be subject to potential CRB ratesetting for all uses of their members' works except for those that had been withdrawn.

Each MRO would be required to supply a complete list of the publishers, works, percentage shares and rights it represented, as well as the MRO's licensing contact information, to the GMRO, and would be obligated to keep that information current. The requirement to identify the titles and writers of represented works essentially tracks what is required today under the ASCAP consent decree and has long been voluntarily provided by the PROs and HFA through their public "lookup" databases.[947] The critical

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assert its opt-out right. Additionally, to effectuate such a voluntary arrangement, the publisher would need to notify the MRO of the agreement, so that the MRO could make appropriate adjustments to its collection and distribution processes.

[945] Under the new MRO-based system, record labels would no longer engage in "pass-though" licensing of musical works as they are entitled to do today under section 115. Third-party services would instead seek blanket licenses from the MROs, or directly from any publishers who had opted out. Apart from long-time concerns by publishers and songwriters about their inability to receive direct payment from digital services under the pass-through regime, the possibility of varying rates under the updated licensing framework being proposed would seemingly render pass-through licensing inefficient at best. In their comments, record labels indicated a willingness to eliminate this aspect of section 115. *See* RIAA Second Notice Comments at 19 ("The major record companies generally support in principle the elimination of pass-through licensing.").

[946] The section 112, 114, and 115 licenses contain antitrust exemptions to allow copyright owners and users to negotiate collectively, and the PROs are permitted to do so under the consent decrees. *See* 17 U.S.C. §§ 112(e)(2), 114(e)(1), 115(c)(3)(B).

[947] *See* ASCAP Consent Decree § X; *Ace Title Search*, ASCAP, https://www.ascap.com/Home/ace-title-search/index.aspx (last visited Jan. 29, 2015); *BMI Repertoire*, BMI, http://repertoire.bmi.com/startpage.asp (last visited Jan. 29, 2015); HFA, *Songfile Search*, SONGFILE, https://secure.harryfox.com/songfile/public/publicsearch.jsp (last visited Jan. 16, 2015).

difference is that the publicly accessible data would be available in a more sophisticated database format that would facilitate automated matching functions, bulk licensing processes, and reconciliation of third-party databases.

MROs would also be responsible for notifying the GMRO of any members that had exercised opt-out rights by providing the relevant opt-out information, including where a direct license might be sought, for the central database so potential licensees would know where to go for license authority. Additionally, under requirements that would be phased in over time, MROs would need to supply the ISWC—and over time, the ISNI—identifiers for each of the works they represented. As everyone appears to agree, the move to unique identifiers as a primary means to recognize both musical works and sound recordings is essential to an efficient licensing system.

But MROs would not have to share all of their data for purposes of the public database. For example, there would be no need for an MRO to provide contact information for its members (other than those that opted out) since the MRO would be responsible for distributing royalties under the licenses it issued. Details about contractual arrangements between publishers and their songwriters that the MROs might need for their own distribution purposes would seem to be unnecessary to provide for public use. Under the Office's approach, MROs would only be required to furnish such information as would be necessary to facilitate accurate licensing transactions and usage reporting in a system of multiple MROs. As suggested below, the specific data to be supplied could be subject to regulatory oversight and adjusted over time.

2. The GMRO

Even though the preponderance of licensing activity would be carried out by the MROs and directly licensing publishers, the hub of the new licensing structure would be the GMRO. Similar to SoundExchange, the GMRO ("SongExchange"?) would be a non-profit entity designated, and regulated, by the government.[948] The GMRO would be overseen by a board that included representatives from both the music publishing and songwriter communities.

By virtue of maintaining authoritative and accessible ownership data, the GMRO would help to coordinate licensing and royalty payments across the MROs and individual publishers. But it would not serve as a centralized collection facility other than with respect to unidentified royalty recipients. The Office believes that adding an additional administrative layer to core royalty collection and distribution functions would add time

[948] SoundExchange is regulated by the Copyright Royalty Board as the designated collective. *See, e.g.* 37 C.F.R. §§ 380.2(c), 380.4.

and expense to these processes and should be avoided if possible.[949] At the same time, the GMRO would serve as the recipient for payments on behalf of unidentified owners.

a. Data-Related Responsibilities

The GMRO would ingest data from MROs and other authoritative sources to create its master database. The GMRO database would list the publishers, musical works, percentage shares and rights represented by the various MROs, along with prescribed identifiers such as ISWCs and ISNIs. In addition, the database would flag opt-out publishers, the specific rights and works that were opted out, and provide the publishers' licensing contact information.

In addition to musical work data, it seems that the GMRO could and should also incorporate sound recording data into the public database, including track titles, record labels, featured artists, play times and ISRCs. It is the Office's understanding that SoundExchange currently has identification and ownership information—including ISRCs—for approximately 14 million sound recordings.[950] The GMRO could absorb this data from SoundExchange. Through SoundExchange's continuing administration of the section 112 and 114 licenses, an ISRC requirement for remaining tracks—as well as the ISNI standard—could be phased in under those licenses, with the ongoing results to be shared with the GMRO.[951]

Like SoundExchange, the GMRO would play an active role in gathering missing data, reconciling conflicting data, and correcting flawed data. It would need to establish a process to handle competing ownership claims as necessary.

But perhaps most important among the data-related responsibilities of the GMRO. would be to gather or generate "matches" of musical works with sound recordings. There is simply no easy means for licensees to acquire generalized data identifying the musical works embodied in individual sound recordings. Some private entities such as HFA have made substantial progress on this front through a combination of automated and manual matching protocols, but there is no comprehensive source for this information, and even HFA has yet to match millions of titles.[952]

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[949] SIRA took a similar approach by providing for direct payment to the individual designated agents. SIRA, H.R. 5553.

[950] SoundExchange Second Notice Comments at 4-5.

[951] SoundExchange is currently exploring making its data available to others. *See id.* at 5 ("SoundExchange is actively exploring means by which it might provide interested services a means of accessing [its sound recording] data for use in identifying to SoundExchange with greater precision the recordings they use under the statutory licenses.").

[952] Tr. at 217:02-218:16 (June 23, 2014) (Christos P. Badavas, HFA).

A matching database would represent a huge advance in music licensing, as it would enable digital services efficiently to identify musical works and their owners based on the tracks they are using. Undoubtedly it is a significant undertaking, but given an appropriate level of resources it would seem to be achievable, at least with respect to the most frequently used songs. As HFA reports, 1-2 million sound recordings account for almost 95% of usage in a typical digital music service.[953] Happily (and not surprisingly), it is the most commercially valuable sound recordings and musical works that tend to be the easiest to identify and associate with one another.

On the licensee side of the equation, whenever an ISWC, IRSC or ISNI (or other prescribed identifier) appeared in the database, it would be a required element in a licensee's report under a section 114 or 115 license. The consistent use of these standards would undoubtedly facilitate the GMRO's efforts to match musical works to sound recordings and distribute royalties to their owners.

Finally, as noted above, the song data and licensing information collected by the GMRO would be publicly accessible—not only in the form of individual records through a "lookup"-style database, but also in bulk form and/or via APIs that would allow licensees the ability to use it to update their records or perform matching or other functions relating to their licensing needs.

b. Default Licensing and Payment

Notwithstanding the GMRO database and other available resources, there would still be works (and shares of works) for which the owners were not identified.[954] The GMRO would therefore also serve as the default licensing and collection agent for musical works (or shares of works) that licensees were unable to associate with an MRO or opt-out publisher. Services relying on blanket performance and/or mechanical licenses for musical works that had usage-based payment obligations would transmit records of use for unmatched works, along with associated payments, to the GMRO.[955] The GMRO

[953] NMPA & HFA First Notice Comments at 13.

[954] This is a particular concern with respect to new releases, as publisher and songwriter disagreements over their respective ownership shares in songs often delay the finalization of mechanical licenses for months or even years after the record is released. Tr. at 340:05-341:14 (June 23, 2014) (Andrea Finkelstein, SME).

[955] Since royalty obligations might vary among MROs and publishers, the default payments would need to be made in an amount sufficient to cover the highest potential rate payable to any entity with which the licensee had a licensing arrangement. In some cases, a blanket license might require payment of a set amount for the reporting period in question regardless of usage (for example, a fixed percentage of the service's revenues, as in the case of ASCAP's license with Pandora), with the royalty pool to be allocated by the collecting agent. In such a case, there would be no need to pay into the GMRO, and any reporting issues would need to be addressed by the MRO.

would then attempt to identify the MRO or individual rightsowner itself and, if successful, pay the royalties out.[956] If unsuccessful in its research efforts, the GMRO would add the usage record to a public unclaimed royalties list and hold the funds for some period of time—*e.g.*, three years—to see if a claimant came forward. As is the case with SoundExchange, after that period, the GMRO could use any remaining unclaimed funds to help offset the costs of its operations. Such a default licensing and payment option would provide protection for licensees—by reporting unmatched works and paying the associated royalties to the GMRO, they could avoid liability for infringement for those uses.

But any such system would require appropriate incentives to ensure that both licensees and publishers were holding up their respective ends of the bargain. Setting aside any general funding obligations in relation to the GMRO, which are discussed below, the Office believes that licensees should be required to pay an administrative fee (perhaps assessed on a per-title basis) for any unmatched uses reported to the GMRO.[957] In addition to encouraging due diligence on the part of licensees to locate missing information before resorting to the default system, such fees would help underwrite the GMRO's efforts to locate and pay rightsholders.

At the same time, MROs and their members should also be encouraged to maintain complete and reliable data with the GMRO. The primary incentive to do so, of course, would be to facilitate prompt and accurate payments by licensees. In this regard, the Office believes it could be useful to establish phased-in compliance targets over a period of several years for the provision of the most critical publisher data, including missing ISWCs, to the GMRO.[958] If, after an appropriate review of the situation and an

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[956] Any difference between the royalties paid to the GMRO and the actual rate of a subsequently identified publisher could be contributed to the GMRO to offset costs. In the case of a publisher not affiliated with an MRO and hence not subject to any rate agreement, the publisher should receive the lowest potential rate that the licensee might pay for that use and the GMRO could also deduct a reasonable administrative fee not greater than any fee currently charged by any of the MROs. This latter rule would incentivize publishers to affiliate with an MRO of their choice rather than rely on the much less efficient GMRO claims procedure.

[957] A somewhat analogous fee is currently required for the filing of an NOI with the Office under section 115 in lieu of serving it on a licensee when the licensee cannot be found in the Office's records (though no royalty payment is required). *See* 37 C.F.R. § 201.3(e)(1). As noted above, large-scale licensees appear to be reluctant to avail themselves of this process due to the filing fees (which reflect the costs incurred by the Office in administering these notices, as per 17 U.S.C. § 708(a)). The level of the administrative fee that would be assessed by the GMRO—which would receive more general funding from users, as discussed below—would need to be carefully assessed in relation to its purpose.

[958] By way of illustration, in year one, 20% of works listed by an MRO might be required to include the ISWC; in year two, 40%; and so on up to near-total compliance.

opportunity to rectify concerns, an MRO were found to fall short of the mark, any licensee required to pay the GMRO's administrative fee for unmatched works to that publisher would be entitled to recoup some portion of that fee (say half) from its royalty payments to that publisher pending correction of the problem.

c. Resources and Funding

A question that will inevitably arise in any discussion concerning an overhaul of our music licensing system is how the new system—more specifically, the startup costs and various activities of the GMRO—would be funded. The Office has some suggestions to offer on this point.

First, the Copyright Office believes that both copyright owners and users should bear the costs of the new system, as both groups will share in its benefits. Traditionally, publishers and songwriters have underwritten much of the cost of licensing performance and mechanical rights and distributing royalties through commissions paid to the PROs and HFA. But record labels and digital services have also borne significant administrative costs in gathering and compiling the data necessary to obtain and report under licenses.

As envisioned by the Office, the GMRO would build and maintain a public database of ownership and licensing information for musical works and sound recordings. As part of this obligation, it would be responsible for matching sound recording data to musical works. The GMRO would also be responsible for collecting and distributing royalties for unclaimed works. These are substantial undertakings. Some licensees have expressed willingness to help fund a more workable system.[959] The Office believes that publishers and songwriters will also need to contribute, although much of their contribution might be in the form of shared data.

As explained above, under the Office's proposal, every MRO, as well as SoundExchange, will be required to contribute key elements of data to create and maintain a centralized music database. MROs will be responsible for allocating and distributing the vast majority of royalties (and will charge commissions to publishers and songwriters for those services). In exchange for these contributions on the part of copyright owners, the Office believes that the primary financial support for the data-related and default licensing activities of the GMRO should come from fees charged to users of the section 112, 114, and 115 licenses.

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[959] *See, e.g.*, DiMA Second Notice Comments at 5 (suggesting that the government "designate a small portion of license fees" paid by licensees to cover costs); RIAA First Notice Comment at 22 ("Record companies are prepared to contribute information concerning new works, and potentially a share of start-up costs.").

Although music users would be paying royalties directly to MROs and individual publishers—and to SoundExchange as well—they would have a separate obligation to pay a licensing surcharge to the GMRO in recognition of the value it would be providing to the licensee community. The licensing surcharge might, for example, be assessed as a small percentage of royalties due from the licensee under its section 112, 114, and/or 115 statutory licenses, including any direct deals for equivalent rights. In order to fund startup costs, licensees could perhaps contribute a lump sum against future surcharge assessments, to be recouped over time.

The surcharge to be paid by statutory licensees could be determined by the CRB through a periodic administrative process based on the GMRO's costs, and would be offset by other sources of funding. For example, in addition to the generally applicable surcharge, as explained above, the Office believes that individual licensees should be charged an administrative fee in connection with reporting and paying unattributed uses to the GMRO.[960] Publishers not affiliated with an MRO who claimed works from the unmatched list would also be expected to pay a processing fee, as they would at an MRO. Nonstatutory licensees could be required to pay the GMRO's reasonable costs for the bulk provision of data. Such fees—which would help to offset the costs of the GMRO—could be considered by the CRB in establishing the surcharge.

An additional source of funding would be any royalties that remained unclaimed by publishers after the prescribed holding period (perhaps three years). Such unattributed monies—or "black box" funds—would also be available to offset the GMRO's administrative costs. As with the GMRO's other sources of income, these funds, too, could be considered by the CRB in establishing the licensing surcharge.[961]

3. The CRB

a. New Ratesetting Protocol

Under the Office's proposal, ratesetting by the CRB would shift from a five-year cycle to a system under which the CRB would step in only as necessary—that is, only when an MRO or SoundExchange and licensee could not agree on a rate.

The unfortunate reality is that the costs of ratesetting are very high, whether the proceeding occurs in federal court or before an administrative tribunal. The Office believes that the current approach under the section 112, 114, and 115 licenses—under which rates are required to be established for the full spectrum of uses for the upcoming five years—is probably not the most efficient use of resources. Such an approach

[960] As noted above, an MRO that failed to contribute adequate data to the GMRO could be required to absorb some portion of such administrative fees.

[961] If the black box funds were ever to exceed the GMRO's costs, the excess could be distributed to publishers by the GMRO based on a market-share-based allocation process.

presents the nontrivial problem of how to identify, evaluate and price still-nascent business models. Even if they are identified, some of these uses might be easily settled outside of the context of a CRB proceeding. In the case of existing models, the extant rates may be sufficiently satisfactory for both sides to continue in effect. Greater flexibility in the ratesetting process would allow the ratesetting body to address only those rates that were worthwhile to litigate.

In support of its proposal, the Office observes that ASCAP and BMI have operated under such an *ad hoc* system in the federal rate courts, with only a relatively small number of their rates actually litigated. A likeminded CRB approach could yield more voluntary agreements and less litigation. Further, licensees would no longer have to shoehorn themselves into an existing rate category to take advantage of statutory licensing, because MRO licenses could be specifically tailored to address the nuances of the business model at hand.

Last but not least, it is difficult to see how an integrated licensing framework such as that proposed by the Office could function under two different ratesetting paradigms, as exist in their separate worlds today. In order to bundle performance and mechanical licensing—or, as discussed below, sound recording and musical work rights—in an efficient manner, there should be a unified ratesetting process. The CRB would face enormous administrative challenges if it had to administer both periodic and *ad hoc* ratesetting proceedings simultaneously.[962]

b. All-In Rates for Noninteractive Streaming

During the study, various commenting parties floated the suggestion of all-in blanket licensing that would encompass both sound recording and musical work rights.[963] Our current framework presents seemingly insuperable hurdles to achieving what many view as a tantalizing goal. Even under the framework proposed by the Office—which notwithstanding publisher opt-out rights still contemplates ratesetting for musical works that has no equivalent on the sound recording side—it would be difficult to implement all-in rates on a broad basis.

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[962] In this regard, Congress might also wish to amend the statutory framework for the CRB to allow for greater flexibility in staffing. Currently, the statute is highly specific, in that it provides for three full-time staff members: one to be paid no more than the basic rate for level 10 of GS-15 of the General Schedule; one to be paid between the basic rate for GS-13 and level 10 of GS-14; and one to be paid between the basic rate for GS-8 and level 10 of GS-11. 17 U.S.C. § 802(b), (e)(2). Especially if its duties were expanded to include additional licensing activities and fee-setting responsibilities, the CRB would seemingly be better served with a statute that provided more discretion with respect to the number and seniority of the legal staff that assist the three Judges.

[963] *See, e.g.*, RIAA First Notice Comments at 14-17 (proposing a blanket licensing solution for all rights implicated when using musical works); Tr. at 194:05-18 (June 4, 2014) (Scott Sellwood, Google/YouTube) ("I certainly like the idea of an all-in valuation of the music copyright.").

In one area, however—the licensing of noninteractive streaming uses by internet services, satellite and terrestrial radio, and others—such a model might be achievable. Here the Office has suggested that government supervision of the public performance right be moved from the federal rate courts to the CRB. Accordingly, both sound recording owners and musical work owners would be subject to CRB ratesetting to the extent they were unable to negotiate agreements with digital providers. The Office believes that any such proceedings could potentially be combined.

Taking the suggestion of the RIAA, for example, record labels and music publishers could agree up front to a split of royalties as between them for the category of use to be litigated.[964] They could then participate jointly in the ratesetting proceeding vis-à-vis the licensee. The licensee's focus before the CRB would thus be on its total royalty obligation, rather than the particular amounts to be paid to labels or publishers. Even barring an up-front agreement between the labels and publishers, ratesetting for the service in question might still proceed on an all-in basis, with the CRB to establish the split between sound recordings and musical works in a separate phase of the proceeding that did not include the licensee.

c. GMRO Surcharge

As noted above, under the Office's proposal, the GMRO would be funded in part by a licensing surcharge to be paid directly by licensees to the GMRO. The Office believes that the CRB, with its in-house economic expertise, would be well equipped to determine the surcharge through a periodic review process. That process would be conducted separate and apart from any ratesetting activities. Indeed, an important element of such a proceeding would be to preclude any consideration of royalty rates in establishing the licensing surcharge (and vice versa). The surcharge would be set independently, based on licensee data and the GMRO's costs and capital needs.[965]

d. Procedural Improvements

In addition to the substance of the CRB's ratesetting determinations, a number of seasoned stakeholders addressed the procedural rules that currently govern the CRB's work. The CRB is constrained by procedural mandates set forth in section 803 of the Copyright Act, which govern the initiation and conduct of ratesetting proceedings, including such matters as filing rules for participants, the timing and content of direct cases, the handling of various evidentiary and discovery matters, and settlement

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[964] RIAA First Notice Comments at 15-17. Any such agreement concerning the royalty split would presumably need to address the parties' obligations to each other in relation to a settlement rather than a litigated outcome.

[965] As it does in CRB proceedings today, in considering appropriate fees, the CRB could impose safeguards to protect against public dissemination of confidential business information.

negotiations.[966] This sort of procedural detail is unusual in a federal statutory scheme and is more typically left to regulation or the discretion of the tribunal.

Stakeholders complain that the current CRB system is unduly burdensome and expensive. Currently, ratesetting participants are required to put in their written direct statement before they conduct discovery—that is, they are required to construct and support their rate proposals to the CRB without the benefit of economic information from the other side.[967] This is completely counterintuitive to anyone familiar with ordinary litigation practice.

In keeping with this construct, ratesetting proceedings are divided into separate direct and rebuttal phases, with discovery conducted after each phase.[968] Parties may seek to amend their rate proposals in response to what they learn in discovery.[969] In practical effect, this means there are two trial proceedings, with overlapping arguments and evidence, instead of one. As might be expected, stakeholders would prefer to have the issues for trial fully joined and addressed in single proceeding. The Office is sympathetic to these concerns and believes the CRB process should be modified so it more closely resembles typical litigation. As has been suggested by some, this could include greater reliance on the Federal Rules of Civil Procedure and Federal Rules of Evidence, albeit with appropriate modifications (such as relaxation of hearsay rules).[970]

Multifactor ratesetting standards also contribute to the length and expense of proceedings, as parties feel compelled to furnish evidence and argument on each statutorily prescribed factor. A move to a simpler standard such as willing buyer/willing seller—perhaps unembellished by specific considerations (in contrast to the standard as currently embodied in section 114[971])—might also help to streamline the ratesetting process by permitting each side to focus on the most salient aspects of their case.

Many CRB participants complained that the existing process does not facilitate early settlement. In order for a settlement to be the basis for an industrywide rate, it must be adopted by the CRB.[972] The CRB does not appear always to be comfortable in adopting settlement agreements that settle less than the entire proceeding—for example, a settlement among fewer than all participants—while the rest of the proceeding remains

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[966] *See generally* 17 U.S.C. § 803.

[967] *Id.* § 803(b)(6)(C)(ii).

[968] *Id.* § 803(b)(6)(C)(i)-(ii).

[969] *Id.* § 803(b)(6)(C)(i).

[970] *See id.* § 803(b)(6)(C)(iii) (allowing hearsay to be admitted upon CRB discretion).

[971] *Id.* § 114(f)(2)(B).

[972] *Id.* § 801(b)(7).

pending.[973] And the record shows that participants feel obligated to continue litigating until a settlement is adopted.[974] This is not an efficient system. The Office agrees that this should be rectified by clarifying the statutory provisions governing the CRB to favor partial settlements at any stage of the proceeding when requested by the settling participants.[975]

Finally, while the Office believes that the high-level procedural concerns described should be addressed by legislative amendments, Congress may also wish to remove unnecessary procedural details in the statute that are better left to regulation. The CRB should have the latitude to develop specific procedural rules—and modify them as appropriate—within the basic parameters set forth in the statute.

4. Regulatory Implementation

Should Congress decide to restructure the music licensing system, the Office believes that it might be most productive for any resulting legislation to set out the essential elements of the updated system and leave the particulars to regulation. Such a construct would likely be more realistic to enact than an exhaustive statutory prescription—especially in the case of music licensing, where the particulars can be overwhelming. In addition to whatever legislative advantages it might confer, a more general approach would have added benefit of flexibility, since regulations can be adjusted over time to address new developments and unforeseen contingencies.

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[973] The CRB has occasionally adopted settlements resolving some but not all rate concerns. *See, e.g.*, Adjustment of Rates and Terms for Preexisting Subscription and Satellite Digital Audio Radio Services, 72 Fed. Reg. 71,795 (Dec. 19, 2007); Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 4080. But adoption of partial settlements is not the norm.

[974] *See, e.g.*, Tr. at 122:15-22 (June 23, 2014) (Colin Rushing, SoundExchange) ("But it was this group, College Webcasters, Inc. We entered into a settlement with them. We also did a settlement with NAB. Neither of these settlements were actually adopted by the CRB until the very end of the proceeding. And so we found ourselves unsure of what, you know, whether the settlements were, actually, going to be adopted."); Tr. at 99:16-100:03 (June 16, 2014) (Brad Prendergast, SoundExchange) (the current system "leaves a lot of parties still in the litigation proceeding, when they'd rather not be"); Tr. at 129:17-130:03 (June 23, 2014) (Steven Marks, RIAA) ("I also think that the CRB, it would be nice to have, maybe, some set times for the CRB to rule on settlements that are proposed. We had, our last mechanical settlement that was offered, a delay of almost a year.").

[975] Notably, this problem would also likely be ameliorated by a move to an "as-needed" ratesetting system as recommended by the Office, where rate determinations would bind only the participants to the proceeding (notwithstanding their potential influence on other market actors). Such proceedings would focus on narrower disputes and should therefore be easier to resolve than proceedings covering a multitude of rates and stakeholders.

Logically, the Copyright Office should have primary regulatory responsibility for the many issues that would need to be addressed in implementing a new statutory framework. For example, the Office could establish rules for the provision of data to the GMRO, licensee reporting requirements, and collective audits. It could also promulgate technical requirements for the statutory licenses, with the power to update such specifications as necessary.

The CRB, too, would have regulatory responsibilities. In addition to its periodic review of the surcharge to be assessed by the GMRO, the CRB would enact rules that would govern the filing and conduct of the ratesetting proceedings it would oversee. Like the Copyright Office, the CRB should have the requisite regulatory authority to carry out its responsibilities.

5. Further Evaluation

Should Congress choose to embark upon a series of changes to our licensing system such as those described above, the Office recommends that the new system be evaluated by the Copyright Office after it has been operation for a period of several years. Assuming that the new licensing framework includes an opt-out mechanism as described above, the efficacy of that process would be of particular interest. If the opt-out system were found to be having adverse effects on the marketplace, Congress could consider narrowing those rights. If, on the other hand, the opt-out option were working well, Congress might wish to expand it to other categories.

APPENDIX A FEDERAL REGISTER NOTICES

search_cfm under the searchable listing of determinations or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Signed at Washington DC, this 20th day of February 2014.

Hope D. Kinglock,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2014–05760 Filed 3–14–14; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Eligibility To Apply For Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than March 27, 2014.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than March 27, 2014.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue NW., Washington, DC 20210.

Signed at Washington, DC, this 20th day of February 2014.

Hope D. Kinglock,

Certifying Officer, Office of Trade Adjustment Assistance.

Appendix—13 TAA Petitions Instituted Between 2/10/14 and 2/14/14

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
85059	Avery Dennison (Company)	Clinton, SC	02/10/14	02/10/14
85060	Fresenius Medical Care NA (Workers)	Livingston, CA	02/11/14	02/10/14
85061	IBM (State/One-Stop)	San Jose, CA	02/11/14	02/10/14
85062	Computer Sciences Corporation (State/One-Stop)	Oakland, CA	02/11/14	02/10/14
85063	EPIC Technologies, LLC (Company)	El Paso, TX	02/11/14	02/10/14
85064	Southside Manufacturing (Workers)	Blairs, VA	02/11/14	02/04/14
85065	Woodcraft Industries (Company)	Belletonte, PA	02/12/14	02/10/14
85066	Sun Edison (previously MEMC) (State/One-Stop)	St. Peters, MO	02/12/14	02/12/14
85067	FLSmidth Spokane Inc (Workers)	Meridian, ID	02/12/14	02/11/14
85068	GE Hitachi Nuclear Energy (Company)	Canonsburg, PA	02/12/14	02/11/14
85069	Allstate Insurance Company (Workers)	Roanoke, VA	02/12/14	01/28/14
85070	Time Machine, Inc. (Company)	Polk, PA	02/14/14	02/12/14
85071	General Electric (GE) (Union)	Ft. Edward, NY	02/14/14	02/04/14

[FR Doc. 2014–05758 Filed 3–14–14; 8:45 am]

BILLING CODE 4510–FN–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2014–03]

Music Licensing Study: Notice and Request for Public Comment

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of Inquiry.

SUMMARY: The United States Copyright Office announces the initiation of a study to evaluate the effectiveness of existing methods of licensing music. To aid this effort, the Office is seeking public input on this topic. The Office will use the information it gathers to report to Congress. Congress is currently conducting a review of the U.S. Copyright Act, 17 U.S.C. 101 *et seq.,* to evaluate potential revisions of the law in light of technological and other developments that impact the creation, dissemination, and use of copyrighted works.

DATES: Written comments are due on or before May 16, 2014. The Office will be announcing one or more public meetings to address music licensing issues, to take place after written comments are received, by separate notice in the future.

ADDRESSES: All comments shall be submitted electronically. A comment page containing a comment form is posted on the Office Web site at *http://www.copyright.gov/docs/musiclicensingstudy*. The Web site interface requires commenting parties to complete a form specifying their name and organization, as applicable, and to upload comments as an attachment via a browser button. To meet accessibility standards, commenting parties must upload comments in a single file not to exceed six megabytes (MB) in one of the following formats: The Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The form and face of the comments must include both the name of the submitter and organization. The Office will post the comments publicly on the Office's Web site in the form that they are received, along with associated names and organizations. If electronic submission of comments is not feasible, please contact the Office at 202–707–8350 for special instructions.

FOR FURTHER INFORMATION CONTACT: Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, by email at *jcharlesworth@loc.gov* or by telephone at 202–707–8350; or Sarang V. Damle, Special Advisor to the General Counsel, by email at *sdam@loc.gov* or by telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

Congress is currently engaged in a comprehensive review of the U.S. Copyright Act, 17 U.S.C. 101 *et seq.,* to evaluate potential revisions to the law in light of technological and other developments that impact the creation, dissemination, and use of copyrighted works. The last general revision of the Copyright Act took place in 1976 (''Copyright Act'' or ''Act'') following a lengthy and comprehensive review process carried out by Congress, the Copyright Office, and interested parties. In 1998, Congress significantly amended the Act with the passage of the Digital Millennium Copyright Act (''DMCA'') to address emerging issues of the digital age. Public Law 105–304, 112 Stat. 2860 (1998). While the Copyright Act reflects many sound and enduring principles, and has enabled the internet to flourish, Congress could not have foreseen all of today's technologies and the myriad ways consumers and others engage with creative works in the digital environment. Perhaps nowhere has the landscape been as significantly altered as in the realm of music.

Music is more available now than it has ever been. Today, music is delivered to consumers not only in physical formats, such as compact discs and vinyl records, but is available on demand, both by download and streaming, as well as through smartphones, computers, and other devices. At the same time, the public continues to consume music through terrestrial and satellite radio, and more recently, internet-based radio. Music continues to enhance films, television, and advertising, and is a key component of many apps and video games.

Such uses of music require licenses from copyright owners. The mechanisms for obtaining such licenses are largely shaped by our copyright law, including the statutory licenses under Sections 112, 114, and 115 of the Copyright Act, which provide government-regulated licensing regimes for certain uses of sound recordings and musical works.

A musical recording encompasses two distinct works of authorship: The musical work, which is the underlying composition created by the songwriter or composer, along with any accompanying lyrics; and the sound recording, that is, the particular performance of the musical work that has been fixed in a recording medium such as CD or digital file. The methods for obtaining licenses differ with respect to these two types of works, which can be—and frequently are—owned or managed by different entities. Songwriters and composers often assign rights in their musical works to music publishers and, in addition, affiliate themselves with performing rights organizations (''PROs''). These intermediaries, in turn, assume responsibility for licensing the works. By contrast, the licensing of sound recordings is typically handled directly by record labels, except in the case of certain types of digital uses, as described below.

Musical Works—Reproduction and Distribution. Under the Copyright Act, the owner of a musical work has the exclusive right to make and distribute phonorecords of the work (*i.e.,* copies in which the work is embodied, such as CDs or digital files), as well as the exclusive right to perform the work publicly. 17 U.S.C. 106(1), (3). The copyright owner can also authorize others to engage in these acts. *Id.* These rights, however, are typically licensed in different ways.

The right to make and distribute phonorecords of musical works (often referred to as the ''mechanical'' right) is subject to a compulsory statutory license under Section 115 of the Act. *See generally* 17 U.S.C. 115. That license—instituted by Congress over a century ago with the passage of the 1909 Copyright Act—provides that, once a phonorecord of a musical work has been distributed to the public in the United States under the authority of the copyright owner, any person can obtain a license to make and distribute phonorecords of that work by serving a statutorily compliant notice and paying the applicable royalties. *Id.*

In 1995, Congress confirmed that a copyright owner's exclusive right to reproduce and distribute phonorecords of a musical work, and the Section 115 license, extend to the making of ''digital phonorecord deliveries'' (''DPDs'')—that is, the transmission of digital files embodying musical works. *See* Digital Performance Right in Sound Recordings Act of 1995 (''DPRSRA''), Public Law 104–39, sec. 4, 109 Stat. 336, 344–48; 17 U.S.C. 115(c)(3)(A).[1] The Copyright Office has thus interpreted the Section 115 license to cover music downloads (including ringtones), as well as the server and other reproductions necessary to engage in streaming activities. *See* In the Matter of Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, Docket No. RF 2006–1 (Oct. 16, 2006), *http://www.copyright.gov/docs/ringtone-decision.pdf;* Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 73 FR 66173 (Nov. 7, 2008).

Licenses under Section 115 are obtained on a song-by-song basis. Because a typical online music service needs to offer access to millions of songs to compete in the marketplace, obtaining the licenses on an individual basis can present administrative challenges.[2] Many music publishers have designated the Harry Fox Agency, Inc. as an agent to handle such song-by-song mechanical licensing on their behalf.

The royalty rates and terms for the Section 115 license are established by an administrative tribunal—the Copyright Royalty Board (''CRB'') [3]—which applies a standard set forth in Section 801(b) of the Act that considers four different factors. These include: The availability of creative works to the public; economic return to the owners and users of musical works; the respective contributions of owners and users in making works available; and the industry impact of the rates.[4]

The Section 115 license applies to audio-only reproductions that are primarily made and distributed for private use. *See* 17 U.S.C. 101, 115. Reproductions and distribution of musical works that fall outside of the Section 115 license—including ''synch'' uses in audiovisual media like

[1] Under the terms of Section 115, a record company or other entity that obtains a statutory license for a musical work can, in turn, authorize third parties to make DPDs of that work. *See* 17 U.S.C. 115(c)(3). In such a ''pass-through'' situation, the statutory licensee is then responsible for reporting and paying royalties for such third-party uses to the musical work owner.

[2] Concerns about the efficiency of the Section 115 licensing process are not new. For instance, in 2005, then-Register of Copyrights Marybeth Peters testified before Congress that Section 115 had become ''outdated,'' and made several proposals to reform the license. *See Copyright Office Views on Music Licensing Reform: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary,* 109th Cong. 4–9 (2005). In 2006, the House Judiciary Committee's Subcommittee on Courts, the Internet, and Intellectual Property forwarded the Section 115 Reform Act (''SIRA'') to the full Judiciary Committee by unanimous voice vote. *See* H.R. 5553, 109th Cong. (2006). This bill would have updated Section 115 to create a blanket-style license. The proposed legislation was not reported out by the full Judiciary Committee, however.

[3] The Copyright Royalty Board (''CRB'') is the latest in a series of administrative bodies Congress has created to adjust the rates and terms for the statutory licenses. The first, the Copyright Royalty Tribunal (''CRT''), was created in 1976. *See* Public Law 94–553, sec. 801, 90 Stat. 2541, 2594–96 (1976). In 1993, Congress replaced the CRT with a system of ad-hoc copyright arbitration royalty panels (''CARPs''). *See* Copyright Royalty Tribunal Reform Act of 1993, Public Law 103–198, sec. 2, 107 Stat. 2304, 2304–2308. Congress replaced the CARP system with the CRB in 2004. *See* Copyright Royalty and Distribution Reform Act of 2004, Public Law 108–419, 118 Stat. 2341.

[4] *See* 17 U.S.C. 801(b)(1).

television, film, and videos; advertising and other types of commercial uses; and derivative uses such as ''sampling''—are licensed directly from the copyright owner according to negotiated rates and terms.

Musical Works—Public Performance. The method for licensing public performances of musical works differs significantly from the statutory mechanical license provided under Section 115. Licensing fees for such performances are generally collected on behalf of music publishers, songwriters, and composers by the three major PROs: the American Society of Composers, Authors and Publishers (''ASCAP''), Broadcast Music, Inc. (''BMI''), and SESAC. Songwriters and composers, as well as their publishers, commonly affiliate with one of the three for purposes of receiving public performance income. Rather than song-by-song licenses, the PROs typically offer ''blanket'' licenses for the full range of music in their repertories. These licenses are available for a wide variety of uses, including terrestrial, satellite, and internet radio, on-demand music streaming services, Web site and television uses, and performance of music in bars, restaurants, and other commercial establishments. The PROs monitor the use of musical works by these various entities and apportion and distribute collected royalties to their publisher, songwriter, and composer members.

Unlike the mechanical right, the public performance of musical works is not subject to compulsory licensing under the Copyright Act. Since 1941, however, ASCAP and BMI's licensing practices have been subject to antitrust consent decrees overseen by the Department of Justice.[5] These consent decrees were designed to protect licensees from price discrimination or other anti-competitive behavior by the two PROs. Under the decrees, ASCAP and BMI administer the public performance right for their members' musical works on a non-exclusive basis. They are required to provide a license to any person who seeks to perform copyrighted musical works publicly, and must offer the same terms to similarly situated licensees. In addition, ASCAP's consent decree expressly bars it from offering mechanical licenses.[6] Since 1950, prospective licensees that are unable to agree to a royalty rate with ASCAP or BMI have been able to seek a determination of a reasonable license fee in the federal district court for the Southern District of New York.[7]

The two PRO consent decrees were last amended well before the proliferation of digital music: The BMI decree in 1994,[8] and the ASCAP decree in 2001.[9] The consent decrees have been the subject of much litigation over the years, including, most recently, suits over whether music publishers can withdraw digital licensing rights from the PROs and negotiate public performance licenses directly with digital music services.[10]

Sound Recordings—Reproduction and Distribution. Congress extended federal copyright protection to sound recordings in 1972. That law, however, did not provide retroactive protection for sound recordings fixed prior to February 15, 1972, and such works therefore have no federal copyright status.[11] They are, however, subject to the protection of applicable state laws until 2067. *See* 17 U.S.C. 301(c).[12]

The owner of a copyright in a sound recording fixed on or after February 15, 1972, like the owner of a musical work copyright, enjoys the exclusive right to reproduce and distribute phonorecords embodying the sound recording, including by means of digital transmission, and to authorize others to do the same. 17 U.S.C. 106(1), (3), 301(c). Except in the limited circumstances where statutory licensing applies, as described below, licenses to reproduce and distribute sound recordings—such as those necessary to make and distribute CDs, transmit DPDs, and operate online music services, as well as to use sound recordings in a television shows, films, video games, etc.—are negotiated directly between the licensee and sound recording owner (typically a record label). Thus, while in the case of musical works, the royalty rates and terms applicable to the making and distribution of CDs, DPDs, and the operation of interactive music services are subject to government oversight, with respect to sound recordings, licensing for those same uses takes place without government supervision.

Sound Recordings—Public Performance. Unlike musical works, a sound recording owner's public performance right does not extend to all manner of public performances. Traditionally, the public performance of sound recordings was not subject to protection at all under the Copyright Act. In 1995, however, Congress enacted the DPRSRA, which provided for a limited right when sound recordings are publicly performed ''by means of a digital audio transmission.'' Public Law 104–39, 109 Stat. 336; 17 U.S.C. 106(6), 114(a). This right extends, for example, to satellite radio and internet-based music services.[13] Significantly, however, the public performance of sound recordings by broadcast radio stations remains exempt under the Act. 17 U.S.C. 114(d)(1).[14]

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[5] *See generally United States* v. *Broadcast Music, Inc.,* 275 F.3d 168, 171–72 (2d Cir. 2001) (describing the history). SESAC, a smaller performing rights organization created in 1930 to serve European publishers, is not subject to a similar consent decree, although it has been involved recently in private antitrust litigation. *See Meredith Corp.* v. *SESAC LLC,* No. 09–cv–9177, 2014 WL 812795 (S.D.N.Y. Mar. 3, 2014).

[6] *United States* v. *ASCAP,* No. 41–cv–1395, 2001–2 Trade Cas. (CCH) ¶ 73,474, 2001 WL 1589999, *3 (S.D.N.Y. June 11, 2001). Although BMI has taken the position that a strict reading of its consent decree does not bar it from offering mechanical licenses, it generally has not done so. *See* Broadcast Music, Inc., Comments on Department of Commerce Green Paper 4–5 (Nov. 13, 2013), *available at http://www.ntia.doc.gov/files/ntia/bmi_comments.pdf.*

[7] Significantly, musical work owners are precluded from offering evidence concerning the licensing fees paid for digital performances of sound recordings as a point of comparison in the district court ratesetting proceedings. Section 114 of the Copyright Act provides that license fees payable for the public performance of sound recordings may not be taken into account ''in any administrative, judicial, or other governmental proceeding to set or adjust the rates payable to'' musical work copyright owners. 17 U.S.C. 114(i).

[8] *United States* v. *Broadcast Music, Inc.,* No. 64–cv–3787, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966), *as amended,* 1996 Trade Cases (CCH) ¶ 71,378, 1994 WL 901652 (S.D.N.Y. Nov. 18, 1994).

[9] *United States* v. *ASCAP,* No. 41–cv–1395, 2001–2 Trade Cas. (CCH) ¶ 73,474, 2001 WL 1589999 (S.D.N.Y. June 11, 2001).

[10] *See In re Pandora Media, Inc.,* Nos. 12–cv–8035, 41–cv–1395, 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013); *Broadcast Music, Inc.* v. *Pandora Media, Inc.,* Nos. 13–cv–4037, 64–cv–3787, 2013 WL 6697788 (S.D.N.Y. Dec. 19, 2013).

[11] In 2009, Congress asked the Copyright Office to study the ''desirability and means'' of extending federal copyright protection to pre-February 15, 1972 sound recordings. Public Law 111–8, 123 Stat. 524 (2010) (explanatory statement). In 2011, the Office completed that study, issuing a report recommending that federal copyright protection be so extended. United States Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings* (2011), *available at http://www.copyright.gov/docs/sound/pre-72-report.pdf.*

[12] Thus, a person wishing to digitally perform a pre-1972 sound recording cannot rely on the Section 112 and 114 statutory licenses and must instead obtain a license directly from the owner of the sound recording copyright. *See* Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 FR 23054, 23073 (Apr. 17, 2013) (determination of the CRB finding that ''[t]he performance right granted by the copyright laws for sound recordings applies only to those recordings created on or after February 15, 1972'' and adopting provisions allowing exclusion of performances of pre-1972 sound recordings from certain statutory royalties).

[13] In 1998, as part of the DMCA, Congress amended Sections 112 and 114 of the Copyright Act to clarify that the digital sound recording performance right applies to services like webcasting. *See* Public Law 105–304, secs. 402, 405, 112 Stat. 2860, 2888, 2890.

[14] The Copyright Office has long supported the extension of the public performance right in sound

Continued

For certain uses, including those by satellite and internet radio, the digital public performance right for sound recordings is subject to statutory licensing in accordance with Sections 112 and 114 of the Act. Section 112 provides for a license to reproduce the phonorecords (sometimes referred to as ''ephemeral recordings'') necessary to facilitate a service's transmissions to subscribers, while Section 114 licenses the public performances of sound recordings resulting from those transmissions. This statutory licensing framework applies only to noninteractive (*i.e.,* radio-style) services as defined under Section 114; interactive (or on-demand services) are not covered. *See* 17 U.S.C. 112(e); 17 U.S.C. 114(d)(2), (f). For interactive services, sound recording owners negotiate licenses directly with users.

The rates and terms applicable to the public performance of sound recordings under the Section 112 and 114 licenses are established by the CRB. *See* 17 U.S.C. 801 *et seq.* The royalties due under these licenses are paid to an entity designated by the CRB—currently SoundExchange, Inc.—which collects, processes, and distributes payments on behalf of rights holders.[15]

Notably, under Section 114, the rate standard applicable to those satellite radio and music subscription services that existed as of July 31, 1998 (*i.e.,* ''preexisting'' services[16]) differs from that for other services such as internet radio.[17] Royalty rates for pre-existing satellite radio and subscription services are governed by the four-factor standard in Section 801(b) of the Act—that is, the standard that applies to the Section 115 license for musical works.[18] By contrast, under the terms of Section 114, rates and terms for noninteractive public performances via internet radio and other newer digital music services are to be determined by the CRB based on what a ''willing buyer'' and ''willing seller'' would have agreed to in the marketplace.[19]

Subjects of Inquiry

The Copyright Office seeks public input on the effectiveness of the current methods for licensing musical works and sound recordings. Accordingly, the Office invites written comments on the specific subjects above. A party choosing to respond to this Notice of Inquiry need not address every subject, but the Office requests that responding parties clearly identify and separately address each subject for which a response is submitted.

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.

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

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?

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?

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

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

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?

Sound Recordings

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

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.

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?

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

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?

13. How do differences in the applicability of the sound recording

recordings to broadcast radio. *See Internet Streaming of Radio Broadcasts: Balancing the Interests of Sound Recording Copyright Owners With Those of Broadcasters: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary,* 108th Cong. 6–7 (2004) (statement of David Carson, General Counsel, U.S. Copyright Office), *available at http://www.copyright.gov/docs/carson071504.pdf.* Only a handful of countries lack such a right; in addition to the United States, the list includes China, North Korea, and Iran. This gap in copyright protection has the effect of depriving American performers and labels of foreign royalties to which they would otherwise be entitled, because even countries that recognize a public performance right in sound recordings impose a reciprocity requirement. According to one estimate, U.S. rights holders lose approximately $70 million each year in royalties for performances in foreign broadcasts. *See generally* Mary LaFrance, *From Whether to How: The Challenge of Implementing a Full Public Performance Right in Sound Recordings,* 2 Harv. J. of Sports & Ent. L 221, 226 (2011).

[15] The Act requires that receipts under the Section 114 statutory license be divided in the following manner: 50 percent to the owner of the digital public performance right in the sound recording, 2½ percent to nonfeatured musicians, 2½ percent to nonfeatured vocalists, and 45 percent to the featured recording artists. 17 U.S.C. 114(g)(2).

[16] 17 U.S.C. 114(j)(10), (11). Today, Sirius/XM is the only preexisting satellite service that seeks statutory licenses under Section 114. *See* Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 FR 23054, 23055 (Apr. 17, 2013). There are two preexisting subscription services, Music Choice and Muzak. *Id.*

[17]

[18] *See* 17 U.S.C. 114(f)(1), 801(b)(1).

[19] 17 U.S.C. 114(f)(2)(B) instructs the CRB to ''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 willing seller.'' The provision further requires the CRB to consider ''whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings,'' and ''the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.'' *Id.*

For all types of services eligible for a Section 114 statutory license, the rates for the phonorecords (ephemeral recordings) used to operate the service are to be established by the CRB under Section 112 according to a ''willing buyer/willing seller'' standard. 17 U.S.C. 112(e). In general, the Section 112 rates have been a relatively insignificant part of the CRB's ratesetting proceedings, and have been established as a subset of the 114 rate. *See, e.g.,* Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 FR 23054, 23055–56 (Apr. 17, 2013).

public performance right impact music licensing?

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?

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?

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?

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

Revenues and Investment

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

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

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?

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

Data Standards

22. Are there ways the federal government could encourage the adoption of universal standards for the identification of musical works and sound recordings to facilitate the music licensing process?

Other Issues

23. 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.

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

Dated: March 11, 2014.

Jacqueline C. Charlesworth,

General Counsel and Associate, Register of Copyrights.

[FR Doc. 2014–05711 Filed 3–14–14; 8:45 am]

BILLING CODE 1410–30–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2014–020]

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before April 16, 2014. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepares appraisal memoranda that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments on the schedule.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting Records Management Services (ACNR) using one of the following means:

Mail: NARA (ACNR), 8601 Adelphi Road, College Park, MD 20740–6001
Email: *request.schedule@nara.gov*
FAX: 301–837–3698

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Margaret Hawkins, Director, Records Management Services (ACNR), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: 301–837–1799. Email: *request.schedule@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media-neutral unless specified otherwise. An item in a schedule is media-neutral when the disposition instructions may be applied to records regardless of the medium in which the records are created and maintained. Items included in schedules submitted to NARA on or after December 17, 2007, are media-neutral unless the item is specifically limited to a specific medium. (See 36 CFR 1225.12(e).)

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an imports) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

85,099, Harrington Tool Company, Ludington, Michigan.

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

85,046, AIG Claims, Houston, Texas.
85,097, SuperMedia Services, LLC., Middleton, Massachusetts.
85,122, Bimbo Bakaries USA, Inc., Wichita, Kansas.
85,144, IP & Science (Patent Payments), Bingham Farms, Michigan.
85,145, AXA Equitable Life Insurance Company, Charlotte, North Carolina.

Determinations Terminating Investigations of Petitions for Worker Adjustment Assistance

After notice of the petitions was published in the **Federal Register** and on the Department's Web site, as required by Section 221 of the Act (19 USC 2271), the Department initiated investigations of these petitions.

None.

I hereby certify that the aforementioned determinations were issued during the period of March 31, 2014 through April 4, 2014. These determinations are available on the Department's Web site *tradeact/taa/taa_search_form.cfm* under the searchable listing of determinations or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Signed at Washington, DC this 10th day of April 2014.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2014–10166 Filed 5–2–14; 8:45 am]

BILLING CODE 4510–FN–P

LIBRARY OF CONGRESS

U.S. Copyright Office

[Docket No. 2014–03]

Music Licensing Study

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of public roundtables.

SUMMARY: The U.S. Copyright Office is undertaking a study to evaluate the effectiveness of current methods for licensing musical works and sound recordings. The study will assess whether and how existing methods serve the music marketplace, including new and emerging digital distribution platforms. In addition to soliciting written comments, the Office is conducting three two-day public roundtables on music licensing issues. A Notice of Inquiry soliciting written comments in response to a number of subjects was issued on March 17, 2014, and written comments are due on or before May 16, 2014. *See* 78 FR 14739 (Mar. 17, 2014). At this time, the Copyright Office announces three public roundtables to be held in June 2014 in Nashville, Los Angeles, and New York.

DATES: The two-day public roundtable in Nashville will be held on June 4 and 5, 2014, on both days from 9:00 a.m. to 5:00 p.m. The two-day public roundtable in Los Angeles will be held on June 16 and 17, 2014, on both days from 9:00 a.m. to 5:00 p.m. The two-day public roundtable in New York will be held on June 23 and 24, 2014, from 9:00 a.m. to 5:00 p.m. on June 23, and from 8:30 a.m. to 4:00 p.m. on June 24. Requests to participate in the roundtables must be received by the Copyright Office by May 20, 2014.

ADDRESSES: The Nashville roundtable will take place at Belmont University's Mike Curb College of Entertainment and Music Business, 34 Music Square East, Nashville, Tennessee 37203. The Los Angeles roundtable will take place at the UCLA School of Law, 385 Charles E. Young Drive East, Los Angeles, California 90095. The New York roundtable will take place at the New York University School of Law, 40 Washington Square South, New York, New York 10012. Requests to participate in the roundtables should be submitted using the form available on the Office's Web site at *http://www.copyright.gov/docs/musiclicensingstudy.* If electronic submission is not feasible, please contact the Office at 202–707–8350 for special instructions.

FOR FURTHER INFORMATION CONTACT: Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, by email at *jcharlesworth@loc.gov* or by telephone at 202–707–8350; or Sarang V. Damle, Special Advisor to the General Counsel, by email at *sdam@loc.gov* or by telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION: Congress is currently engaged in a comprehensive review of the U.S. Copyright Act, 17 U.S.C. 101 *et seq.,* to evaluate potential revisions to the law in light of technological and other developments that impact the creation, dissemination, and use of copyrighted works. In light of Congress's review and significant changes to the music industry in recent years, the U.S. Copyright Office is conducting a study to assess the effectiveness of current methods for licensing sound recordings and musical works. The Office published a Notice of Inquiry on March 17, 2014, seeking written comments on twenty-four subjects concerning the current environment in which music is licensed. *See* 78 FR 14739 (Mar. 17, 2014).

At this time, the Copyright Office is providing notice of its intention to seek further input for its study through three two-day public roundtables to be held in Nashville, Los Angeles, and New York. The public roundtables will offer an opportunity for interested parties to comment on pertinent music licensing issues. The roundtables will address topics set forth in the Notice of Inquiry, including: The current music licensing landscape; licensing of sound recordings, including under the Section 112 and 114 statutory licenses and the treatment of pre-1972 recordings; licensing of musical works, including under the Section 115 statutory license and through the performing rights organizations (''PROs''); fair royalty rates and platform parity; industry data standards; industry incentives and investment; and potential future developments in music licensing. Following discussion of the various agenda topics by roundtable participants, observers at the roundtables will be provided a limited opportunity to offer additional comments.

The roundtable hearing rooms will have a limited number of seats for participants and observers. Those who seek to participate should complete and submit the form available on the Office's Web site at *http://www.copyright.gov/docs/musiclicensingstudy* so it is received by the Office no later than May 20, 2014. For individuals who wish to observe a roundtable, the Office will provide public seating on a first-come, first-serve basis on the days of the roundtable.

Dated: April 30, 2014.

Jacqueline C. Charlesworth,

General Counsel and Associate Register of Copyrights.

[FR Doc. 2014–10242 Filed 5–2–14; 8:45 am]

BILLING CODE 1410–30–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA 2014–026]

Creation of Freedom of Information Act Advisory Committee

AGENCY: National Archives and Records Administration.

U.S.C. § 300j–9(i), 33 U.S.C. § 1367, 15 U.S.C. § 2622, 42 U.S.C. § 6971, 42 U.S.C. § 7622, 42 U.S.C. § 9610, 42 U.S.C. § 5851, 49 U.S.C. § 42121, 18 U.S.C. § 1514A, 49 U.S.C. § 60129, 49 U.S.C. § 20109, 6 U.S.C. § 1142, 15 U.S.C. § 2087, 29 U.S.C. § 218c, 12 U.S.C. § 5567, 46 U.S.C. § 2114, 21 U.S.C. § 399d, and 49 U.S.C. § 30171.

Signed at Washington, DC on July 18, 2014.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2014–17342 Filed 7–22–14; 8:45 am]

BILLING CODE 4510–26–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2014–03]

Music Licensing Study: Second Request for Comments

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of inquiry.

SUMMARY: The U.S. Copyright Office has undertaken a study to evaluate the effectiveness of current methods for licensing musical works and sound recordings. At this time, the Office seeks additional comments on whether and how existing music licensing methods serve the music marketplace, including new and emerging digital distribution platforms.

DATES: Written comments are due on or before August 22, 2014.

ADDRESSES: All comments shall be submitted electronically. A comment page containing a comment form is posted on the Office Web site at *http://www.copyright.gov/200B;docs/200B;musiclicensingstudy.* The Web site interface requires commenting parties to complete a form specifying their name and organization, as applicable, and to upload comments as an attachment via a browser button. To meet accessibility standards, commenting parties must upload comments in a single file not to exceed six megabytes (MB) in one of the following formats: The Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The form and face of the comments must include both the name of the submitter and organization. The Office will post the comments publicly on its Web site in the form that they are received, along with associated names and organizations. If electronic submission of comments is not feasible, please contact the Office at 202–707–8350 for special instructions.

FOR FURTHER INFORMATION CONTACT: Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, by email at *jcharlesworth@loc.gov* or by telephone at 202–707–8350; or Sarang V. Damle, Special Advisor to the General Counsel, by email at *sdam@loc.gov* or by telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

The U.S. Copyright Office is conducting a study to assess the effectiveness of the current methods for licensing musical works and sound recordings. To aid with this study, the Office published an initial Notice of Inquiry on March 17, 2014 (''First Notice'') seeking written comments on twenty-four subjects concerning the current environment in which music is licensed. 78 FR 14739 (Mar. 17, 2014). The eighty-five written submissions received in response to this initial notice can be found on the Copyright Office Web site at *http://www.copyright.gov/docs/musiclicensingstudy/200B;comments/Docket2014_3/.* In June 2014, the Office conducted three two-day public roundtables in Nashville, Los Angeles, and New York City. The three roundtables provided participants with the opportunity to share their views on the topics identified in the First Notice and other issues relating to music licensing. *See* 79 FR 25626 (May 5, 2014). Transcripts of the proceedings at each of the three roundtables will be made available on the Copyright Office Web site at *http://www.copyright.gov/docs/200B;musiclicensingstudy/.*

In the initial round of written comments and during the roundtable sessions, a number of significant issues were discussed that the Office believes merit additional consideration.

First, as explained in the First Notice, in 2013, the two federal district courts overseeing the antitrust consent decrees governing the largest performance rights organizations (''PROs''), American Society of Composers, Authors and Publishers (''ASCAP'') and Broadcast Music, Inc. (''BMI''), held in separate opinions that under those decrees, music publishers could not withdraw selected rights—such as ''new media'' rights—to be directly licensed outside of the PROs; rather, a particular publisher's song catalog must either be ''all in'' or ''all out.'' [1] Following these rulings, both in public statements and at the recent roundtables, certain major music publishers have indicated that, if the consent decrees remain in place without modification, they intend to withdraw their entire catalogs from the two PROs and directly license public performances.[2] Such a move would affect not only online services, but more traditional areas of public performance such as radio, television, restaurants, and bars.

Stakeholders at the roundtables expressed significant concerns regarding the impact of major publishers' complete withdrawal from the PROs. Notably, traditional songwriter contracts typically include provisions that assume that a songwriter's performance royalties will be collected by and paid directly to the songwriter through a PRO, without contemplating alternative arrangements. Songwriters and composers raised questions as to how withdrawing publishers would fulfill this responsibility in the future, including whether they would be in a position to track and provide adequate usage and payment data under a direct licensing system. Another concern is how such withdrawals would affect the PROs' cost structures and the commission rates for smaller entities and individual creators who continued to rely upon these organizations to license and administer their public performance rights. At the same time, some stakeholders questioned the existing distribution methodologies of the PROs, suggesting that the PROs should rely more on census-based reporting (as is typically supplied by digital services) and less on sampling or non-census-based approaches to allocate royalty fees among members.

Next, many stakeholders appear to be of the view that the Section 115 statutory license for the reproduction and distribution of musical works should either be eliminated or significantly modified to reflect the realities of the digital marketplace. While music owners and music users have expressed a range of views as to the particulars of how this might be accomplished, much of the commentary and discussion has centered on two

[1] *In re Pandora Media, Inc.,* Nos. 12–cv–8035, 41–cv–1395, 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013); *Broadcast Music, Inc.,* v. *Pandora Media, Inc.,* Nos. 12–cv–4037, 64–cv–3787, 2013 WL 6697788 (S.D.N.Y. Dec. 19, 2013).

[2] *See* Ed Christman, *Universal Music Publishing Plots Exit From ASCAP, BMI,* Billboard (Feb. 1, 2013), *http://www.billboard.com/biz/articles/news/publishing/1537554/universal-music-publishing-plots-exit-from-ascap-bmi; see also* Ed Christman, *Sony/ATV's Martin Bandier Repeats Warning to ASCAP, BMI, Billboard* (July 11, 2014), *http://www.billboard.com/biz/articles/news/publishing/6157469/sonyatvs-martin-bandier-repeats-warning-to-ascap-bmi.*

possible approaches. The first would be to sunset the Section 115 license with the goal of enabling musical work owners to negotiate licenses directly with music users at unregulated, marketplace rates (as the synchronization market for musical works currently operates). Some stakeholders have acknowledged, however, that such a market-based system might still have to allow for the possibility of collective licensing to accommodate individuals and smaller copyright owners who might lack the capacity or leverage to negotiate directly with online service providers and others.

A second model, advocated by the record labels, would be to eliminate Section 115 and instead allow music publishers and sound recording owners collectively to negotiate an industrywide revenue-sharing arrangement as between them. For the uses falling under this approach, a fixed percentage of licensing fees for use of a recorded song would be allocated to the musical work and the remainder would go to the sound recording owner. Record labels would be permitted to bundle musical work licenses with their sound recording licenses, with third-party licensees to pay the overall license fees to publishers and labels according to the agreed industry percentages. While musical work owners would retain control over the first recordings of their works, such an arrangement would cover not only audio-only uses but would extend to certain audiovisual uses not currently covered by the Section 115 license, such as music videos and lyric display.

Another theme that emerged from the first round of written comments and the public roundtables relates to the Section 112 and 114 statutory licenses for the digital performance of sound recordings.[3] Although there appeared to be substantial agreement that these licenses are largely effective, there was also a general consensus that improvements could be made to the Copyright Royalty Judges' (''CRJs'') statutorily mandated ratesetting procedures. For instance, under 17 U.S.C. 803(b)(6), parties in proceedings before the CRJs must submit written direct statements before any discovery is conducted. A number of commenters believed that the ratesetting process could be significantly streamlined by allowing for discovery before presentation of the parties' direct cases, as in ordinary civil litigation. Stakeholders were also of the view that it would be more efficient to combine what are now two separate direct and rebuttal phases of ratesetting hearings, as contemplated by 17 U.S.C. 803(b)(6)(C), into a single integrated trial—again as is more typical of civil litigation. There was also general agreement that more could be done to encourage settlement of rate disputes, such as adoption of settlements earlier in the process and allowing such settlements to be treated as non-precedential with respect to non-settling participants.

Finally, many commenting parties pointed to the lack of standardized and reliable data related to the identity and ownership of musical works and sound recordings as a significant obstacle to more efficient music licensing mechanisms. Stakeholders observed that digital music files are often distributed to online providers without identifiers such as the International Standard Recording Code (''ISRC'') and/or International Standard Musical Work Code (''ISWC''), and that the lack of these identifiers (or other unique or universal identifiers) makes it difficult for licensees or others to link particular music files with the copyrighted works they embody. In addition to problems identifying the musical works and sound recordings themselves, commenters noted the difficulties of ascertaining ownership information, especially in the case of musical works, which frequently have multiple owners representing varying percentages of particular songs. These issues, in turn, relate to a more general ''transparency'' concern of music creators that usage and payment information—including information about advances and equity provided by licensees to publishers and labels—may not be fully and readily accessible to songwriters, composers and artists.

At this time, the Office is soliciting additional comments on these subjects, as set forth in the specific questions below. Parties may also take this opportunity to respond to the positions taken by others in the first round of comments and/or at the roundtables. Those who plan to submit additional comments should be aware that the Office has studied and will take into consideration the comments already received, so there is no need to restate previously submitted material. While a party choosing to respond to this Notice of Inquiry need not address every subject below, the Office requests that responding parties clearly identify and separately address each subject for which a response is submitted.

Subjects of Inquiry

Data and Transparency

1. Please address possible methods for ensuring the development and dissemination of comprehensive and authoritative public data related to the identity and ownership of musical works and sound recordings, including how best to incentivize private actors to gather, assimilate and share reliable data.

2. What are the most widely embraced identifiers used in connection with musical works, sound recordings, songwriters, composers, and artists? How and by whom are they issued and managed? How might the government incentivize more universal availability and adoption?

3. Please address possible methods for enhancing transparency in the reporting of usage, payment, and distribution data by licensees, record labels, music publishers, and collective licensing entities, including disclosure of non-usage-based forms of compensation (*e.g.,* advances against future royalty payments and equity shares).

Musical Works

4. Please provide your views on the logistics and consequences of potential publisher withdrawals from ASCAP and/or BMI, including how such withdrawals would be governed by the PROs; whether such withdrawals are

[3] Based upon written comments and discussion at the roundtables, it appears that certain language in the First Notice concerning the lack of availability of licenses for pre-1972 recordings under Sections 112 and 114 may have been misinterpreted by some. In a footnote, the First Notice observed that ''a person wishing to digitally perform a pre-1972 sound recording cannot rely on the Section 112 and 114 statutory licenses and must instead obtain a license directly from the owner of the sound recording copyright.'' 78 FR 14739, 14741 n.12. In making this statement, the Office was not opining on the necessity of obtaining such a license under state law, but merely observing that licenses for the digital performance of pre-1972 sound recordings, and for the reproductions to enable such performances, are not available under Section 112 or 114. A licensee seeking such a license would thus need to obtain it directly from the sound recording owner (as the Office understands to be the current practice of some licensees with respect to performances of pre-1972 recordings).

On the other side of the coin, it appears that others have misread the Office's observation in its report on pre-1972 sound recordings that ''[i]n general, state law does not appear to recognize a performance right in sound recordings'' as an official statement that no such protection is (or should be) available under state law. *See U.S. Copyright Office, Federal Copyright Protection for Pre-1972 Sound Recordings* 44 (2011). This, too, is a misinterpretation. While, as a factual matter, a state may not have affirmatively acknowledged a public performance right in pre-1972 recordings as of the Office's 2011 report, the language in the report should not be read to suggest that a state could not properly interpret its law to recognize such a right. As the Office explained, ''common law protection is amorphous, and courts often perceive themselves to have broad discretion.'' *Id.* at 48.

compatible with existing publisher agreements with songwriters and composers; whether the PROs might still play a role in administering licenses issued directly by the publishers, and if so, how; the effect of any such withdrawals on PRO cost structures and commissions; licensees' access to definitive data concerning individual works subject to withdrawal; and related issues.

5. Are there ways in which the current PRO distribution methodologies could or should be improved?

6. In recent years, PROs have announced record-high revenues and distributions. At the same time, many songwriters report significant declines in income. What marketplace developments have led to this result, and what implications does it have for the music licensing system?

7. If the Section 115 license were to be eliminated, how would the transition work? In the absence of a statutory regime, how would digital service providers obtain licenses for the millions of songs they seem to believe are required to meet consumer expectations? What percentage of these works could be directly licensed without undue transaction costs and would some type of collective licensing remain necessary to facilitate licensing of the remainder? If so, would such collective(s) require government oversight? How might uses now outside of Section 115, such as music videos and lyric displays, be accommodated?

Sound Recordings

8. Are there ways in which Section 112 and 114 (or other) CRB ratesetting proceedings could be streamlined or otherwise improved from a procedural standpoint?

International Music Licensing Models

9. International licensing models for the reproduction, distribution, and public performance of musical works differ from the current regimes for licensing musical works in the United States. Are there international music licensing models the Office should look to as it continues to review the U.S. system?

Other Issues

10. Please identify any other pertinent issues that the Copyright Office may wish to consider in evaluating the music licensing landscape.

Dated: July 18, 2014.

Jacqueline C. Charlesworth,

General Counsel and Associate, Register of Copyrights.

[FR Doc. 2014–17354 Filed 7–22–14; 8:45 am]

BILLING CODE 1410–30–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2014–044]

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before August 22, 2014. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting Records Management Services (ACNR) using one of the following means:

Mail: NARA (ACNR), 8601 Adelphi Road, College Park, MD 20740–6001.

Email: request.schedule@nara.gov.

Fax: 301–837–3698.

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Margaret Hawkins, Director, Records Management Services (ACNR), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: 301–837–1799. Email: *request.schedule@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media neutral unless specified otherwise. An item in a schedule is media neutral when the disposition instructions may be applied to records regardless of the medium in which the records are created and maintained. Items included in schedules submitted to NARA on or after December 17, 2007, are media neutral unless the item is limited to a specific medium. (See 36 CFR 1225.12(e).)

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit

Total Responses: 1,643.

Average Time per Response: 60 minutes.

Estimated Total Burden Hours: 1,643 hours.

Total Other Burden Cost: $0.

Comments submitted in response to this request will be summarized and/or included in the request for Office of Management and Budget approval; they will also become a matter of public record.

James H. Moore, Jr.,

Deputy Assistant Secretary for Policy, U.S. Department of Labor.

[FR Doc. 2014–18184 Filed 7–31–14; 8:45 am]

BILLING CODE 4510–23–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2014–03]

Music Licensing Study

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of extension of comment period.

SUMMARY: The United States Copyright Office is extending the deadline for public comments regarding the effectiveness of existing methods of licensing music that were solicited in a July 23, 2014 Notice of Inquiry. *See* 79 FR 42833 (July 23, 2014).

DATES: Written comments are now due on or before September 12, 2014.

ADDRESSES: All comments shall be submitted electronically. A comment page containing a comment form is posted on the Office Web site at *http://www.copyright.gov/docs/musiclicensingstudy.* The Web site interface requires commenting parties to complete a form specifying their name and organization, as applicable, and to upload comments as an attachment via a browser button. To meet accessibility standards, commenting parties must upload comments in a single file not to exceed six megabytes (MB) in one of the following formats: The Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The form and face of the comments must include both the name of the submitter and organization. The Office will post the comments publicly on the Office's Web site in the form that they are received, along with associated names and organizations. If electronic submission of comments is not feasible, please contact the Office at 202–707–8350 for special instructions.

FOR FURTHER INFORMATION CONTACT: Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, by email at *jcharlesworth@loc.gov* or by telephone at 202–707–8350; or Sarang V. Damle, Special Advisor to the General Counsel, by email at *sdam@loc.gov* or by telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

The U.S. Copyright Office is conducting a study to assess the effectiveness of current methods for licensing sound recordings and musical works. The Office received written comments responding to an initial Notice of Inquiry, and held three public roundtables in Nashville, Los Angeles and New York. *See* 78 FR 13739 (Mar. 17, 2014); 79 FR 25626 (May 5, 2014).

On July 23, 2014, the Office published a second Notice of Inquiry, seeking additional written comments on ten subjects concerning the music licensing environment. 79 FR 42833. To ensure commenters have sufficient time to address the topics set forth in the July 2014 Notice of Inquiry, the Office is extending the time for filing written comments from August 22, 2014 to September 12, 2014.

Dated: July 28, 2014.

Maria A. Pallante,

Register of Copyrights.

[FR Doc. 2014–18096 Filed 7–31–14; 8:45 am]

BILLING CODE 1410–30–P

LIBRARY OF CONGRESS

U.S. Copyright Office

[Docket No. 2014–02]

Extension of Comment Period; Study on the Right of Making Available; Request for Additional Comments

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Extension of comment period.

SUMMARY: The U.S. Copyright Office is extending the deadline for public comments that address topics listed in the Office's July 15, 2014 Request for Additional Comments.

DATES: Comments are now due no later than 5:00 p.m. EDT on September 15, 2014.

ADDRESSES: All comments should be submitted electronically. To submit comments, please visit *http://www.copyright.gov/docs/making_available/.* The Web site interface requires submitters to complete a form specifying name and organization, as applicable, and to upload comments as an attachment via a browser button. To meet accessibility standards, commenting parties must upload comments in a single file not to exceed six megabytes (''MB'') in one of the following formats: a Portable Document File (''PDF'') format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (''RTF''); or ASCII text file format (not a scanned document). The form and face of the comments must include both the name of the submitter and organization. The Office will post all comments publicly on the Office's Web site exactly as they are received, along with names and organizations. If electronic submission of comments is not feasible, please contact the Office at 202–707–1027 for special instructions.

FOR FURTHER INFORMATION CONTACT: Maria Strong, Senior Counsel for Policy and International Affairs, by telephone at 202–707–1027 or by email at *mstrong@loc.gov,* or Kevin Amer, Counsel for Policy and International Affairs, by telephone at 202–707–1027 or by email at *kamer@loc.gov.*

SUPPLEMENTARY INFORMATION: On July 15, 2014, the Copyright Office issued a Request for Additional Comments on the state of U.S. law recognizing and protecting ''making available'' and ''communication to the public'' rights for copyright holders.[1] The Request listed several questions for interested members of the public to address in the context of U.S. implementation of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) rights of ''making available'' and ''communication to the public,'' and also invited views on specific issues raised during the public roundtable held in Washington, DC on May 5, 2014. To provide sufficient time for commenters to respond, the Office is extending the time for filing additional comments from August 14, 2014 to September 15, 2014.

Dated: July 28, 2014.

Karyn A. Temple Claggett,

Associate Register of Copyrights.

[FR Doc. 2014–18097 Filed 7–31–14; 8:45 am]

BILLING CODE 1410–30–P

[1] Study on the Right of Making Available; Request for Additional Comments, 79 FR 41309 (July 15, 2014).

APPENDIX B COMMENTING PARTIES AND ROUNDTABLE PARTICIPANTS

Parties Who Responded to First Notice of Inquiry

1. ABKCO Music & Records, Inc. (ABKCO)
2. American Association of Independent Music (A2IM)
3. American Society of Composers, Authors and Publishers (ASCAP)
4. Audiosocket
5. Barnett III, William
6. Brigham Young University Copyright Licensing Office
7. Broadcast Music, Inc. (BMI)
8. Camp, Ben
9. Center for Copyright Integrity
10. Castle, Christian L.
11. Cate, John
12. Consumer Federation of America (CFA) and Public Knowledge
13. Content Creators Coalition
14. Continental Entertainment Group
15. Copyright Alliance
16. Council of Music Creators
17. CTIA – The Wireless Association (CTIA)
18. Digital Data Exchange, LLC (DDEX)
19. Digital Media Association (DiMA)
20. DotMusic
21. Educational Media Foundation (EMF)
22. Ferrick, Melissa
23. Future of Music Coalition (FMC)

24. Gear Publishing Company and Lisa Thomas Music Services, LLC
25. Geo Music Group & George Johnson Music Publishing
26. Global Image Works
27. Greco, Melanie Holland
28. Harris, Jim
29. Hayes, Bonnie
30. Henderson, Linda S.
31. Herstand, Ari
32. Indiana University, Archives of African American Music and Culture
33. Interested Parties Advancing Copyright (IPAC)
34. Jessop, Paul
35. Kohn, Bob
36. LaPolt, Dina
37. Library of Congress
38. Lincoff, Bennett
39. Lowery, David
40. McAuliffe Esq., Emmett
41. Menell, Peter S.
42. Mitchell, John T.
43. Modern Works Music Publishing
44. Music Choice
45. Music Library Association
46. Music Reports, Inc. (MRI)
47. National Academy of Recording Arts & Sciences (NARAS)

48. National Association of Broadcasters (NAB)
49. National Music Publishers' Association (NMPA) and Harry Fox Agency, Inc. (HFA)
50. National Public Radio, Inc. (NPR)
51. National Religious Broadcasters Music License Committee (NRBMLC)
52. National Religious Broadcasters Noncommercial Music License Committee (NRBNMLC)
53. National Restaurant Association
54. Nauman, Vickie
55. Newman Esq., Deborah
56. Netflix, Inc.
57. Novak, Adam
58. Pagnani, Aidan
59. Pala Rez Radio
60. Pattison, Pat
61. Public Knowledge and Consumer Federation of America (CFA)
62. Public Television Coalition (PTC)
63. Radio Music License Committee, Inc. (RMLC)
64. Recording Industry Association of America, Inc. (RIAA)
65. Robin Green, Lynne
66. Rys, Jason
67. Schlieman, Derek S.
68. Screen Actors Guild – American Federation of Television and Radio Artists (SAG-AFTRA) and American Federation of Musicians of the United States and Canada (AFM)
69. SESAC, Inc. (SESAC)

70. Shocked, Michelle

71. Simpson, Jerrod

72. Sirius XM Radio Inc.

73. Society of Composers & Lyricists (SCL)

74. Songwriters Guild of America, Inc. (SGA)

75. SoundExchange, Inc.

76. Spotify USA Inc.

77. SRN Broadcasting

78. St. James, Charles

79. Television Music License Committee, LLC (TMLC)

80. Traugh, David

81. United States Marine Band

82. Willey, Robert

83. Wixen Music Publishing, Inc.

84. Yates, James M.

Participants in Nashville Hearings

1. Barker, John (ClearBox Rights and IPAC)
2. Buresh, Heather (Music Row Administrators Group)
3. Chertkof, Susan (RIAA)
4. Coleman, Dan (Modern Music Works Publishing)
5. Driskill, Marc (Sea Gayle Music and AIMP, Nashville Chapter)
6. Earls, Kent (UMPG)
7. Gervais, Daniel (Vanderbilt University Law School)
8. Gottlieb, Tony (Get Songs Direct, LLC)
9. Herbison, Barton (NSAI)
10. Johnson, George (Geo Music Group and George Johnson Music Publishing)
11. Kass, Fritz (Intercollegiate Broadcasting System, Inc.)
12. Kimes, Royal Wade (Wonderment Records)
13. Knife, Lee (DiMA)
14. Marks, Steven (RIAA)
15. McIntosh, Bruce (Codigo Music and Fania Records)
16. Meitus, Robert (Meitus Gelbert Rose LLP)
17. Mosenkis, Sam (ASCAP)
18. Oxenford, David (Wilkinson Barker Knauer LLP)
19. Schaffer, Brittany (NMPA and Loeb & Loeb LLP)
20. Sellwood, Scott (Google and YouTube)
21. Soled, Janice (My Music Screen)
22. Stollman, Marc (Stollman Law, PA)
23. Turley-Trejo, Ty (Brigham Young University Copyright Licensing Office)
24. Waltz, Reid Alan (SESAC)

Participants in Los Angeles Hearings

1. Anthony, Paul (Rumblefish)
2. Arrow, Ed (UMPG)
3. Barker, John (ClearBox Rights and IPAC)
4. Bernstein, Keith (Crunch Digital)
5. Blake, Lawrence J. (Concord Music Group, Inc.)
6. Bull, Eric D. (Create Law)
7. Cate, John (American Music Partners)
8. Cohan, Timothy A. (PeerMusic)
9. Goldberg, Ilene (IMG Consulting)
10. Greaves, Deborah (Label Law, Inc.)
11. Greenstein, Gary R. (Wilson Sonsini Goodrich & Rosati)
12. Harbeson, Eric (Music Library Association)
13. Hauth, Russell (Salem Communications and NRBMLC)
14. Irwin, Ashley (SCL)
15. Kokakis, David (UMPG)
16. Kossowicz, Tegan (UMG)
17. LaPolt, Dina (Dina LaPolt P.C.)
18. Lemone, Shawn (ASCAP)
19. Lipsztein, Leonardo (Google and YouTube)
20. Lord, Dennis (SESAC)
21. Marks, Steven (RIAA)
22. Menell, Peter (UC Berkeley School of Law)
23. Miller, Jennifer (Audiosocket)
24. Muddiman, Hélène (Hollywood Elite Composers)

25. Nauman, Vickie (CrossBorderWorks)

26. Prendergast, Brad (SoundExchange, Inc.)

27. Rudolph, John (Music Analytics)

28. Rys, Jason (Wixen Music Publishing, Inc.)

29. Sanders, Charles J. (SGA)

30. Schyman, Garry (SCL)

31. Watkins, Les (MRI)

Participants in New York Hearings

1. Albert, Eric (Stingray Digital Group)
2. Badavas, Christos P. (HFA)
3. Barker, John (ClearBox Rights and IPAC)
4. Barron, Gregg (BMG Rights Management)
5. Bengloff, Richard (A2IM)
6. Bennett, Jeffrey (SAG-AFTRA)
7. Besek, June (Columbia Law School, Kernochan Center for Law, Media and the Arts)
8. Carapella, Cathy (Global Image Works)
9. Carnes, Rick (SGA)
10. Coleman, Alisa (ABKCO)
11. Conyers III, Joe (Downtown Music Publishing)
12. DeFilippis, Matthew (ASCAP)
13. Diab, Waleed (Google and YouTube)
14. Donnelley, Patrick (Sirius XM Radio Inc.)
15. Duffett-Smith, James (Spotify USA Inc.)
16. Dupler, Todd (NARAS)
17. Fakler, Paul (NAB and Music Choice)
18. Finkelstein, Andrea (SME.)
19. Gibbs, Melvin (Content Creators Coalition)
20. Greer, Cynthia (Sirius XM Radio Inc.)
21. Griffin, Jodie (Public Knowledge)
22. Hoyt, Willard (TMLC)
23. Huey, Dick (Toolshed Inc.)

24. Kass, Fritz (Intercollegiate Broadcasting System, Inc.)
25. Knife, Lee (DiMA)
26. Kohn, Bob (Kohn on Music Licensing)
27. Lee, Bill (SESAC)
28. Lummel, Lynn (ASCAP)
29. Mahoney, Jim (A2IM)
30. Malone, William (Intercollegiate Broadcasting System, Inc.)
31. Marin, Aldo (Cutting Records, Inc.)
32. Marks, Steven (RIAA)
33. Merrill, Tommy (The Press House and #IRespectMusic)
34. Morgan, Blake (ECR Music Group and #IRespectMusic)
35. Potts, Cheryl (Crystal Clear Music & CleerKut)
36. Rae, Casey (FMC)
37. Raff, Andrew (Shutterstock, Inc.)
38. Raffel, Colin (Prometheus Radio Project)
39. Reimer, Richard (ASCAP)
40. Resnick, Perry (RZO, LLC)
41. Rich, Bruce (RMLC)
42. Rinkerman, Gary (Drinker, Biddle & Reath LLP)
43. Rosen, Stuart (BMI)
44. Rosenthal, Jay (NMPA)
45. Rushing, Colin (SoundExchange, Inc.)
46. Steinberg, Michael G. (BMI)
47. Wood, Doug (National Council of Music Creator Organizations)

Parties Who Responded to Second Notice of Inquiry

1. ABKCO Music & Records, Inc. (ABKCO)
2. American Association of Independent Music (A2IM)
3. American Society of Composers, Authors and Publishers (ASCAP)
4. Bean, David
5. Broadcast Music, Inc. (BMI)
6. Buckley, William Jr.
7. Carapetyan, Gregory
8. Castle, Christian L.
9. Columbia Law School, Kernochan Center for Law, Media and the Arts
10. Computer & Communications Industry Association (CCIA)
11. Concord Music Group, Inc.
12. Content Creators Coalition
13. Deutsch, L. Peter
14. Digital Media Association (DiMA)
15. Future of Music Coalition (FMC)
16. Geo Music Group & George Johnson Music Publishing
17. Guyon, Cindy
18. Guyon, Rich
19. Interested Parties Advancing Copyright (IPAC)
20. LaPolt, Dina
21. Modern Works Music Publishing
22. Music Choice
23. Music Managers' Forum (MMF) and Featured Artists' Coalition (FAC)
24. Music Reports, Inc. (MRI)

25. Nashville Songwriters Association International (NSAI)
26. National Academy of Recording Arts & Sciences (NARAS)
27. National Association of Broadcasters (NAB)
28. National Music Publishers' Association (NMPA) and Harry Fox Agency, Inc. (HFA)
29. National Public Radio, Inc. (NPR)
30. Office of the County Attorney, Montgomery County, Maryland
31. Pangasa, Maneesh
32. Parker, Brad
33. Pilot Music Business Services, LLC
34. Pipeline Project 2014, Belmont University's Mike Curb College of Music Business and Entertainment
35. Production Music Association (PMA)
36. Public Knowledge
37. Radio Music License Committee, Inc. (RMLC)
38. Recording Industry Association of America, Inc. (RIAA)
39. Resnick, Perry (RZO, LLC)
40. Righeimer, Carolyn
41. Rinkerman, Gary (Drinker, Biddle & Reath LLP)
42. Samuels, Jon M.
43. Screen Actors Guild – American Federation of Television and Radio Artists (SAG-AFTRA) and American Federation of Musicians of the United States and Canada (AFM)
44. Sirius XM Radio Inc.
45. Songwriters Guild of America, Inc. (SGA)
46. SoundExchange, Inc.
47. Stone, Bob

48. Szajner, Robert

49. Television Music License Committee, LLC (TMLC)

50. U.S. Chamber of Commerce, Global Intellectual Property Center (GIPC)

51. Wager, Gregg

APPENDIX C ABBREVIATIONS

ABBREVIATIONS

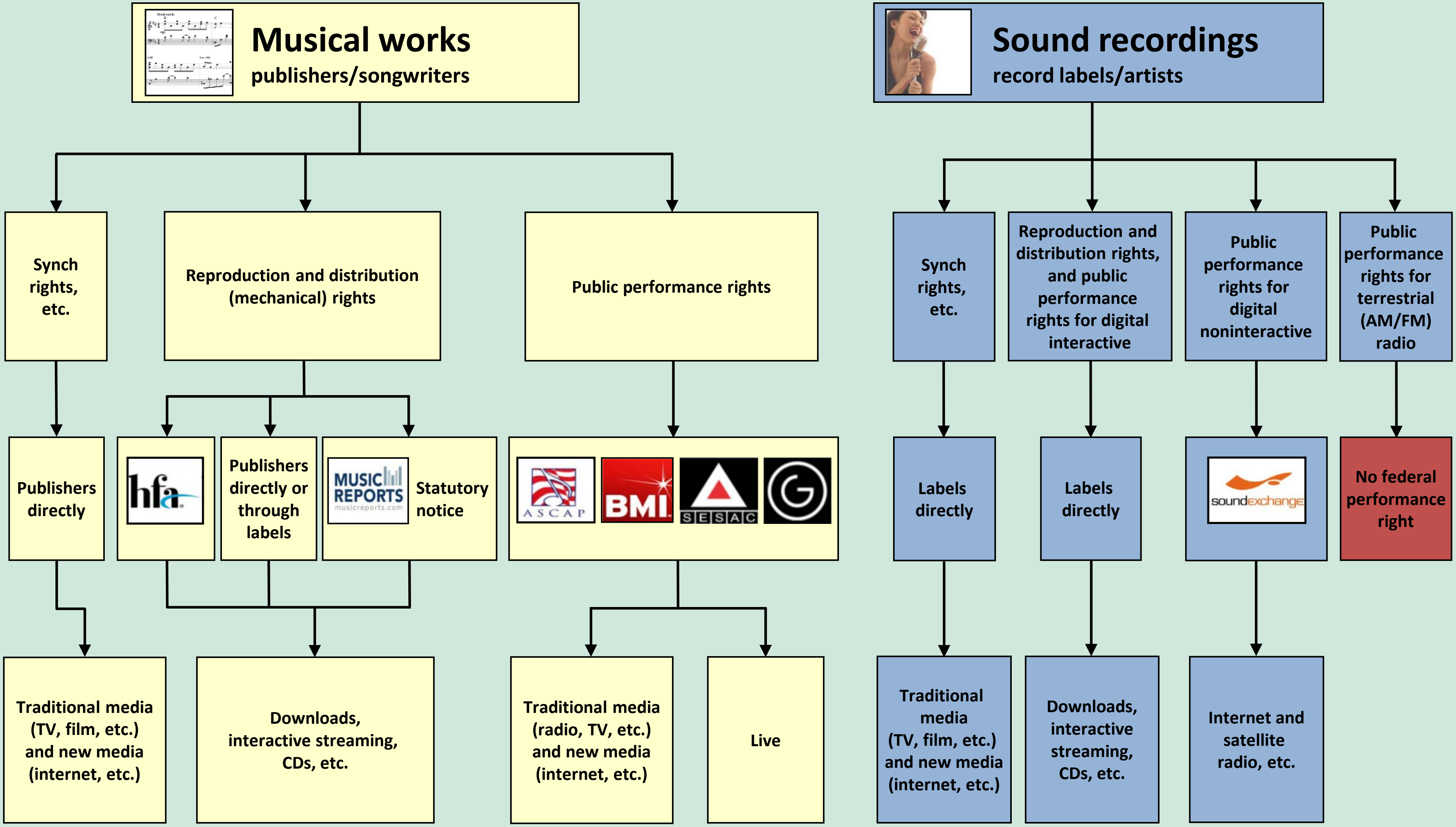
A2IM	American Association of Independent Musicians
ABKCO	ABKCO Music & Records, Inc.
AFM	American Federation of Musicians of the United States and Canada
AHRA	Audio Home Recording Act
AIMP	Association of Independent Music Publishers
ASCAP	American Society of Composers, Authors and Publishers
BMI	Broadcast Music, Inc.
BYU	Brigham Young University Copyright Licensing Office
CARP	Copyright Arbitration Royalty Panel
CCIA	Computer & Communications Industry Association
CFA	Consumer Federation of America
CISAC	International Confederation of Societies of Authors and Composers
CRB	Copyright Royalty Board
CRT	Copyright Royalty Tribunal
CTIA	CTIA—The Wireless Association
DDEX	Digital Data Exchange, LLC
DiMA	Digital Media Association
DMCA	Digital Millenium Copyright Act
DOJ	United States Department of Justice
DPD	Digital phonorecord delivery
DPRSRA	Digital Performance Right in Sound Recordings Act
EMF	Educational Media Foundation
EMI	EMI Music Publishing Ltd.
FAC	Featured Artists' Coalition
FMC	Future of Music Coalition
FTC	United States Federal Trade Commission

GMR	Global Music Rights
GMRO	General music rights organization
GIPC	U.S. Chamber of Commerce, Global Intellectual Property Center
GRD	Global Repertoire Database
HFA	Harry Fox Agency, Inc.
IFPI	International Federation of the Phonographic Industry
IMR	International Music Registry
ISNI	International Standard Name Identifier
IPAC	Interested Parties Advancing Copyright
IPI	Interested Parties Information
ISO	International Organization for Standardization
ISRC	International Standard Recording Code
ISWC	International Standard Musical Work Code
MMF	Music Managers' Forum
MRI	Music Reports, Inc.
MRO	Music rights organization
Music Biz	Music Business Association
NAB	National Association of Broadcasters
NARAS	National Academy of Recording Arts & Sciences
NCTA	National Cable & Telecommunications Association
NDMA	New digital media agreement
NMPA	National Music Publishers' Association
NOI	Notice of Intent
NPR	National Public Radio, Inc.
NRBMLC	National Religious Broadcasters Music License Committee
NRBNMLC	National Religious Broadcasters Noncommercial Music License Committee

NSAI	Nashville Songwriters Association International
NTIA	National Telecommunications and Information Administration
PPL	Phonographic Performance Ltd.
PRO	Performing rights organization
PTC	Public Television Coalition
RESPECT Act	Respecting Senior Performers as Essential Cultural Treasures Act
RMLC	Radio Music License Committee, Inc.
RIAA	Recording Industry Association of America, Inc.
SAG-AFTRA	Screen Actors Guild-American Federation of Television and Radio Artists
SCL	Society of Composers & Lyricists
SEA	Songwriters Equity Act
SGA	Songwriters Guild of America, Inc.
SIRA	Section 115 Reform Act of 2006
SME	Sony Music Entertainment, Inc.
Sony/ATV	Sony/ATV Music Publishing LLC
SOCAN	Society of Composers, Authors and Music Publishers of Canada
TMLC	Television Music License Committee, LLC
UMG	Universal Music Group
UMPG	Universal Music Publishing Group
UPC	Universal Product Code
USPTO	U.S. Patent and Trademark Office
WIPO	World Intellectual Property Organization
WMG	Warner Music Group

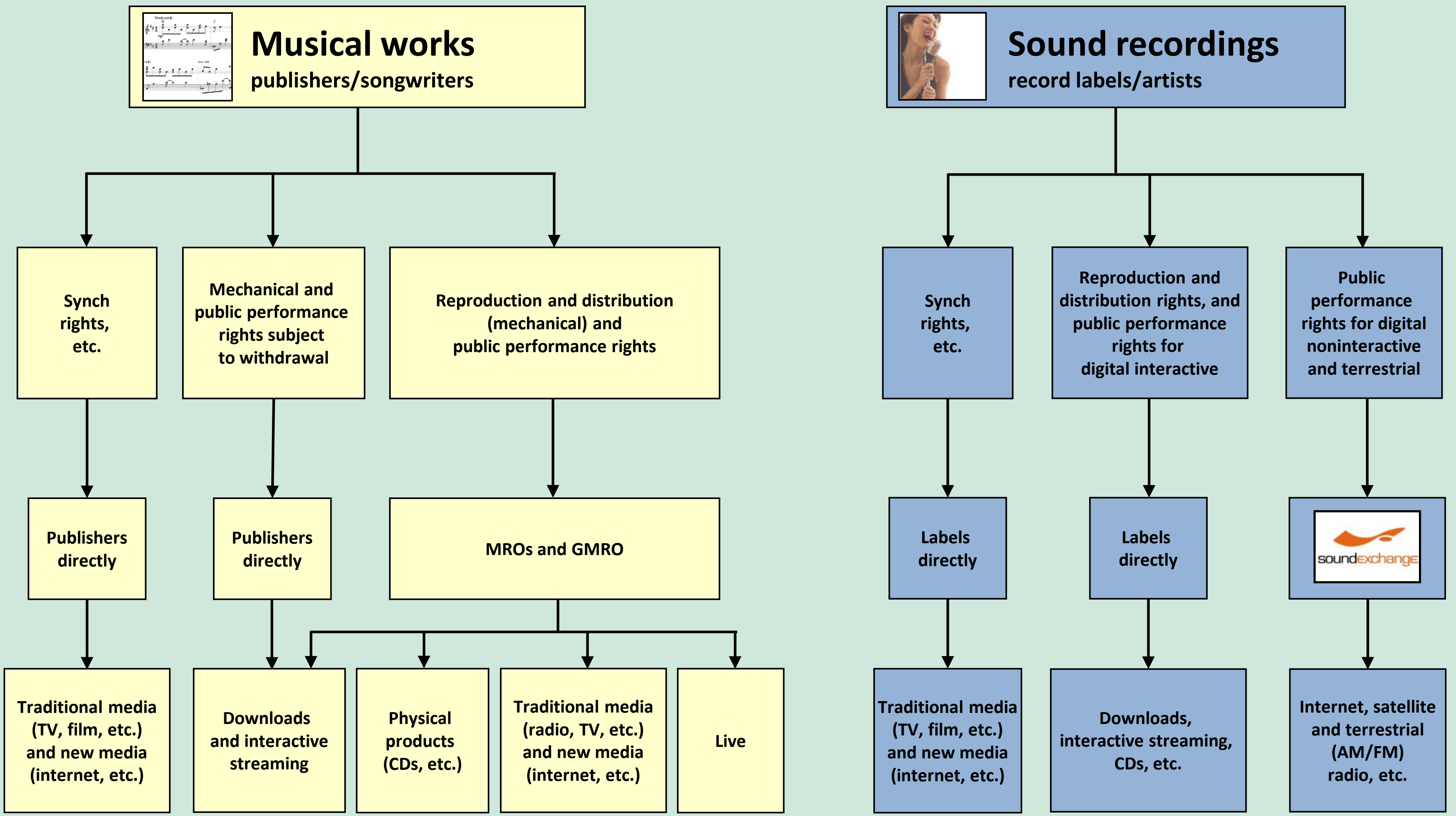
APPENDIX D LICENSING AND RATESETTING CHARTS

Copyright and the Music Marketplace:
Existing Licensing Framework



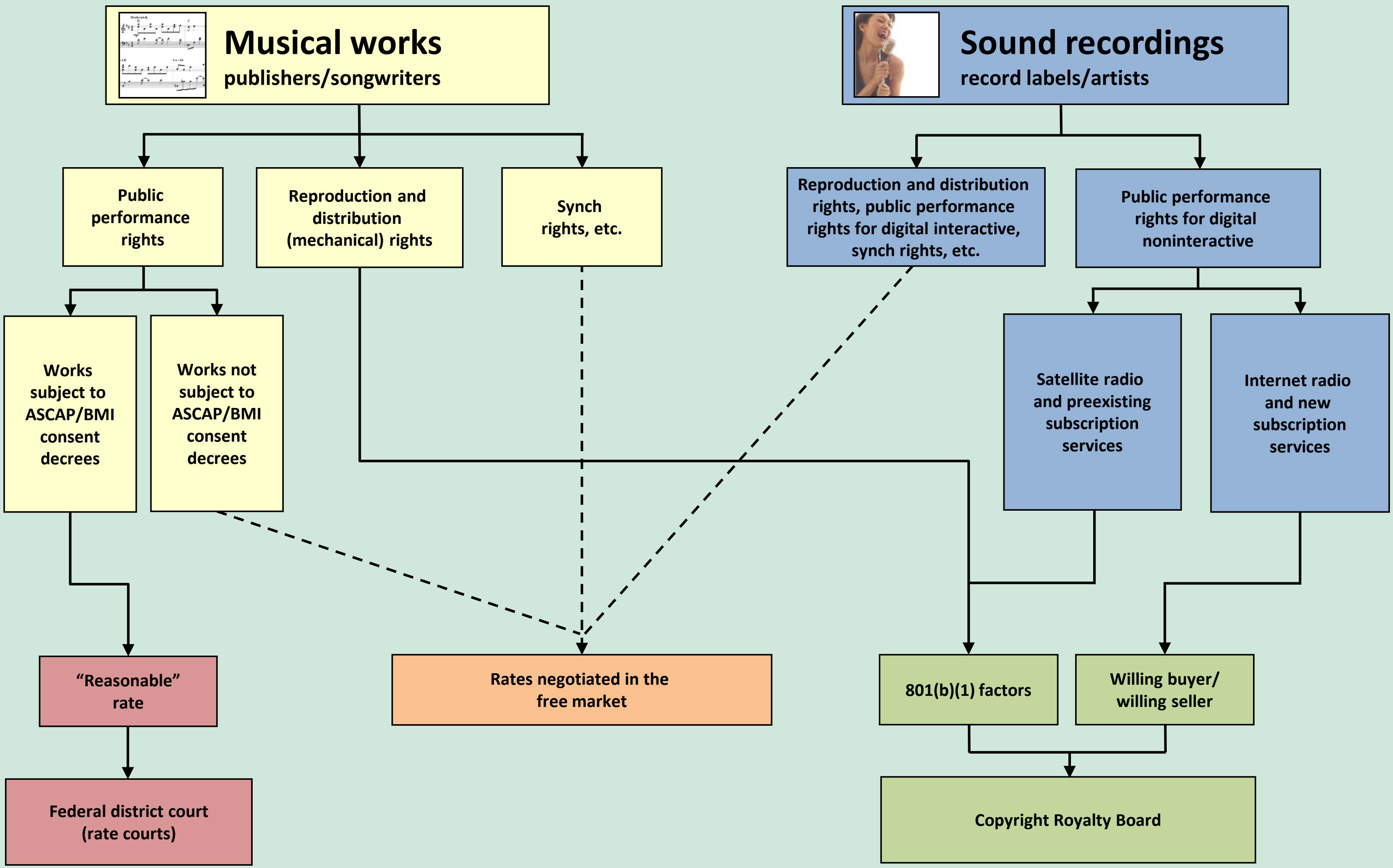
Copyright and the Music Marketplace:

Proposed Licensing Framework



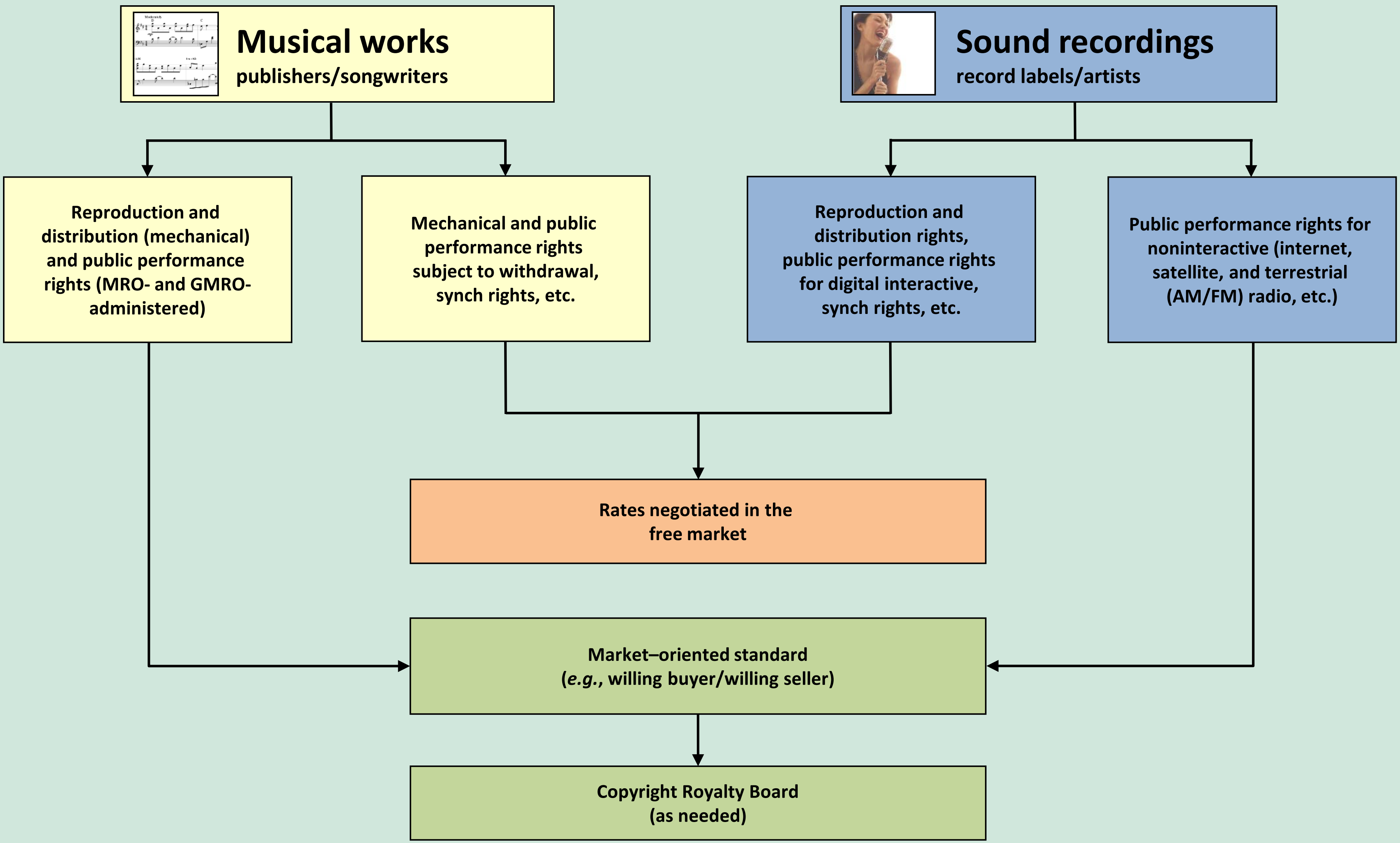
Copyright and the Music Marketplace:

Existing Ratesetting Framework



Copyright and the Music Marketplace:

Proposed Ratesetting Framework



FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEPHANIE LENZ, *Plaintiff-Appellee/ Cross-Appellant*, v. UNIVERSAL MUSIC CORP.; UNIVERSAL MUSIC PUBLISHING INC.; UNIVERSAL MUSIC PUBLISHING GROUP INC., *Defendants-Appellants/ Cross-Appellees*.	Nos. 13-16106 13-16107 D.C. No. 5:07-cv-03783-JF OPINION

Appeal from the United States District Court
for the Northern District of California
Jeremy D. Fogel, District Judge, Presiding

Argued and Submitted
July 7, 2015—San Francisco, California

Filed September 14, 2015

Before: Richard C. Tallman, Milan D. Smith, Jr.,
and Mary H. Murguia, Circuit Judges.

Opinion by Judge Tallman;
Partial Concurrence and Partial Dissent by Judge Milan D. Smith, Jr.

SUMMARY[*]

Digital Millennium Copyright Act

The panel affirmed the district court's denial of the parties' cross-motions for summary judgment in an action under the Digital Millennium Copyright Act ("DMCA") alleging that the defendants violated 17 U.S.C. § 512(f) by misrepresenting in a takedown notification that the plaintiff's home video constituted an infringing use of a portion of a Prince composition.

The panel held that the DMCA requires copyright holders to consider fair use before sending a takedown notification, and that failure to do so raises a triable issue as to whether the copyright holder formed a subjective good faith belief that the use was not authorized by law. Regarding good faith belief, the panel held that the plaintiff could proceed under an actual knowledge theory. The panel held that the willful blindness doctrine may be used to determine whether a copyright holder knowingly materially misrepresented that it held a good faith belief that the offending activity was not a fair use. The plaintiff here, however, could not proceed to trial under a willful blindness theory because she did not show that the defendants subjectively believed there was a high probability that the video constituted fair use. The panel also held that a plaintiff may seek recovery of nominal damages for an injury incurred as a result of a § 512(f) misrepresentation.

[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Judge M. Smith concurred in part, dissented in part, and concurred in the judgment. Dissenting from Part IV.C of the majority opinion, addressing good faith belief, he questioned whether § 512(f) directly prohibits a party from misrepresenting that it has formed a good faith belief that a work is subject to the fair use doctrine. He wrote that the plain text of the statute prohibits misrepresentations that a work is infringing, not misrepresentations about the party's diligence in forming its belief that the work is infringing. Judge M. Smith disagreed that there was any material dispute about whether the defendants considered fair use, and he wrote that the willful blindness doctrine does not apply where, as here, a party has failed to consider fair use and has affirmatively misrepresented that a work is infringing.

COUNSEL

Kelly M. Klaus (argued) and Melinda LeMoine, Munger, Tolles & Olson LLP, Los Angeles, California, for Defendants-Appellants/Cross-Appellees.

Corynne McSherry (argued), Cindy Cohn, Kurt Opsahl, Daniel K. Nazer, and Julie Samuels, Electronic Frontier Foundation, San Francisco, California; Ashok Ramani, Michael S. Kwun, and Theresa H. Nguyen, Keker & Van Nest LLP, San Francisco, California, for Plaintiff-Appellee/Cross-Appellant.

Steven Fabrizio and Scott Wilkens, Jenner & Block LLP, Washington, D.C., for Amicus Curiae Motion Picture Association of America, Inc.

Jennifer Pariser, Of Counsel, Recording Industry Association of America, Washington, D.C.; Cynthia Arato, Marc Isserles, and Jeremy Licht, Shapiro, Arato & Isserles LLP, New York, New York, for Amicus Curiae Recording Industry Association of America.

Joseph Gratz, Durie Tangri LLP, San Francisco, California, for Amici Curiae Google Inc., Twitter Inc., and Tumblr, Inc.

Marvin Ammori and Lavon Ammori, Ammori Group, Washington, D.C., for Amicus Curiae Automatic, Inc.

Julie Ahrens and Timothy Greene, Stanford Law School Center for Internet and Society, Stanford, California, for Amici Curiae Organization fo Transformative Works, Public Knowledge, and International Documentary Association.

OPINION

TALLMAN, Circuit Judge:

Stephanie Lenz filed suit under 17 U.S.C. § 512(f)—part of the Digital Millennium Copyright Act ("DMCA")—against Universal Music Corp., Universal Music Publishing, Inc., and Universal Music Publishing Group (collectively "Universal"). She alleges Universal misrepresented in a takedown notification that her 29-second home video (the "video") constituted an infringing use of a portion of a composition by the Artist known as Prince, which Universal insists was unauthorized by the law. Her claim boils down to a question of whether copyright holders have been abusing the extrajudicial takedown procedures provided for in the DMCA by declining to first evaluate whether the content qualifies as fair use. We hold that the statute requires copyright holders to consider fair use before sending a takedown notification, and that failure to do so raises a triable issue as to whether the copyright holder formed a subjective good faith belief that the use was not authorized by law. We affirm the denial of the parties' cross-motions for summary judgment.

I

Founded in May 2005, YouTube (now owned by Google) operates a website that hosts user-generated content. *About YouTube*, YouTube.com, https://www. youtube.com/yt/about/ (last visited September 4, 2015). Users upload videos directly to the website. *Id.* On February 7, 2007, Lenz uploaded to YouTube a 29-second home video of her two young children in the family kitchen dancing to the song *Let's Go Crazy* by Prince.[1] Available at https://www.youtube.com/ watch?v=N1Kf JHFWlhQ (last visited September 4, 2015). She titled the video "'Let's Go Crazy' #1." About four seconds into the video, Lenz asks her thirteen month-old son "what do you think of the music?" after which he bobs up and down while holding a push toy.

At the time Lenz posted the video, Universal was Prince's publishing administrator responsible for enforcing his copyrights. To accomplish this objective with respect to YouTube, Robert Allen, Universal's head of business affairs, assigned Sean Johnson, an assistant in the legal department,

[1] YouTube is a for-profit company that generates revenues by selling advertising. If users choose to become "content partners" with YouTube, they share in a portion of the advertising revenue generated. Lenz is not a content partner and no advertisements appear next to the video.

to monitor YouTube on a daily basis. Johnson searched YouTube for Prince's songs and reviewed the video postings returned by his online search query. When reviewing such videos, he evaluated whether they "embodied a Prince composition" by making "significant use of . . . the composition, specifically if the song was recognizable, was in a significant portion of the video or was the focus of the video." According to Allen, "[t]he general guidelines are that . . . we review the video to ensure that the composition was the focus and if it was we then notify YouTube that the video should be removed."

Johnson contrasted videos that met this criteria to those "that may have had a second or less of a Prince song, literally a one line, half line of Prince song" or "were shot in incredibly noisy environments, such as bars, where there could be a Prince song playing deep in the background . . . to the point where if there was any Prince composition embodied . . . in those videos that it was distorted beyond reasonable recognition." None of the video evaluation guidelines explicitly include consideration of the fair use doctrine.

When Johnson reviewed Lenz's video, he recognized *Let's Go Crazy* immediately. He noted that it played loudly in the background throughout the entire video. Based on these details, the video's title, and Lenz's query during the video asking if her son liked the song, he concluded that Prince's song "was very much the focus of the video." As a result, Johnson decided the video should be included in a takedown notification sent to YouTube that listed more than 200 YouTube videos Universal believed to be making unauthorized use of Prince's songs.[2] The notice included a "good faith belief" statement as required by 17 U.S.C. § 512(c)(3)(A)(v): "We have a good faith belief that the above-described activity is not authorized by the copyright owner, its agent, or the law."

After receiving the takedown notification, YouTube removed the video and sent Lenz an email on June 5, 2007, notifying her of the removal. On June 7, 2007, Lenz attempted to restore the video by sending a counter-notification to YouTube pursuant to § 512(g)(3). After YouTube provided this counter-notification to Universal per § 512(g)(2)(B), Universal protested the video's reinstatement because Lenz failed to properly acknowledge that her statement was made under penalty of perjury, as required by § 512(g)(3)(C). Universal's protest reiterated that the video constituted infringement because there was no record that "either she or YouTube were ever granted licenses to reproduce, distribute, publicly perform or otherwise exploit the Composition." The protest made no mention of fair use. After obtaining *pro bono* counsel, Lenz sent a second counter-notification on June 27, 2007, which resulted in YouTube's reinstatement of the video in mid-July.

II

Lenz filed the instant action on July 24, 2007, and her Amended Complaint on August 15, 2007. After the district court dismissed her tortious interference claim and request for

[2] "[T]he parties do not dispute that Lenz used copyrighted material in her video or that Universal is the true owner of Prince's copyrighted music." *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1153–54 (N.D. Cal. 2008).

declaratory relief, Lenz filed her Second Amended Complaint on April 18, 2008, alleging only a claim for misrepresentation under § 512(f). The district court denied Universal's motion to dismiss the action.

On February 25, 2010, the district court granted Lenz's partial motion for summary judgment on Universal's six affirmative defenses, including the third affirmative defense that Lenz suffered no damages. Both parties subsequently moved for summary judgment on Lenz's § 512(f) misrepresentation claim. On January 24, 2013, the district court denied both motions in an order that is now before us.

The district court certified its summary judgment order for interlocutory appeal under 28 U.S.C. § 1292(b), and stayed proceedings in district court pending resolution of the appeal. We granted the parties permission to bring an interlocutory appeal.

III

We review *de novo* the district court's denial of summary judgment. When doing so, we "must determine whether the evidence, viewed in a light most favorable to the non-moving party, presents any genuine issues of material fact and whether the district court correctly applied the law." *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). On cross-motions for summary judgment, we evaluate each motion independently, "giving the nonmoving party in each instance the benefit of all reasonable inferences." *ACLU v. City of Las Vegas*, 333 F.3d 1092, 1097 (9th Cir. 2003).

When evaluating an interlocutory appeal, we "may address any issue fairly included within the certified order because it is the *order* that is appealable, and not the controlling question identified by the district court." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) (emphasis in original) (quotation omitted). We may therefore "address those issues *material* to the order from which appeal has been taken." *In re Cinematronics, Inc.*, 916 F.2d 1444, 1449 (9th Cir. 1990) (emphasis in original) (permitting appellate review of a ruling issued prior to the order certified for interlocutory appeal).

IV

Effective on October 28, 1998, the DMCA added new sections to existing copyright law by enacting five Titles, only one of which is relevant here: Title II—Online Copyright Infringement Liability Limitation Act—now codified in 17 U.S.C. § 512. Sections 512(c), (f), and (g) are at the heart of the parties' dispute.

A

Section 512(c) permits service providers, e.g., YouTube or Google, to avoid copyright infringement liability for storing users' content if—among other requirements—the service provider "expeditiously" removes or disables access to the content after receiving notification from a copyright holder that the content is infringing. 17 U.S.C. § 512(c). Section 512(c)(3)(A) sets forth the elements that such a "takedown notification" must contain. These elements include identification of the copyrighted work, identification of the allegedly infringing material, and, critically, a statement that the copyright holder believes in good faith the infringing material "is not authorized by the copyright owner, its agent, or the law." *Id.* § 512(c)(3)(A). The procedures outlined in § 512(c) are referred to as the DMCA's "takedown procedures."

To avoid liability for disabling or removing content, the service provider must notify the user of the takedown. *Id.* § 512(g)(1)–(2). The user then has the option of restoring the content by sending a counter-notification, which must include a statement of "good faith belief that the material was removed or disabled as a result of mistake or misidentification . . . ." *Id.* § 512(g)(3)(C). Upon receipt of a valid counter-notification, the service provider must inform the copyright holder of the counter-notification and restore the content within "not less than 10, nor more than 14, business days," unless the service provider receives notice that the copyright holder has filed a lawsuit against the user seeking to restrain the user's infringing behavior. *Id.* § 512(g)(2)(B)–(C). The procedures outlined in § 512(g) are referred to as the DMCA's "put-back procedures."

If an entity abuses the DMCA, it may be subject to liability under § 512(f). That section provides: "Any person who knowingly materially misrepresents under this section—(1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages . . . ." *Id.* § 512(f). Subsection (1) generally applies to copyright holders and subsection (2) generally applies to users. Only subsection (1) is at issue here.

B

We must first determine whether 17 U.S.C. § 512(c)(3)(A)(v) requires copyright holders to consider whether the potentially infringing material is a fair use of a copyright under 17 U.S.C. § 107 before issuing a takedown notification. Section 512(c)(3)(A)(v) requires a takedown notification to include a "statement that the complaining party has a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law." The parties dispute whether fair use is an authorization under the law as contemplated by the statute—which is so far as we know an issue of first impression in any circuit across the nation. "Canons of statutory construction dictate that if the language of a statute is clear, we look no further than that language in determining the statute's meaning. . . . A court looks to legislative history only if the statute is unclear." *United States v. Lewis*, 67 F.3d 225, 228–29 (9th Cir. 1995) (citations omitted). We agree with the district court and hold that the statute unambiguously contemplates fair use as a use authorized by the law.

Fair use is not just excused by the law, it is wholly authorized by the law. In 1976, Congress codified the application of a four-step test for determining the fair use of copyrighted works:

> Notwithstanding the provisions of sections 106 and 106A, *the fair use of a copyrighted work*, . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, *is not an infringement of copyright*. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107 (emphasis added). The statute explains that the fair use of a copyrighted work is permissible because it is a non-infringing use.

While Title 17 of the United States Code ("Copyrights") does not define the term "authorize" or "authorized," "[w]hen there is no indication that Congress intended a specific legal meaning for the term, the court may look to sources such as dictionaries for a definition." *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999). Black's Law Dictionary defines "authorize" as "1. To give legal authority; to empower" and "2. To formally approve; to sanction." *Authorize*, Black's Law Dictionary (10th ed. 2014). Because 17 U.S.C. § 107 both "empowers" and "formally approves" the use of copyrighted material if the use constitutes fair use, fair use is "authorized by the law" within the meaning of § 512(c). *See also* 17 U.S.C. § 108(f)(4) ("Nothing in this section in any way affects the *right* of fair use as provided by section 107 . . . ." (emphasis added)).

Universal's sole textual argument is that fair use is not "authorized by the law" because it is an affirmative defense that excuses otherwise infringing conduct. Universal's interpretation is incorrect as it conflates two different concepts: an affirmative defense that is labeled as such due to the procedural posture of the case, and an affirmative defense that excuses impermissible conduct. Supreme Court precedent squarely supports the conclusion that fair use does not fall into the latter camp: "[A]nyone who . . . makes a fair use of the work is not an infringer of the copyright with respect to such use." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984).

Given that 17 U.S.C. § 107 expressly authorizes fair use, labeling it as an affirmative defense that excuses conduct is a misnomer:

> Although the traditional approach is to view "fair use" as an affirmative defense, . . . it is better viewed as a right granted by the Copyright Act of 1976. Originally, as a judicial doctrine without any statutory basis, fair use was an infringement that was excused—this is presumably why it was treated as a defense. As a statutory doctrine, however, fair use is not an infringement. Thus, since the passage of the 1976 Act, fair use should no longer be considered an

> infringement to be excused; instead, it is logical to view fair use as a right. Regardless of how fair use is viewed, it is clear that the burden of proving fair use is always on the putative infringer.

Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1542 n.22 (11th Cir. 1996); *cf.* Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 Wash. L. Rev. 685, 688 (2015) ("Congress did not intend fair use to be an affirmative defense—a defense, yes, but not an affirmative defense."). Fair use is therefore distinct from affirmative defenses where a use infringes a copyright, but there is no liability due to a valid excuse, e.g., misuse of a copyright, *Practice Management Information Corp. v. American Medical Ass'n*, 121 F.3d 516, 520 (9th Cir. 1997), and laches, *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 950–51 (9th Cir. 2001).

Universal concedes it must give due consideration to other uses authorized by law such as compulsory licenses. The introductory language in 17 U.S.C. § 112 for compulsory licenses closely mirrors that in the fair use statute. *Compare* 17 U.S.C. § 112(a)(1) ("Notwithstanding the provisions of section 106, . . . it is not an infringement of copyright for a transmitting organization entitled to transmit to the public a performance or display of a work . . . to make no more than one copy or phonorecord of a particular transmission program embodying the performance or display . . . ."), *with id.* § 107 ("Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright."). That fair use may be labeled as an affirmative defense due to the procedural posture of the case is no different than labeling a license an affirmative defense for the same reason. *Compare Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 573 & n.3, 590 (1994) (stating that "fair use is an affirmative defense" where the district court converted a motion to dismiss based on fair use into a motion for summary judgment), *with A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1025–26 (9th Cir. 2001) ("Napster contends that . . . the district court improperly rejected valid affirmative defenses of . . . implied license . . . ."). Thus, Universal's argument that it need not consider fair use in addition to compulsory licenses rings hollow.

Even if, as Universal urges, fair use is classified as an "*affirmative* defense," we hold—for the purposes of the DMCA—fair use is uniquely situated in copyright law so as to be treated differently than traditional affirmative defenses. We conclude that because 17 U.S.C. § 107 created a type of non-infringing use, fair use is "authorized by the law" and a copyright holder must consider the existence of fair use before sending a takedown notification under § 512(c).

C

We must next determine if a genuine issue of material fact exists as to whether Universal knowingly misrepresented that it had formed a good faith belief the video did not constitute fair use. This inquiry lies not in whether a court would adjudge the video as a fair use, but whether Universal formed a good faith belief that it was not. Contrary to the district court's holding, Lenz may proceed under an actual knowledge theory, but not under a willful blindness theory.

1

Though Lenz argues Universal should have known the video qualifies for fair use as a matter of law, our court has already decided a copyright holder need only form a subjective good faith belief that a use is not authorized. *Rossi v. Motion Picture Ass'n of Am. Inc.*, 391 F.3d 1000 (9th Cir. 2004). In *Rossi*, we explicitly held that "the 'good faith belief' requirement in § 512(c)(3)(A)(v) encompasses a subjective, rather than objective standard." *Id.* at 1004. We further held:

> In § 512(f), Congress included an expressly limited cause of action for improper infringement notifications, imposing liability only if the copyright owner's notification is a knowing misrepresentation. A copyright owner cannot be liable simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in making the mistake. Rather, there must be a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner.

Id. at 1004–05 (citations omitted). Neither of these holdings are dictum. *See United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc) ("[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense.").

As a result, Lenz's request to impose a subjective standard only with respect to factual beliefs and an objective standard with respect to legal determinations is untenable. Such a request grafts an objective standard onto

§ 512(c)(3)(A)(v) directly in contravention to *Rossi*. *See Rossi*, 391 F.3d at 1004 ("When enacting the DMCA, Congress could have easily incorporated an objective standard of reasonableness. The fact that it did not do so indicates an intent to adhere to the subjective standard traditionally associated with a good faith requirement."). We therefore judge Universal's actions by the subjective beliefs it formed about the video.

2

Universal faces liability if it knowingly misrepresented in the takedown notification that it had formed a good faith belief the video was not authorized by the law, i.e., did not constitute fair use. Here, Lenz presented evidence that Universal did not form any subjective belief about the video's fair use—one way or another— because it failed to consider fair use at all, and knew that it failed to do so. Universal nevertheless contends that its procedures, while not formally labeled consideration of fair use, were tantamount to such consideration. Because the DMCA requires consideration of fair use prior to sending a takedown notification, a jury must determine whether Universal's actions were sufficient to form a subjective good faith belief about the video's fair use or lack thereof.

To be clear, if a copyright holder ignores or neglects our unequivocal holding that it must consider fair use before sending a takedown notification, it is liable for damages under § 512(f). If, however, a copyright holder forms a subjective *good faith* belief the allegedly infringing material does not constitute fair use, we are in no position to dispute the copyright holder's belief even if we would have reached the opposite conclusion. A copyright holder who pays lip service to the consideration of fair use by claiming it formed a good faith belief when there is evidence to the contrary is still subject to § 512(f) liability. *Cf. Disney Enters., Inc. v. Hotfile Corp.*, No. 11-cv-20427, 2013 WL 6336286, at *48 (S.D. Fla. Sept. 20, 2013) (denying summary judgment of § 512(f) counterclaim due to "sufficient evidence in the record to suggest that [Plaintiff] Warner intentionally targeted files it knew it had no right to remove"); *Rosen v. Hosting Servs., Inc.*, 771 F. Supp. 2d 1219, 1223 (C.D. Cal. 2010) (denying summary judgment of § 512(f) counterclaim where the takedown notification listed four URL links that did not contain content matching the description of the purportedly infringed material); *Online Policy Grp. v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1204–05 (N.D. Cal. 2004) ("[T]here is no genuine issue of fact that Diebold knew—and indeed that it specifically intended—that its letters to OPG and Swarthmore would result in prevention of publication of that content. . . . The fact that Diebold never actually brought suit against any alleged infringer suggests strongly that Diebold sought to use the DMCA's safe harbor provisions—which were designed to protect ISPs, not copyright holders—as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property.").

In order to comply with the strictures of § 512(c)(3)(A)(v), a copyright holder's consideration of fair use need not be searching or intensive. We follow *Rossi*'s guidance that formation of a subjective good faith belief does not require investigation of the allegedly infringing content. *See* 391 F.3d at 1003, 1005. We are mindful of the pressing crush of voluminous infringing content that copyright holders face in a digital age. But that does not excuse a failure to comply with the procedures outlined by Congress. *Cf. Lenz*, 572 F. Supp. 2d at 1155 ("[I]n the majority of cases, a consideration of fair use prior to issuing a takedown notice will not be so complicated as to jeopardize a copyright owner's ability to respond rapidly to potential infringements. The DMCA already requires copyright owners to make an initial review of the potentially infringing material prior to sending a takedown notice; indeed, it would be impossible to meet any of the requirements of Section 512(c) without doing so. A consideration of the applicability of the fair use doctrine simply is part of that initial review.").

We note, without passing judgment, that the implementation of computer algorithms appears to be a valid and good faith middle ground for processing a plethora of content while still meeting the DMCA's requirements to somehow consider fair use. *Cf. Hotfile*, 2013 WL 6336286, at *47 ("The Court . . . is unaware of any decision to date that actually addressed the need for human review, and the statute does not specify how belief of infringement may be formed or what knowledge may be chargeable to the notifying entity."). For example, consideration of fair use may be sufficient if copyright holders utilize computer programs that automatically identify for takedown notifications content where: "(1) the video track matches the video track of a copyrighted work submitted by a content owner; (2) the audio track matches the audio track of that same copyrighted work; and (3) nearly the entirety . . . is comprised of a single copyrighted work." Brief for The Org. for Transformative Works, Public Knowledge & Int'l Documentary Ass'n as Amici Curiae Supporting Appellee at 29–30 n.8 (citing the Electronic Frontier Foundation website (link unavailable)).

Copyright holders could then employ individuals like Johnson to review the minimal remaining content a computer program does not cull. *See* Brief for The Recording Indus.

Ass'n of Am. as Amici Curiae Supporting Appellants at 15 ("[T]he RIAA has an entire department dedicated to identifying infringement and issuing takedown requests."); *see also Hotfile*, 2013 WL 6336286, at *14. During oral argument Universal explained that service providers now use screening algorithms. However, we need not definitively decide the issue here because Universal did not proffer any evidence that—at the time it sent the takedown notification to Lenz—it used a computer program to identify potentially infringing content.

3

We hold the willful blindness doctrine may be used to determine whether a copyright holder "knowingly materially misrepresent[ed]" that it held a "good faith belief" the offending activity was not a fair use. *See* 17 U.S.C. § 512(c)(3)(A)(v), (f). "[T]he willful blindness doctrine may be applied, in appropriate circumstances, to demonstrate knowledge or awareness of specific instances of infringement under the DMCA." *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 35 (2d Cir. 2012) (interpreting how a party can establish the "actual knowledge"—a subjective belief—required by § 512(c)(1)(A)(I)); *see also UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1023 (9th Cir. 2013) ("Of course, a service provider cannot willfully bury its head in the sand to avoid obtaining such specific knowledge." (citing *Viacom*, 676 F.3d at 31)). But, based on the specific facts presented during summary judgment, we reject the district court's conclusion that Lenz may proceed to trial under a willful blindness theory.

To demonstrate willful blindness a plaintiff must establish two factors: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070 (2011). "Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts." *Id.* at 2070–71. To meet the *Global-Tech* test, Lenz must demonstrate a genuine issue as to whether—before sending the takedown notification—Universal (1) subjectively believed there was a high probability that the video constituted fair use, and (2) took deliberate actions to avoid learning of this fair use.

On summary judgment Lenz failed to meet a threshold showing of the first factor. To make such a showing, Lenz must provide evidence from which a juror could infer that Universal was aware of a high probability the video constituted fair use. *See United States v. Yi*, 704 F.3d 800, 805 (9th Cir. 2013). But she failed to provide any such evidence. The district court therefore correctly found that "Lenz does not present evidence suggesting Universal subjectively believed either that there was a high probability any given video might make fair use of a Prince composition or her video in particular made fair use of Prince's song 'Let's Go Crazy.'" Yet the district court improperly denied Universal's motion for summary judgment on the willful blindness theory because Universal "has not shown that it *lacked* a subjective belief." By finding blame with Universal's inability to show that it "*lacked* a subjective belief," the district court improperly required Universal to meet its burden of persuasion, even though Lenz had failed to counter the initial burden of production that Universal successfully carried. *See Celotex Corp. v. Catrett*, 477 U.S.

317, 322 (1986); *Nissan Fire & Marine Ins. Co. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Lenz may not therefore proceed to trial on a willful blindness theory.

V

Section 512(f) provides for the recovery of "any damages, including costs and attorneys['] fees, incurred by the alleged infringer . . . who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing . . . ." 17 U.S.C. § 512(f). We hold a plaintiff may seek recovery of nominal damages for an injury incurred as a result of a § 512(f) misrepresentation.

Universal incorrectly asserts that Lenz must demonstrate she incurred "actual monetary loss." Section 512(k) provides a definition for "monetary relief" as "damages, costs, attorneys['] fees, and any other form of monetary payment." The term "monetary relief" appears in § 512(a), (b)(1), (c)(1), and (d), but is notably absent from § 512(f). As a result, the damages an alleged infringer may recover under § 512(f) from "any person" are broader than monetary relief.[3] *Cf. United States v. James*, 478 U.S. 597, 605 (1986) ("Congress' choice of the language '*any* damage' . . . undercuts a narrow construction."), *abrogated on other grounds by Cent. Green Co. v. United States*, 531 U.S. 425 (2001). Because Congress specified the recovery of "any damages," we reject

[3] Title I of the DMCA specifies recovery for "actual damages." 17 U.S.C. § 1203(c)(1)(A). If Congress intended to similarly limit the recovery of § 512(f) damages to pecuniary losses, it could have chosen to do so.

Universal's contention that Congress did not indicate its intent to depart from the common law presumption that a misrepresentation plaintiff must have suffered a monetary loss. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quotation omitted)).

Lenz may seek recovery of nominal damages due to an unquantifiable harm suffered as a result of Universal's actions.[4] The DMCA is akin to a statutorily created intentional tort whereby an individual may recover nominal damages for a "knowingly material misrepresent[ation] under this section [512]." 17 U.S.C. § 512(f); *cf. Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305 (1986) ("We have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution. Accordingly, when § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." (quotation and citations omitted)).

"In a number of common law actions associated with intentional torts, the violation of the plaintiff's right has generally been regarded as a kind of legal damage in itself. The plaintiff who proves an intentional physical tort to the person or to property can always recover nominal damages."

[4] Lenz may not recover nominal damages for "impairment of free speech rights." No authority supports the recovery of nominal damages caused by a private actor's chilling of free speech rights. All of the cases Lenz cites address challenges to governmental action.

3 Dan B. Dobbs et al., *The Law of Torts* § 480 (2d ed. 2011). The tort need not be physical in order to recover nominal damages. Defamation, for example, permits the recovery of nominal damages:

> A nominal damage award can be justified in a tort action only if there is some reason for awarding a judgment in favor of a claimant who has not proved or does not claim a compensable loss with sufficient certainty to justify a recovery of compensatory or actual damages. There may be such a reason in an action for defamation, since a nominal damage award serves the purpose of vindicating the plaintiff's character by a verdict of the jury that establishes the falsity of the defamatory matter.

W. Page Keeton et al., *Prosser and Keeton on Torts* § 116A, at 845 (5th ed. 1984). Also, individuals may recover nominal damages for trespass to land, even though the trespasser's "presence on the land causes no harm to the land [or] its possessor . . . ." Restatement (Second) of Torts § 163 & cmts. d, e (1965).

The district court therefore properly concluded in its 2010 order:

> The use of "any damages" suggests strongly Congressional intent that recovery be available for damages even if they do not amount to . . . substantial economic damages . . . . Requiring a plaintiff who can [show that the copyright holder knowingly

> misrepresented its subjective good faith] to demonstrate in addition not only that she suffered damages but also that those damages were economic and substantial would vitiate the deterrent effect of the statute.

Lenz v. Universal Music Corp., No. C 07-3783 JF, 2010 WL 702466, at *10 (N.D. Cal. Feb. 25, 2010). Relying on this opinion, the Southern District of Florida held the same. *Hotfile*, 2013 WL 6336286, at *48 ("[T]he Court observes that the quantity of economic damages to Hotfile's system is necessarily difficult to measure with precision and has led to much disagreement between the parties and their experts. Notwithstanding this difficulty, the fact of injury has been shown, and Hotfile's expert can provide the jury with a non-speculative basis to assess damages.").

We agree that Lenz may vindicate her statutorily created rights by seeking nominal damages. Because a jury has not yet determined whether Lenz will prevail at trial, we need not decide the scope of recoverable damages, i.e., whether she may recover expenses following the initiation of her § 512(f) suit or *pro bono* costs and attorneys' fees, both of which arose as a result of the injury incurred.

VI

Copyright holders cannot shirk their duty to consider—in good faith and prior to sending a takedown notification—whether allegedly infringing material constitutes fair use, a use which the DMCA plainly contemplates as authorized by the law. That this step imposes responsibility on copyright holders is not a reason for us to reject it. *Cf. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 123–24

(1980) ("[A]ny increased burdens imposed on the Commission as a result of its compliance with [the Consumer Product Safety Act] were intended by Congress in striking an appropriate balance between the interests of consumers and the need for fairness and accuracy with respect to information disclosed by the Commission. Thus, petitioners' claim that the Commission's compliance with the requirements of [the Act] will impose undue burdens on the Commission is properly addressed to Congress, not to this Court."). We affirm the district court's order denying the parties' cross-motions for summary judgment.

AFFIRMED. Each party shall bear its own costs.

M. SMITH, Circuit Judge, concurring in part, dissenting in part, and concurring in the judgment:

I concur in all but Part IV.C of the majority opinion, and concur in the judgment. Because I disagree with the majority's approach to three issues, I respectfully dissent from Part IV.C.

First, I question whether § 512(f) directly prohibits a party from misrepresenting that it has formed a good faith belief that a work is subject to the fair use doctrine. I construe the plain text of the statute to prohibit misrepresentations that a work is infringing, not misrepresentations about the party's diligence in forming its belief that the work is infringing. Second, I disagree that there is any material dispute about whether Universal considered fair use. Because Universal did not consider fair use, it may be held liable for "knowingly" misrepresenting that the video was infringing, if it should be determined that the video is a non-infringing fair use. Universal's misrepresentation, if any, was knowing because Universal knew it had not considered fair use, and therefore knew it lacked a basis to conclude that the video was infringing. Third, I do not believe that the willful blindness doctrine applies where, as here, a party has failed to consider fair use and affirmatively misrepresents that a work is infringing.

I fully agree with the majority's conclusion that § 512(c)(3)(A)(v) requires copyright holders to consider whether potentially infringing material is a fair use before issuing a takedown notice. As the majority opinion explains, a takedown notice must contain "[a] statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law." 17 U.S.C. § 512(c)(3)(A)(v). Because fair use of copyrighted material is not an infringement of copyright, such use is "authorized by . . . the law." *See id.* § 107. Therefore, in order to form "a good faith belief that use of the material in the manner complained of is not authorized by . . . the law," *id.* § 512(c)(3)(A)(v), a party must consider the doctrine of fair use.

Where I part ways with the majority is in the proper analysis of Universal's misrepresentation. The majority concludes that "Universal faces liability if it knowingly misrepresented in the takedown notification that it had formed a good faith belief the video was not authorized by the law, i.e., did not constitute fair use." An unstated premise of this conclusion is that Universal impliedly represented that it had considered fair use when it certified in its takedown notification that it held a good faith belief that the video was not authorized by the law. Under the majority's approach, Universal's liability depends upon the truth or falsity of its implied assertion that it held a good faith belief about whether the video was a fair use.

However, I do not construe § 512(f) to directly prohibit a party from falsely implying that it has considered fair use. *Cf. Rossi v. Motion Picture Ass'n of Am., Inc.*, 391 F.3d 1000, 1004–05 (9th Cir. 2004) (noting that § 512(f) is "an expressly limited cause of action"). Section 512(f) provides that "[a]ny person who *knowingly* materially misrepresents under this section . . . *that material or activity is infringing* . . . shall be liable for any damages." (emphases added). The plain text of the statute prohibits parties from misrepresenting that *a work is infringing*, not from misrepresenting that they have considered fair use.

In my view, the relevant representation in this case is Universal's assertion that the video is infringing. Universal's liability under § 512(f) depends initially on the disputed issue of whether the video is subject to the fair use doctrine. If the video is a fair use, Universal's representation that the video is infringing was false.

This does not end the inquiry, of course, because § 512(f) only applies to "knowing[]" misrepresentations, not to innocent or negligent misrepresentations. The majority approach does not squarely address § 512(f)'s "knowingly" requirement. In *Rossi v. Motion Picture Association of America Inc.*, we observed that "[a] copyright owner cannot be liable [under § 512(f)] simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in making the mistake. Rather, there must be a demonstration of *some actual knowledge of* *misrepresentation* on the part of the copyright owner." 391 F.3d at 1005 (citation omitted) (emphasis added). Universal urges us to construe *Rossi* to mean that a party must subjectively believe that the fact it asserts is false in order to be liable under § 512(f). If this is indeed the meaning of *Rossi*, it is difficult to see how Lenz can possibly prevail.[1]

Section 512(f)'s "knowingly" requirement should not be construed this restrictively. Universal may be held liable for knowingly misrepresenting that the video was infringing if, knowing it had not considered whether the video was a fair use, it erroneously asserted that it was infringing. A party cannot truthfully represent that a work subject to the fair use doctrine is infringing if the party has knowingly failed to consider whether the doctrine applies. Section 107 plainly states that "the fair use of a copyrighted work . . . is not an infringement of copyright." The requirement that a party hold a "good faith" belief that "the infringing material is not authorized by the law" would be rendered meaningless if parties could wholly omit to consider whether the material was a fair use, and was therefore not an "infringing material" at all.

This reading of § 512(f) does not conflict with our decision in *Rossi*. A party that knowingly fails to consider

[1] The majority opinion implies that Universal would be liable if its actions were not sufficient to form a good faith belief about fair use, and that this is a disputed issue for the jury. But if Universal's proposed construction of *Rossi* is correct, Universal would not be liable merely because its actions were not sufficient to form a good faith belief about fair use. Instead, it would only be liable if it *knew* its actions were not sufficient. Otherwise, Universal would not have "knowingly" misrepresented that it had formed a good faith belief about fair use.

fair use before erroneously asserting that a work is infringing has "some actual knowledge of misrepresentation," *Rossi*, 391 F.3d at 1005, because the party knows that, having failed to consider fair use, it lacks a basis to assert that the work is infringing.

This construction of "knowingly" is consistent with common law principles of deceit and fraudulent misrepresentation. Under these principles, a misrepresentation is knowing if the party knows it is ignorant of the truth or falsity of its representation. For example, in *Cooper v. Schlesinger*, 111 U.S. 148, 155 (1884), the Supreme Court stated that "a statement recklessly made, without knowledge of its truth, [is] a false statement knowingly made, within the settled rule." *See also Sovereign Pocahontas Co. v. Bond*, 120 F.2d 39, 39–40 (D.C. Cir. 1941); *Knickerbocker Merch. Co. v. United States*, 13 F.2d 544, 546 (2d Cir. 1926); *L J Mueller Furnace Co. v. Cascade Foundry Co.*, 145 F. 596, 600 (3d Cir. 1906); *Hindman v. First Nat'l Bank*, 112 F. 931, 944 (6th Cir. 1902).

Construing "knowingly" to include assertions made in conscious ignorance of their truth or falsity is also consistent with the principles of the Second Restatement of Torts. The Second Restatement provides that "[a] misrepresentation is fraudulent if the maker (a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) *knows that he does not have the basis for his representation that he states or implies*." Restatement

(Second) of Torts § 526 (emphasis added).[2] Under these principles, Universal faces liability if it misrepresented that the video was infringing, knowing that it lacked a basis to conclude that the video was not a fair use.

It is undisputed that Universal did not consider fair use before sending the takedown notice. Its policy was to send takedown notices if "the composition was the focus of the video," that is, where "[t]he music [was] prominently featured in the video." I disagree with the majority's conclusion that there is a factual dispute regarding whether applying this policy in this case could have been "sufficient to form a subjective good faith belief about the video's fair use or lack thereof." Section 107 explicitly enumerates the factors to be considered in assessing whether a work is a fair use. 17 U.S.C. § 107. Universal's policy of determining whether "the composition was the focus of the video" simply did not permit it to form an opinion about how the fair use factors applied to the video.[3] Moreover, Universal *knew* it lacked a

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[2] The Second Restatement refers to "fraudulent misrepresentation," rather than "knowing" misrepresentation. *See* Restatement (Second) of Torts § 526. However, as the Restatement clarifies, the requirement that a misrepresentation be "fraudulent" "solely" refers to the party's knowledge of misrepresentation. *Compare id*. cmt. a. ("The word 'fraudulent' is here used as referring solely to the maker's knowledge of the untrue character of his representation. This element of the defendant's conduct frequently is called 'scienter' by the courts."), *with Rossi*, 391 F.3d at 1005 ("[T]here must be a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner."). It is therefore instructive to examine the Restatement definition of "fraudulent" in construing the meaning of "knowingly."

[3] The majority opinion implies that a copyright holder could form a good faith belief that a work was not a fair use by utilizing computer programs that automatically identify possible infringing content. I agree that such

basis to conclude that the work was infringing, because it knew that if this video was a fair use, it was not infringing. Section 107 states as much explicitly. *Id.*

The sole disputed issue in this case was whether Universal's representation that the video was infringing was false–that is, whether the video was a fair use. Universal knew that a fair use was not infringing, knew that it had not considered fair use, and nonetheless asserted that the video was infringing. Universal may be held to account if the video was not infringing, because it knew it lacked a basis to assert that it was.

I also have doubts about whether the willful blindness doctrine is relevant to analyzing whether a misrepresentation is "knowing[]" under § 512(f). The doctrine was originally applied to "criminal statutes requir[ing] proof that a defendant acted knowingly or willfully." *See Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068 (2011). Courts reasoned that defendants could not avoid criminal liability under such statutes "by deliberately shielding themselves from clear evidence of critical facts that are

programs may be useful in identifying infringing content. However, the record does not disclose whether these programs are currently capable of analyzing fair use. Section 107 specifically enumerates the factors to be considered in analyzing fair use. These include: "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"; "the nature of the copyrighted work"; "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"; and "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107. For a copyright holder to rely solely on a computer algorithm to form a good faith belief that a work is infringing, that algorithm must be capable of applying the factors enumerated in § 107.

strongly suggested by the circumstances." *Id.* at 2068–69. Federal courts have applied the doctrine to non-criminal statutes that include a requirement that a party have acted knowingly or willfully, including intellectual property statutes. *See id.* at 2068–71 (active inducement of patent infringement under 35 U.S.C. § 271(b)); *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 34–35 (2d Cir. 2012) ("actual knowledge" under 17 U.S.C. § 512(c)'s safe harbor provision); *In re Aimster Copyright Litig.*, 334 F.3d 643, 650–51 (7th Cir. 2003) (contributory infringement of copyright); *Dolman v. Agee*, 157 F.3d 708, 714–15 (9th Cir. 1998) ("willful" copyright infringement under 17 U.S.C. § 504(c)(2)). It does not necessarily follow, however, that we should apply the doctrine to construe § 512(f). Section 512(f) creates a statutory misrepresentation action, and it is likely Congress intended the action to mirror analogous common law torts like fraud, deceit, and misrepresentation. Therefore, we should examine common law tort principles to construe "knowingly," rather than import a doctrine that developed from the criminal law. As I explain above, common law principles of misrepresentation establish that a misrepresentation is knowing if the party knows it is ignorant of the truth or falsity of its representation.

Because the common law of torts already provides ample insight into what Congress meant by "knowingly," there is no need to also apply the more stringent, and confusing, willful blindness test. To demonstrate willful blindness a plaintiff must establish two factors: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Global-Tech*, 131 S. Ct. at 2070. It makes little sense in this case to ask whether Universal subjectively believed that there was a high probability the video was a fair use. The evidence was that Universal knowingly failed to form any belief about whether the video was fair use. This suffices to satisfy § 512(f)'s requirement that the misrepresentation be "knowing[]."

In sum, I would hold that parties must individually consider whether a work is a fair use before representing that the work is infringing in a takedown notice. If they do not, and the work is a non-infringing fair use, they are subject to liability for knowingly misrepresenting that the work is infringing.

For the foregoing reasons, I respectfully dissent in part.

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Attorneys for Plaintiff and Proposed Class

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

DAVID LOWERY, individually and on behalf of himself and all others similarly situated, Plaintiffs, v. SPOTIFY USA INC., a Delaware corporation, Defendant.	Case No.: **CLASS ACTION COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF**

Plaintiff David Lowery, individually and on behalf of himself and all those similarly situated (each, a "Class Member" and, collectively, the "Class") allege as follows:

NATURE OF THE ACTION

1. This is a class action brought by Plaintiff, on behalf of himself and the numerous other similarly-situated holders of mechanical rights in copyrighted musical works that Defendant Spotify USA Inc. ("Spotify" or "Defendant") has used without mechanical licenses in an egregious, continuous and ongoing campaign of deliberate copyright infringement.

2. Specifically, Spotify has — and continues to — unlawfully reproduce and/or distribute copyrighted musical compositions (the "Works") to more than 75 million users via its interactive commercial music streaming service, as well as its offline listening service. Spotify reproduces and/or distributes the Works despite its failure to identify and/or locate the owners of those compositions for payment or to provide them with notice of Spotify's intent to reproduce and/or distribute the Works.

3. Spotify's infringement of Plaintiff's and the Class Members' mechanical rights is knowing and willful. Indeed, Spotify has publicly admitted its failures to obtain licenses for the musical works it distributes or reproduces or to pay royalties to copyright owners for its use of their Works. Moreover, Plaintiff is informed and believes that Spotify has created a reserve fund of millions of dollars wherein the royalty payments Spotify wrongfully withholds from artists are held. The existence of this fund reflects Spotify's practice and pattern of copyright infringement, wherein Spotify reproduces and/or distributes the Works without first obtaining appropriate authorization or license. Such use of the Works creates substantial harm and injury to the copyright holders, and diminishes the integrity of the Works.

JURISDICTION AND VENUE

4. This action is a civil action over which this court has original jurisdiction under 28 U.S.C. §§ 1331 and 1338 in that the claims herein arise under federal copyright law (17 U.S.C. § 101, *et seq.*) (the "Copyright Act"). Jurisdiction also exists pursuant to 28 U.S.C. § 1332(d)(2) because the matter in controversy exceeds the sum or value of $5,000,000 (exclusive of interest and costs), is a class

action in which a member of the proposed class, including Plaintiff, is a citizen of a state different from Defendant Spotify, and the number of members of the proposed class exceeds 100.

5. Venue in this District is proper under 28 U.S.C. § 1391(b) and/or 28 U.S.C. § 1400(a). On information and belief, a substantial part of the acts of infringement complained of herein occurs or has occurred in this District, and Defendant is subject to personal jurisdiction in this District.

THE PARTIES

6. Plaintiff and the Class are individuals and entities residing in the United States and each of whom, during the Class Period (as defined herein), own the reproduction and distribution rights of copyrighted musical works reproduced and distributed by Defendant Spotify USA Inc.

7. Plaintiff David Lowery is an individual who is a resident of Georgia.

8. Defendant Spotify USA Inc. is a Delaware corporation with its principal place of business at 45 W. 18th Street, 7th Floor, New York, New York 10011. Spotify is duly qualified to do and is doing business in California. Through its interactive Internet-based services, Defendant enters into commercial transactions, contracts and other arrangements with residents of California. Performance of various of Defendant's contracts results in the knowing and repeated unlicensed reproduction and distribution of musical works over the Internet to California residents. Defendant's online activities knowingly and purposely interact with computers of residents in California, including Class Members.

FACTUAL BACKGROUND

9. Plaintiff David Lowery has been a fixture of the music industry for decades, and like the members of the class, has made his livelihood creating and performing music. Mr. Lowery is a prolific songwriter and producer, and is the author or co-author of more than 150 songs for his popular groups Cracker and Camper Van Beethoven.

10. Mr. Lowery and the Class are the copyright owners or owners of exclusive rights in numerous copyrighted compositions in the United States, and have the mechanical rights to these works of music.

11. Pursuant to the Copyright Act, Plaintiff and the Class possess exclusive rights regarding the reproduction and/or distribution of the copyrighted Works, including the associated licensing rights to such activities.

12. Plaintiff and the Class distribute, sell and/or license the Works in the form of CDs, cassettes, and other tangible media throughout the United States, including in California. Plaintiff and the Class reproduce, distribute, sell, and/or license the Works in the form of digital audio files delivered and performed via the Internet.

13. Plaintiff and the Class have invested and continue to invest substantial money, energy, time, effort and creative talent to create and develop the Works.

14. Spotify is an interactive commercial music streaming service (among other services) that operates an Internet website (www.spotify.com) permitting users to customize listening choices for recorded music and to create Internet "radio stations." Its Internet services are downloadable to computers and handheld devices (via mobile applications) making its streaming capabilities widely available to millions of users. Indeed, Spotify has optimized its website for use on iOS and Android-based devices thereby reaching vast markets of users. Spotify claims to have played over 25 billion listening hours of music since its launch seven years ago. (See, Spotify's announcement, "Say hello to the most entertaining Spotify ever", attached hereto as Exhibit A).

15. Spotify offers its services to the public on both a free non-subscription and "premium" paid subscription basis. Paid subscribers enjoy numerous benefits unavailable to users of Spotify's free service, including but not limited to, commercial-free listening privileges, "high quality audio," fully customizable play lists, and enhanced features such as "unlimited skips," "listen offline" and "play any

track." (See, www.spotify.com.) Spotify's "premium" service is offered to users for a monthly fee of $9.99. (See, www.spotify.com.)

16. Spotify's website is currently one of the most frequently visited and used interactive streaming music sites on the Internet and boasts a library of "millions of tracks" available to users so that "the right music is always at your fingertips." (See, www.spotify.com.) As of June 10, 2015, Spotify claimed to have 75 million active users (and 20 million paid subscribers). (See, Spotify's announcement, "20 Million Reasons To Say Thanks" attached hereto as Exhibit B).

17. Spotify further claims that, "We have now paid more than $3 billion USD in royalties, including more than $300 million in the first three months of 2015 alone. That's good for music, good for music fans . . . and good for music makers." (See Exhibit B.) Consequently, Spotify earns millions of dollars in revenues for its services, including from residents of California.

18. Plaintiff and the Class are informed and believe and thereupon allege that Spotify sells the right to advertise to users on its website and mobile applications to earn revenue above and beyond paid subscriptions.

19. Spotify's Internet music service is intended to and does promote Spotify's services in a manner designed to attract users and paid subscribers of its services.

20. Spotify regularly reproduces and/or distributes to listeners and users of its services Plaintiff's and Class Members' musical compositions, and has done so repeatedly for at least the past three years. In the course of rendering its streaming services to users and subscribers, Spotify reproduces and/or distributes Plaintiff's and Class Members' musical compositions numerous times.

21. Spotify has not licensed Plaintiff's and the Class Members' musical compositions or otherwise received authorization from them to reproduce or distribute such works to its users and subscribers.

22. Spotify's unlawful reproduction and/or distribution of Plaintiff's and Class Members' copyrighted works has substantially harmed and continues to harm Plaintiff and the Class Members.

23. A non-exhaustive and illustrative list of Plaintiff's Works that Spotify has illegally reproduced and/or distributed for its users, includes, but is not limited to the following (among others): "Almond Grove", Copyright Registration No. PAu003764032; "Get On Down the Road", Copyright Registration No. PAu003745342; "King of Bakersfield", Copyright Registration No. PAu003745341; and "Tonight I Cross the Border", Copyright Registration No. PAu003745338. Plaintiff has received Certificates of Copyright Registration from the Register of Copyrights for the Works.

24. Spotify's egregious and willful violations of Plaintiff's and the Class Members' rights are highlighted in Spotify's recent admissions regarding its failure to: (1) obtain licenses for the musical works it distributes and reproduces (thereby infringing multiple copyrighted works); and (2) compensate copyright owners for its use of their Works. For example, in Spotify's May 23, 2014 Comments to the United States Copyright Office's Notice of Inquiry in connection with that Office's Music Licensing Study (hereinafter, "Comments", attached hereto as Exhibit C), Spotify admitted that in some instances "Spotify may not be able to identify the copyright owners from the sound recordings provided to Spotify." (Comments, at 5.) Spotify failed to pay songwriter royalties to a publishing company approximately 21% of the time. *See* Ethan Smith, *Songwriters Lose Out on Royalties*, WALLSTREET JOURNAL, Oct. 14, 2015.

25. The Copyright Act provides statutory penalties to discourage Spotify's infringement, including statutory damages awards of between $750 and $30,000 for each infringed work, and up to $150,000 for a willful infringement.

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CLASS ALLEGATIONS

26. Plaintiff Lowery brings this action on behalf of himself and on behalf of all other similarly situated owners of mechanical rights for registered musical compositions, which rights were improperly infringed by Spotify's unlicensed and/or unauthorized reproduction and/or distribution of those compositions. The proposed class is comprised of and defined as follows:

> All owners of mechanical distribution and reproduction rights in musical compositions registered under United States federal law, which compositions were reproduced or distributed by Spotify without license or authorization since December 28, 2012.

27. This action may be properly brought and maintained as a class action because there is a well-defined community of interest in the litigation and the members of the proposed class are clearly and easily ascertainable and identifiable.

28. The class for whose benefit this action is brought is so numerous that joinder of all class members is impracticable. Plaintiff is informed and believes that there are hundreds or thousands of class members and that those class members can be readily ascertained from Spotify's database files and records, and via discovery in this action. Spotify should maintain records of the musical compositions it reproduces or distributes. The Class Members can also be readily located and notified of this action.

29. The claims of Plaintiff Lowery are typical of the claims of the members of the class, and his interests are consistent with and not antagonistic to those of the other class members he seeks to represent. Plaintiff Lowery holds the rights to multiple musical compositions which Spotify has reproduced and/or distributed without license and without providing notification to Mr. Lowery. Plaintiff and all members of the class have sustained actual pecuniary loss and face irreparable harm arising out of Spotify's continued infringement as complained of herein.

30. Plaintiff Lowery has no interests that are adverse to, or which conflict with, the interests of the absent members of the class and is able to fairly and adequately represent and protect the interests of such a class. Plaintiff Lowery has raised a viable copyright infringement claim of the type reasonably expected to be raised by members of the class, and will vigorously pursue those claims. If necessary, Plaintiff Lowery may seek leave of the Court to amend this Complaint to include additional class representatives to represent the class or additional claims as may be appropriate. Plaintiff Lowery is represented by experienced, qualified and competent counsel who are committed to prosecuting this action.

31. Common questions of fact and law exist as to all members of the class that predominate over any questions affecting only individual members of the class. These common legal and factual questions, which do not vary from class member to class member, and which may be determined without reference to the individual circumstances of any class member include, without limitation, the following:

(A) Whether Spotify reproduced or distributed or otherwise exploited via its service registered musical compositions without first obtaining a license or other required authorization;

(B) Whether Spotify's reproduction, distribution or other exploitation of registered musical compositions without first obtaining a license or other required authorization constitutes a violation of the Copyright Act, 17 U.S.C. §§ 106 and 501;

(C) Whether Spotify's unauthorized reproduction, distribution or other exploitation of registered musical compositions was done willfully, thereby entitling the members of the class to increased statutory damages;

(D) Whether Spotify made accurate royalty payments for the musical compositions it reproduced or distributed;

(E) Whether Spotify's violation of California Business & Professions Code § 17200 is continuing, thereby entitling Class Members to injunctive or other relief;

(F) The basis and method for determining and computing damages; and

(G) Whether Spotify's conduct is continuing, thereby entitling the members of the class to injunctive or other relief.

32. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since individual litigation of the claims of all class members is impracticable. The claims of the individual members of the class may range from smaller sums to larger sums, depending upon the number of infringements. Thus, for those class members with smaller claims, the expense and burden of individual litigation may not justify pursuing the claims individually. And even if every member of the class could afford to pursue individual litigation—which is highly unlikely in the independent artist community—the court system could not. It would be unduly burdensome to the courts in which individual litigation of numerous cases would proceed. Individualized litigation would also present the potential for varying, contradictory, or inconsistent judgments and would magnify the delay and expense to all parties and to the court system resulting from multiple trials of the same factual issues. On the other hand, the maintenance of this action as a class action presents few management difficulties, conserves the resources of the parties and of the court system, and protects the rights of each member of the class. Plaintiffs anticipate no difficulty in the management of this action as a class action.

COUNT ONE

(Direct Copyright Infringement - 17 U.S.C. §§ 106 and 501)

33. Plaintiff and the Class reallege and incorporate by reference each and every allegation contained in paragraphs 1 through 32 of the Complaint with the same force and effect as if fully set for that length herein.

34. Spotify, without license, permission, or consent of Plaintiff and the Class, has made unauthorized reproductions and/or engaged in unauthorized distribution of Plaintiff's and Class Members' copyrighted musical compositions, including but not limited to, those compositions listed in paragraph 23 *infra*. Such conduct constitutes infringement of Plaintiff's and Class Members' registered copyrights in violation of 17 U.S.C. §§ 106, *et seq*. and 501.

35. The infringement of Plaintiff's and Class Members' rights in each of their copyrighted compositions constitutes a separate and distinct act of infringement.

36. Spotify's conduct is willful, intentional, purposeful, in disregard of and indifferent to the rights of Plaintiff and Class Members.

37. As a direct and proximate result of Spotify's willful and infringing conduct, Plaintiff and Class Members are entitled to the maximum statutory damages or to their actual damages and Defendant's profits, whichever are higher, against Defendant pursuant to 17 U.S.C. § 504(b). Plaintiff and Class Members will elect whether or not to seek statutory damages prior to final judgment. Plaintiff and Class Members are also entitled to attorney's fees and costs by virtue of Defendant's infringement pursuant to 17 U.S.C. § 505.

38. Defendant's acts have caused and will continue to cause irreparable harm and injury to Plaintiff and Class Members for which they have no adequate remedy at law. Pursuant to 17 U.S.C. § 502, Plaintiff and Class Members are therefore entitled a preliminary injunction and a permanent injunction prohibiting infringement of Plaintiff's and Class Members' copyrights and exclusive rights under United States law.

COUNT TWO

(Unfair Business Practices – Cal. Bus. & Prof. Code § 17200, *et seq.*)

39. Plaintiff realleges and incorporates by reference each and every allegation contained in paragraphs 1 through 38 of the Complaint with the same force and effect as if fully set for that length herein.

40. On information and belief, Plaintiff alleges that Spotify: (a) depresses the value of the royalties owed to Plaintiff and the Class Members' for use of their Works through an arbitrary and non-negotiated payment structure; and (b) captures and holds funds which are otherwise distributable and earns interest thereon, thereby profiting off its own unlawful conduct. These business practices are unlawful and unfair pursuant to California Business & Professions Code § 17200.

41. As a direct and proximate result of Spotify's conduct alleged herein, Plaintiff and the Class Members are entitled to recover all proceeds and other compensation received or to be received by Spotify for its failure to pay royalties. This includes any interest accrued on the royalty funds inappropriately withheld from Plaintiff and the Class Members. Plaintiff and the Class Members have been damaged, and Spotify has been unjustly enriched, in an amount that is not as yet fully ascertained but which Plaintiff is informed and believes is not less than $150,000,000, according to proof at trial.

42. Unless the Court enjoins and restrains Spotify's conduct, Plaintiff and the Class Members will continue to endure great and irreparable harm that cannot be fully compensated or measured in monetary value alone. Accordingly, Plaintiff and the Class Members are entitled to temporary, preliminary and permanent injunctions, prohibiting further acts of unfair competition pursuant to California Business & Professions Code § 17203.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and on behalf of all other persons similarly situated, respectfully prays for relief against Defendant as follows:

1. Certify this matter as a class action;

2. Enter an order appointing Plaintiff Lowery as class representative and Plaintiff's counsel as class counsel;

3. Enter judgment in favor of Plaintiff and the Class;

4. Enter injunctive and/or declaratory relief as is necessary to protect the interests of Plaintiff and the Class (17 U.S.C. § 502), including enjoining Defendant from continued copyright infringement and violations of the relevant provisions of the Copyright Act;

5. A temporary, preliminary, and permanent injunction enjoining and restraining Spotify, and its respective agents, servants, directors, officers, principals, employees, representatives, subsidiaries and affiliated companies, successors, assigns, and those acting in concert with them or at their direction, from further violations of California Business & Professions Code § 17200;

6. Injunctive relief that requires Spotify to pay for the services of a third party auditor to identify the owners of Works reproduced and/or distributed by Spotify despite Spotify's failure to first obtain a mechanical license prior to reproducing and/or distributing the Works, and further requiring Spotify to remove all such Works from its services until it obtains proper licenses for them;

7. Restitution of Spotify's unlawful proceeds, including Defendants' gross profits;

8. Award compensatory damages to Plaintiff and the Class in an amount to be ascertained at trial;

9. Award statutory damages to Plaintiff and the Class according to proof, including but not limited to all penalties authorized by the Copyright Act (17 U.S.C. §§ 504(c)(1), 504(c)(2));

10. Award reasonable attorneys' fees and costs (17 U.S.C. § 505);

11. Award Plaintiff and the Class pre- and post-judgment interest to the extent allowable; and

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12. Award such other and further relief that the Court may deem just and proper.

Dated: December 28, 2015

MICHELMAN & ROBINSON LLP

By ______________________________
Sanford L. Michelman
Mona Z. Hanna
David C. Lee
Ilse C. Scott
Melanie Natasha Howard
Attorneys for Plaintiff and Proposed Class

EXHIBIT "A"

Say hello to the most entertaining Spotify ever

Posted on 2015/05/20 by Daniel Ek

We are on a mission. With over 25 billion listening hours under the hood since our launch seven years ago, we're obsessed with figuring out how to bring music into every part of your life, wherever you are, whatever you're doing, whatever your mood. More than ever, you're telling us what you want: the best music to fit your mood and moment mixed with great entertainment throughout your day. We understand that *how* music fits into your life is as powerful as the music itself. So today we're rolling out a richer mobile music experience built around your day, bringing you the music you love when you need it most. Introducing:

- **The Now start page**. From the time you wake up until tonight's party, the Now start page serves you the right music day and night. Need a Monday morning playlist pick-me-up? Done. The right tunes to help you focus after lunch? We've got you covered. And because Now learns what you like, you'll be sure to hear the right music – selected from our in-house experts and your personal collection – whatever the occasion. Recommendations will adapt over time to fit your taste and mood.
- **Spotify Running**. Every week millions of you lace up and hit the road to Spotify. Music is the perfect running companion but sometimes you need even more motivation to push on. That's why Spotify Running is all about helping you go the extra mile.We've combined the best music on the

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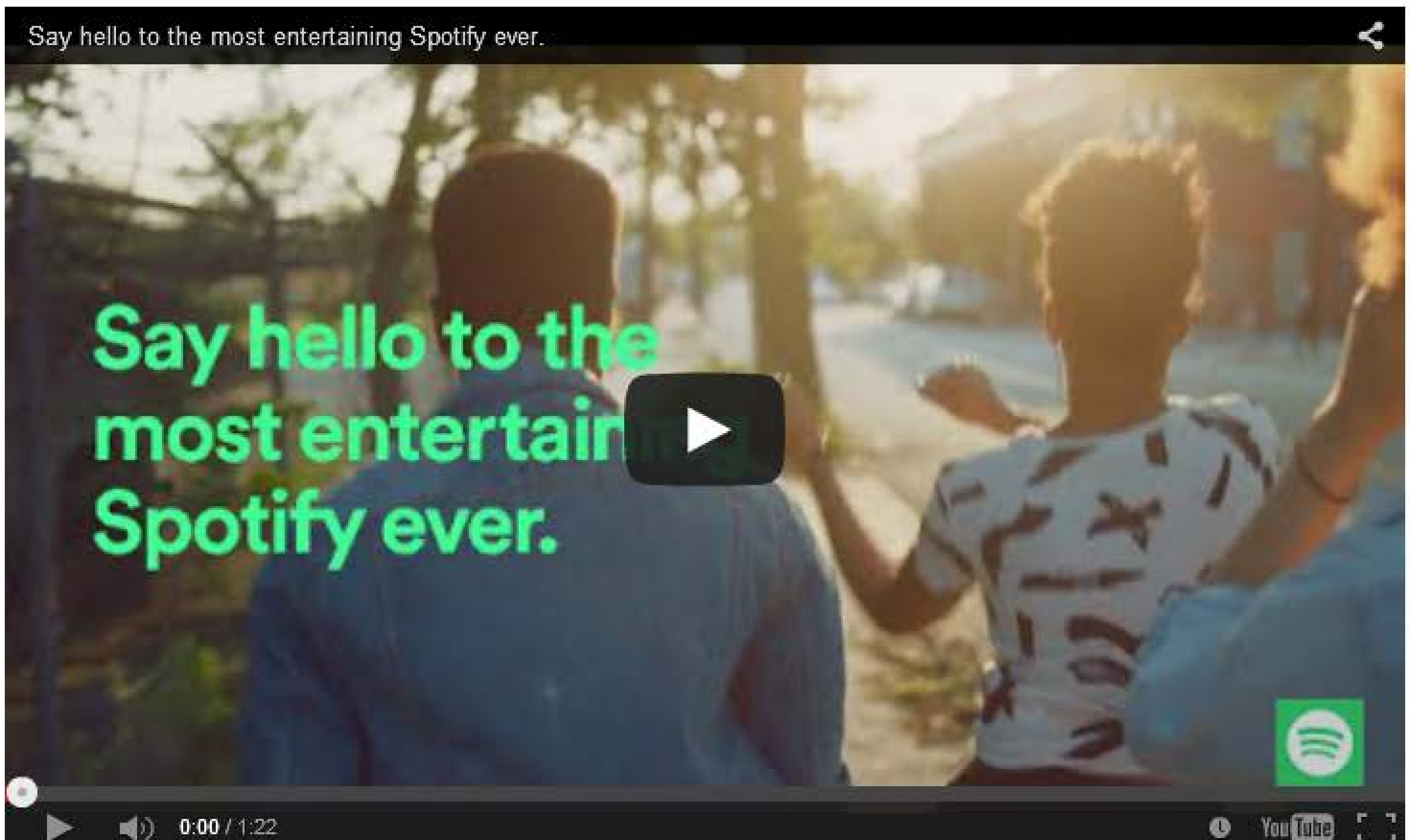
Nominations and Awards

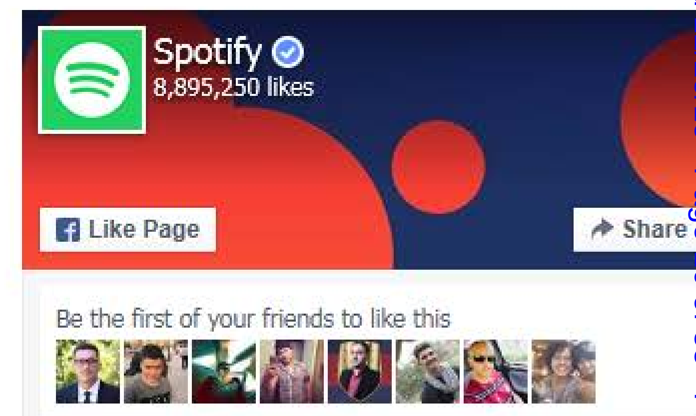
planet – recommendations based on your listening history, multiple-genre playlists and original running compositions written by some of the world's foremost DJs and composers – all tuned to your tempo and seamlessly transitioned to ensure you'll never miss a beat. Start running and Spotify will detect your tempo, matching the perfect music in time to your step – making you a harder, better, faster, stronger runner.

- And that's not all: this Summer we're teaming up with Nike to bring new music experiences to their audiences around the globe. And later this year, you'll be able to access the new Spotify Running experience through the Nike+ app. We're also integrating the RunKeeper app with Spotify Running later this year.



Party
Pre-release
Previews
Product
Spotify
Spotlight

Facebook



Twitter

Tweets Follow

On top of our improved music experience, we're also introducing an expanded world of entertainment built around you:

- **More Than Music**. For the first time, Spotify is adding video clips and audio shows to the music mix. We know there are times in the day you want to switch between music to catch up on the latest news, listen to your favourite podcast or simply watch something fun. And with a stellar range of entertainment to choose from there's something for everyone. Spotify will suggest video and audio shows for you to watch and learn what you love.
- **Spotify Originals**. We're also serving up an exciting slate of original content to entertain your day. Check out our Running Originals – music specifically designed for running that dynamically adapts to your running tempo. A total of six original tracks, all found within Spotify Running, are available at launch. We're also introducing a range of exclusive content, from Dance Move of the Day produced by Amy Poehler's Smart Girls brand, to specially curated radio shows presented by artists including Icona Pop, Jungle and Tyler the Creator.
- **Spotify now comes packed with entertainment, news and clips** from the likes of ABC, BBC, Comedy Central, Condé Nast Entertainment, ESPN, Fusion, Maker Studios, NBC, TED and Vice News, with much more to come (see Notes to Editors for full entertainment roster).

Spotify @Spotify 1h
The Fab Four are here. Re-discover The #BeatlesOnSpotify
cards.twitter.com/cards/a9arm/1b...
Expand

Spotify @Spotify 27 Dec
Get fired up on game day. Intercept @Revis24's playlist, powered by @bose.
cards.twitter.com/cards/a9arm/1b...
Expand

Spotify @Spotify 26 Dec
"10" - @pitchfork

#BeatlesOnSpotify - spoti.fi/1NEjuCS

Tweet to @Spotify

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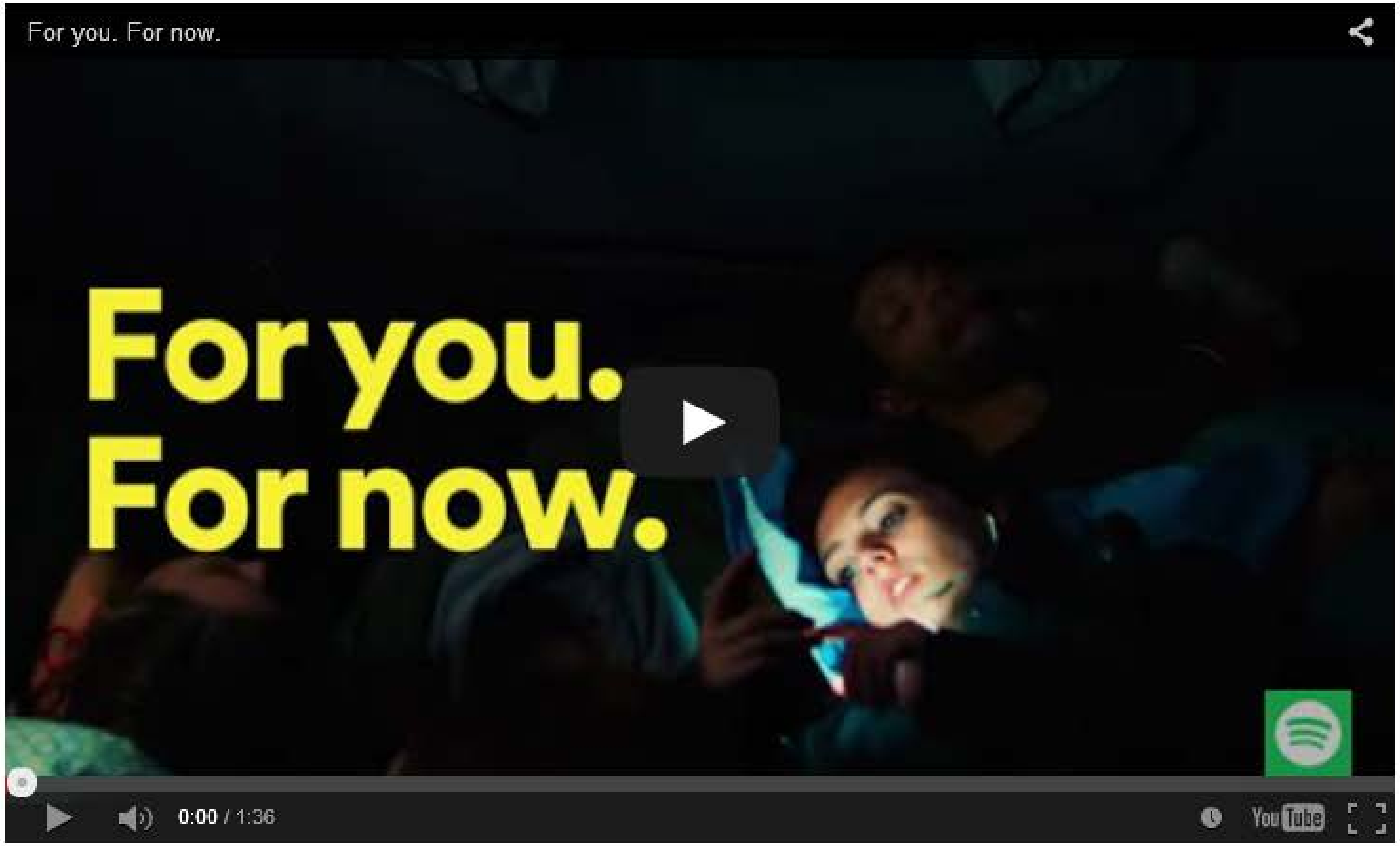

We're so excited to bring you a deeper, richer, more immersive Spotify experience. We want Spotify to help soundtrack your life by offering an even wider world of entertainment with an awesome mix of the best music, podcasts and video delivered to you throughout your day. And we're just getting started. The new Now experience will begin rolling out today to iPhone users in the US, UK, Germany and Sweden – with more markets and platforms to follow in the near future. Spotify Running will start rolling out to iPhone users globally today. That's entertainment.

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EXHIBIT "B"

20 Million Reasons to Say Thanks

Posted on 2015/06/10 by The Spotify Team

What a difference a year makes! At the end of May 2014, we reached 10 million paying subscribers and 40 million active users. Today, we have **reached more than 20 million subscribers** and **more than 75 million active users.** 10 million subscribers in our first five and a half years – and another **10 million subscribers in just a single year**! That's an average of one new subscriber every three seconds over the last year. Wow. And, more people listening on Spotify means more payouts to the creators of the music you love. As we grow, the amount of royalties we pay out to artists, songwriters and rights holders continues to climb faster than ever. We have now **paid more than $3 billion USD in royalties, including more than $300 million in the first three months of 2015 alone**. That's good for music, good for music fans … and good for music makers. Take a look at what it means for four different types of artists. The blue columns show average actual payouts over the last 12 months, which started with 10 million subscribers; the green columns show our projected average payouts over the next 12 months, starting from our new baseline of 20 million paying subscribers.

Categories

Apps
Blog
Contests
Deals
Exclusives
General
Interviews
Life at Spotify
Marketing
Music
Nominations and Awards
Party

Here's how we did it.

We could have never achieved this growth without all of you: the music fans who listen, discover, share and celebrate music and artists every day. Thank you, 20 million X. 20 Million Reasons To Say Thanks

The Underdog
Spoon
20 Million Thank Yous

1	The Underdog Spoon	3:42
2	Love Like Mine Miami Horror, Cleopold	4:11
3	Shut Up and Dance WALK THE MOON	3:19
4	Happy C2C, Derek Martin	3:55
5	Want To Want Me - Westfunk... Jason Derulo	3:13
6	I Really Like You Carly Rae Jepsen	3:25
7	Don't Look Down	

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This entry was posted in GENERAL, LIFE AT SPOTIFY, MUSIC, PRODUCT, SPOTIFY and tagged 20 million, 3 billion, 75 million, premium, Spotify, subscribers, thanks. Bookmark the permalink.

← SPOTIFY REVEALS THE TOP WEDDING SONGS GLOBALLY

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Expand

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"10" - @pitchfork
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Tweet to @Spotify

Archives

EXHIBIT "C"

Before the
UNITED STATES COPYRIGHT OFFICE
Library of Congress

Notice of Inquiry Music Licensing Study: Notice and Request for Public Comment	)))))	Docket No. 2014-03

COMMENTS OF SPOTIFY USA INC.

James Duffett-Smith
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Head of Licensing Business Affairs,
Spotify USA Inc.

May 23, 2014

Introduction and Summary

Spotify USA Inc. ("**Spotify**") respectfully submits these comments in response to the Copyright Office's Notice of Inquiry (the "**NOI**") for a Music Licensing Study: Notice and Request for Public Comment, published in the Federal Register on March 17, 2014. 78 Fed. Reg. 14739 (Mar. 17, 2014). We appreciate the opportunity to participate in the Copyright Office's evaluation of the effectiveness of existing methods of licensing music for the purposes of preparing a report to Congress on potential revisions to the United States Copyright Laws (the "**Copyright Laws**").

Spotify is the largest interactive streaming music service in the United States, offering consumers the ability to receive digital audio transmissions of sound recordings and the musical works embodied therein on an interactive and noninteractive basis from a library that is currently over 20 million songs (the "**Spotify Service**"). Worldwide, the Spotify Service has more than 40 million active users, of whom 10 million are paying subscribers.

To operate the Spotify Service, Spotify needs to secure multiple rights from multiple copyright owners. These rights include, among others, the right to reproduce sound recordings and the musical works embodied therein, the right to distribute sound recordings and the musical works embodied therein, and the right to publicly perform sound recordings and the musical works embodied therein by means of digital audio transmissions.

Spotify secures the right to reproduce, distribute, and publicly perform sound recordings either from individual sound recording copyright owners or distributors (record labels and aggregators). It has in the past in the case of noninteractive digital audio transmissions of sound recordings where only the reproduction and public performance rights of sound recording copyright owners are implicated secured rights pursuant to the statutory licenses set forth in Sections 112 and 114 of the United States Copyright Act (the "**Copyright Act**"). Spotify secures the right to reproduce and distribute the musical works embodied in sound recordings either from musical work copyright owners (typically music publishers) through its licensing administrator Harry Fox or pursuant to the statutory license set forth in Section 115 of the Copyright Act. Spotify secures the right to publicly perform the musical works embodied in sound recordings from the three performing rights organizations ("**PROs**") in the United States (i.e., ASCAP, BMI, and SESAC).

All of these licenses are secured pursuant to the legal regime created by the Copyright Act, which has a significant impact on how Spotify operates the Spotify Service. Globally, Spotify pays out around 70% of all money that it recieves to rightsholders which from launch of the service to date has amounted to over $1bn.The process of securing all of these rights is time consuming, expensive, and often inefficient. Spotify's parent company had already been operating a version of the Spotify Service outside of the United States for 3 years before launching in the United States on 14 July 2011, with the U.S.-delay resulting from the difficulty of securing enough rights from copyright owners such that a sufficiently compelling music product could be offered to the consumer.

Spotify welcomes the Copyright Office's inquiry into the effectiveness of the current means for licensing the rights to music in the United States. Spotify believes that should there be changes made to the Copyright Laws in no circumstances should they be amended in a way that creates more inefficiencies, more uncertainty, and more impediments to innovation that has rewarded creators, consumers, and entrepreneurs.

Spotify strives to offer American consumers a compelling product. The company also believes that authors, artists, and copyright owners deserve to be paid fair compensation for their creative efforts. The Copyright Laws are balanced at the moment and, while in need of modernisation in some relatively small respects, do allow Spotify to conduct its business for the benefit of American consumers, authors, and creators. We would hope that through this study effort, the Copyright Office will take into account the competing – but co-dependent - interests of authors and creators, licensees, and the public and not to disturb the current balance of the Copyright Laws.

Spotify's specific responses to certain of the Copyright Office's questions are set forth below. As a general matter, however, Spotify believes that any reforms to the Copyright Laws should ensure the following:

- Authors and performers receive fair compensation for their creative works.
- Royalties payable for "music" – sound recordings and the musical works embodied therein – have a rational relationship to one another so that the fees established for the use of one copyrighted work take into consideration the fees paid for the use of the other.
- Section 115 is modernized so that there is an efficient mechanism for licensing large numbers of musical works, the ownership of which is often split among multiple parties. This could involve licensing on a blanket basis, whether voluntary or compulsory.
- Collective action by rights owners continues to be subject to government oversight and regulation so that competitors may not act in concert to harm competition.
- Collective licensors are obligated to disclose in a transparent and real-time basis the copyrighted works and the sound recordings in which they are embodied that they are authorized to license and those to which they have lost the right to license within the past 3 months.
- The current balance in the Copyright Laws between the interests of authors, creators, licensees and the public remains.

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.***

The section 115 statutory license is an indispensable component to facilitating a vibrant marketplace for making millions of sound recordings available to the public on commercially reasonable terms.

Today's on-demand streaming services compete not only on functionality but also on, among other things, the breadth of catalog made available to consumers. That most often requires a service to offer content that suits the demands and expectations of all users – from those who want today's top hits to those interested in the longest of the long tail. This means licensing the rights to millions of individual sound recordings and the musical works embodied therein.

Spotify's catalog of available music is dynamic, in that it may increase and decrease on a day-to-day basis. Those changes are driven by whether the rights to particular works – both the sound recordings and the musical works embodied therein – have been secured for reproduction, distribution, and public performance in the United States (and such other territories in which the Spotify Service is made available to the public). Securing the rights to sound recordings – while challenging in its own right – is not constrained by two things that make securing rights in compositions challenging: split interests in copyrights and the difficulty of identification.

The rights to a sound recording are almost always owned by a single entity, typically a record label. The rights to musical works, however, are often split among numerous parties, typically music publishers that represent the rights of individual songwriters. Although the Copyright Laws provide that a nonexclusive licensee of a co-author of a joint work may not be sued for copyright infringement[1], custom and practice in the music industry has developed such that each co-author of a musical work only licenses its proportionate share in the underlying work. This means that in order to avoid liability for copyright infringement – and the crushing statutory damages available under the Copyright Laws – Spotify must obtain licenses from each co-author owning a share in an individual work, no matter how small that co-author's interest might be

Identifying and locating the co-authors of each of millions of copyrighted musical works is a daunting task that is hampered significantly by, among other things, the lack of a modern and publicly searchable database identifying the current owners of musical works and the contact information for such copyright owners. In instances where it is either not possible or economically feasible to identify each co-author of a copyrighted musical work, the Section 115 statutory license provides a critical mechanism for securing rights while also ensuring the payment of royalties to the owners of the copyrighted works.

As the Copyright Office knows, however, in order to avail oneself of the benefits of the Section 115 license, a statutory licensee must provide the copyright owner of a particular musical work with notice of use prior to a reproduction and distribution of the copyright work to the public.[2] Although this approach may have made sense at a time when the Section 115 license was most often utilized by record companies manufacturing and distributing phonorecords – where record labels had long-established relationships with music publishers – this approach no longer makes sense in a world where principal licensees under the Section 115 license are streaming services that are licensing millions of copyrighted musical works as opposed to 10-15 works per phonorecord for several hundred phonorecords to be manufactured and distributed to the public each year.

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[1] See *Davis v. Blige*, 505 F. 3d 90, 100 (2d Cir. 2007); see also 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 6.10[A][2] (2013).

[2] 17 U.S.C. § 115(b)(1).

In the case of Spotify, the company has had to secure the rights to millions of individual copyrighted works, many of which were secured pursuant to the Section 115 license. But when doing so, Spotify first had to be able to identify the copyright owners of each work, had to obtain contact information for those owners, and then ensure that a notice of use was provided to such owners prior to first use. To do this, Spotify had to rely upon the services of third party rights administrators, who themselves often struggle with securing the necessary information to submit a compliant notice of pursuant to the statutory license.

These problems are particularly magnified when dealing with new releases, which consumers expect a service such as Spotify to have available on the day of public release. Where a record label licenses Spotify to use a new release on the Spotify Service to coincide with the "street date" of such release, Spotify may only make the sound recordings from that release available on the Spotify Service if Spotify has secured licenses to the underlying musical works. In some cases Spotify may have a direct license in place, via its administrator with some of the copyright owners that own an interest in the musical works embodied in the sound recordings on the new release. But where its administrator does not obtain a direct licence, Spotify has to obtain a license pursuant to Section 115.

A Section 115 license can only be secured, however, where Spotify can identify the copyright owners of the musical works embodied in that release. Record label licensors of Spotify are not prepared to notify Spotify of such ownership interests and Spotify may not be able to identify the copyright owners from the sound recordings provided to Spotify. Thus, new releases that record labels and artists want to have widespread distribution may not be made publicly available on the Spotify Service due to a lack of information that enables Spotify to avail itself of the Section 115 license.

The requirement that a rightsholder be identified before a Section 115 licence can take effect also creates strange effects when looked at in conjunction with the blanket licences provided by the PROs. Where a copyright owner is not known by Spotify's licensing administrator Harry Fox ("**HFA**"), HFA conducts copyright research to try and identify them. One source that HFA uses is the databases of the PROs, but they are considered by HFA to be secondary sources, which means that HFA will write to the person listed as the owner to confirm the accuracy of the information and the share of the copyright owned. If that person does not respond to HFA then it will not be able to comply with the formalities required for the Section 115 licence so that work will not have a mechanical licence to be made available on Spotify's services. On the other hand, if the work is listed in the PRO database then it <u>will</u> be covered by Spotify's blanket licence from the PRO. This means that in some cases, Spotify will be licensed for performing, but not mechanical rights in the same composition. This would not be an issue if there were a blanket licence available for mechanical rights, or if there were a database that could be relied on in order to comply with Section 115.

An additional inefficiency of the Section 115 license arises from the fact that each copyright owner of each work has to be notified in advance prior to first use by each licensee. But if the intent of the license is to facilitate licensing and provide copyright owners with compensation for use, then it seems unnecessary to require streaming services to provide individual copyright owners with notice prior to use. Copyright owners are presumably already placed on notice of a use by the record labels that are manufacturing and distributing phonorecords to the public. As a result, the requirement that a notice of intent to use a musical work be served before a distribution by a service provider seems redundant. It would be better if a notice could be sent within a reasonable time after distribution (say, two weeks) to allow for efficiencies in getting new releases live. If this were coupled with a definitive register of all musical works legitimately available, then the process would be much smoother for licensees and licensors.

Alternatively, Spotify believes that the effectiveness of the Section 115 license can be ensured if uses of musical works were covered pursuant to a blanket license, in a manner similar to the Section 114 license. Under Section 114 of the Copyright Act, a noninteractive service may publicly perform by means of a digital audio transmission any sound recording that has been released to the public with the consent of the copyright owner.[3] If sound recordings are going to be licensable pursuant to a statutory license on a blanket basis, then Spotify respectfully suggests that it is inefficient and counterproductive to require licensing of the musical works embodied in such sound recordings on any basis other than a blanket basis. In this event though it is important that the current Section 801(b)(1) remains the standard for rate setting.

The Section 115 license could, in Spotify's view, be modified to permit the use of any musical work that has been released to the public with the consent of the copyright owner on a blanket basis. The analog for such a model already exists in Section 114 of the Copyright Act. Additional questions would need to be answered if such a new licensing regime were created – such as to whom would payments be made, either the Copyright Office or one or more licensing collectives – but figuring out who should be paid should not interfere with the adoption of a system that would clearly be more efficient than the system that exists today.

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

Spotify has not participated in any previous ratesetting process pursuant to Section 115 and therefore takes no position on the process at this time, although it does reserve the right to provide additional comments or suggestions in response to the comments filed by other parties in response to the NOI during the reply comments phase of the proceeding.

As to the ratesetting standard, Spotify believes that the current standard set forth in Section 801(b)(1) of the Copyright Act is probably appropriate.[4] The four factors set forth in

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[3] 17 U.S.C. § 114(d)(2)(C)(vii).

[4] 17 U.S.C. § 801(b)(1)(A)-(D) instructs the Copyright Royalty Judges to set rates according to the following objectives:

(A) To maximize the availability of creative works to the public.

(B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, Section 801(b)(1) do appear to properly balance the need to compensate copyright owners fairly while incentivizing the creation of new works with the need of licensees to earn a fair income. The 801(b)(1) standard also allows the Copyright Royalty Board ("**CRB**") to consider factors other than evidence of what might happen in a hypothetical free market.

Spotify has followed with interest the disputes that have arisen following determinations of the CRB (and its predecessor, Copyright Arbitrary Royalty Panels ("**CARPs**")) in Section 114 ratesetting proceedings. In those proceedings where rates have been established pursuant to the willing buyer/willing seller standard,[5] litigation has inevitably followed and Congress has all too frequently been required to step in to provide alternative options to the rates established by a CARP or the CRB.[6]

While we expect other parties with more experience in those ratesetting proceedings to comment in response to the NOI and give the Copyright Office the benefit of their experiences, Spotify believes that any effort to establish rates that reflect what would result from hypothetical negotiations between willing buyer/willing sellers is misguided. Such rates are likely to lead to rates that are too high as they are often premised on the agreements entered into by only the largest of licensors – who have the resources to participate in a ratesetting proceeding – and where such licensors often demand "Most Favored Nations" provisions to ensure that only the highest rates are utilized in the market as opposed to rates that would arise from true free market negotiations.

Spotify therefore supports the continued use of the Section 801(b)(1) standard for the establishment of rates pursuant to Section 115.

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?***

As noted above, Spotify believes that the Section 115 license is currently inefficient for a world in which consumers are increasingly consuming music via streaming or access than through the purchase of physical or digital phonorecords. In such an environment, a blanket license would

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capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

[5] "In establishing rates and terms for transmissions by eligible non-subscription services and new subscription services, 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 determining such rates and terms, the Copyright Royalty Judges shall base their decision on economic, competitive and programming information presented by the parties…" 17 U.S.C. § 114(f)(2)(B).

[6] See the Webcaster Settlement Acts, *supra* note 1.

clearly be more beneficial to both copyright owners and licensees. A blanket license would ensure that payment is made for all uses of musical works while providing licensees with an effective mechanism for securing rights.

If Congress has already determined that certain uses of musical works are covered by a statutory license, then it would seem unnecessary to provide each and every copyright owner with notice of use in advance of such use so long as the copyright owner is being paid for a use. For example, Section 114 does not require a noninteractive streaming service to notify each sound recording copyright owner of a use of a sound recording. Rather, a single Notice of Use of Sound Recordings Under Statutory License is filed with the United States Copyright Office.[7] Spotify sees no reason why notice to copyright owners under Section 115 should be different than notice to copyright owners under Section 114.

The provisioning of a single notice of use for operation under the Section 115 license would clearly be the most significant improvement that could be made to that license. The second most significant change and improvement would be the designation of a single entity for the payment of statutory royalties. The entity designated to receive payments could be the Copyright Office or a private organization, similar to SoundExchange, Inc.

In the first webcaster rate proceeding, the CARP established, and the Librarian of Congress adopted, a model whereby there would be a single "Receiving Agent" that would receive payments from statutory licensees.[8] That single Receiving Agent was then required to distribute royalties to two "Designated Agents," which would then be responsible for distributing royalties to individual copyright owners.[9]

Spotify believes that such a system would work well in the context of the Section 115 statutory license. Where split ownership has arisen from the practices of the participants in the music publishing industry, Spotify believes that music publishers themselves – and not licensees – are in the best position to figure out who owns what interests in what musical works and how royalties paid for the use of musical works should be allocated. Consequently, Spotify believes that music publishers are in the best position to identify a potential receiving agent and possible, multiple designated agents.

Alternatively, if music publishers are unable to identify such entities, then Spotify would recommend that the Section 115 statutory license be modified to adopt a regime similar to that utilized in both Sections 111 and 119 of the Copyright Act, where statutory licensees make payments under those respective statutory licenses to a single entity, the Copyright Office, which then distributes royalties to copyright owners following either negotiation or litigation among the

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[7] 37 C.F.R. § 370.2.

[8] See *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule*, in Docket No. 2000-9 CARP DTRA 1&2, 67 Fed. Reg. 45240, 45266-45268 (July 8, 2002).

[9] Id.

interested parties for a determination of allocation of funds. We see no reason why such a model would not work under Section 115.

Providing for payment to a single entity would also exclude statutory licensees from any competing claims amongst parties claiming inconsistent ownership interests in the same work. This would avoid the situation where the claimed ownership interests of copyright owners exceed 100% of a copyrighted work.

Spotify takes no position on the elements of Section 115 reform that would govern how the royalties would be allocated among musical work copyright owners, beyond the general principles that such allocation and distribution should be fair, timely and transparent. It is important for Spotify that these principles are respected because otherwise Spotify can find itself in a position where it is criticised for not paying royalties, when in fact it has done so but they have not been properly distributed. As long as these principles are respected, though, we believe the parties entitled to those royalties should make such allocation and distribution decisions.

To that end, Spotify believes that any Section 115 reform that establishes a blanket licence should include the following general terms, with the specifics thereof to be established through negotiations among interested parties, either through a notice and comment rulemaking or a proceeding before either the CRB or the Copyright Office:

- **Notice of Use** – a statutory licensee should be permitted to file a single Notice of Use of Musical Works with the Copyright Office. If material information in the Notice of Use should change (e.g., the contact information for the licensee), then the licensee should be obligated to file an Amended Notice of Use with the Copyright Office.

- **Payments / Receiving Agent** – payments by licensees operating under Section 115 should be made to a single entity – the Receiving Agent – which then assumes the obligation to allocate royalties among one or more Designated Agents.

- **Designated Agents** – Designated Agents will assume responsibility for allocating royalties among all copyright owners whose works were utilized during the period for which royalties were paid. Copyright owners should be free to affiliate with the Designated Agent of their choice, with a single Designated Agent assuming responsibility for allocating and distributing royalties to copyright owners who fail to affirmatively affiliate with another Designated Agent.

- **Allocation and Distribution Principles** – Distribution from the Receiving Agent to Designated Agents, allocation between the Designated Agents and onward payment to copyright owners should be done in a fair, timely and transparent manner.

- **Standards for Payment and Reporting** – standards should be established that provide for a single method of calculating liabilities and for reporting uses of copyrighted works. Currently, each copyright owner from whom a licensee may obtain a license may require its own form of reporting. Standardization of reporting should be required, similar to the manner in which reporting is required under Section 114.[10]

- **Audits** – the Receiving Agent should be authorized to conduct audits of statutory licensees under generally accepted auditing principles (e.g., no more than one audit per year, no period may be audited more than once, etc.). If there are multiple Designated Agents, then a Designated Agent should be permitted to conduct an audit, but an audit by one Designated Agent should serve as a valid audit for the purposes of all Designated Agents such that a licensee would not be subject to multiple audits by multiple Designated Agents.[11]

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?***

A licensing regime in which public performance rights and mechanical reproduction rights could be obtained from a single source or pursuant to a single license is an interesting idea and could in theory lead to efficiencies. However, the current system where the PROs are subject to regulation via the consent decrees is working well so reform may not be necessary. In the event that a unified public performance and mechanical reproduction licence is made available, it is important the the rate setting standard under 801(b)(1) continues to be respected.

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

Spotify believes that the process for licensing the public performance of musical works is largely effective and efficient, at least with respect to ASCAP and BMI. By submitting a consent decree license request to those two entities, Spotify is entitled to publicly perform all of the works in those two entities' repertories. Upon executing a license with either ASCAP or BMI, Spotify is further entitled to public perform all of the works in those two entities' repertories as of the time the license was executed for the duration of such license.

These blanket licenses are highly efficient, even though having to secure licenses from multiple PROs is, itself, inefficient. Similar efficiencies could be achieved if SESAC, the smallest of the U.S. PROs, was itself subject to a consent decree.

In contrast to the Section 115 license, music publishers have recognized that public performance rights are efficiently administered through collective licensing. Copyright owners of musical works are not required to join a PRO but they overwhelmingly choose to do (at least for now) because collective licensing reduces transaction costs, results in the sharing of administration

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[10] 37 C.F.R. § 370.4.

[11] Id. § 380.6.

and enforcement, and permits a licensee to use large numbers of works through payments to a single entity.

If music publishers exercise any right to withdraw from a PRO in the entirety, then Spotify believes it is imperative that both the withdrawing publisher and the PRO from which the publisher withdrew provide immediate transparency as to the musical works that are no longer subject to license by the respective PRO. Only by ensuring transparency can a party previously licensed by a PRO ensure that it will not be subject to a claim of copyright infringement and the crushing statutory damages that can arise therefrom.

Publishers have already tried to deny certain licensees of the right to know which works have been withdrawn from a PRO.[12] Therefore, music publishers authorized or permitted to act collectively should be required to disclose those works that are removed from the repertory of a PRO. The PRO should also be required to make available through an online portal all of the works that have been removed in an easily determinable manner. This would mean on a bulk basis by licensor or by date, and not pursuant to queries on a work-by-work basis.

Spotify would oppose any amendments to the Copyright Laws that would undermine the collective licensing of public performance of musical works and believes that the current system where public performance rights are aggregated in the PROs and the PROs are subject to consent decrees works well.

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

Spotify has not previously participated in any ratesetting process under the consent decrees governing ASCAP and BMI and therefore is reluctant to comment on the effectiveness of those processes.

However, Spotify does believe that the royalty fees to be paid by digital music services should not be set in a vacuum. By this we mean that Spotify should not be subject to one rate setting process where it could be subject to a royalty rate of, say 50% of revenue, while subsequently or simultaneously being subject to another rate setting process where it could also be subject to a royalty rate of, say 50%. Such a system would clearly not work as it would result in no service being able to survive.

No matter how farfetched the example in the above paragraph might seem, it is not necessarily far from reality. For example, under the Section 114 statutory license, the CRB

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[12] See *In re Pandora Media, Inc.*, Nos. 12 Civ. 8035 (S.D.N.Y. Dec. 13, 2013).

established royalty rates only on a per performance basis.[13] Pandora Media, Inc., a public company, that would be subject to the CRB's per performance royalty rates had it not been able to elect alternative rates pursuant to the Webcaster Settlement Act of 2009,[14] reports its content acquisition costs as a percentage of its total revenue, with the vast majority of its content acquisition costs allocated to the fees payable for the right to publicly perform sound recordings. According to Pandora's SEC filings for the period ending March 31, 2014, the company's content acquisition costs (mostly fees for sound recordings) consumed 75% total revenues for the three-month period ending March 31, 2013 and 56% of the company's total revenues for the three-month period ending March 31, 2014.[15]

If Pandora had been required to pay the CRB-established royalty rates versus those available to a "pureplay" webcaster, its content acquisitions would have increased by approximately 75% as the per performance rates would have increased from $0.0012 per performance to $0.0021 in 2013 and from $0.0013 to $0.0023 in 2014. This would have resulted in the company paying approximately 125% of total revenues for content acquisition costs for the three-month period ending March 31, 2013 and approximately 94% of total revenues for content acquisition costs for the three-month period ending March 31, 2014.

Reasonable people would probably conclude that no company could long survive if it were paying out more than 100% of its revenues. Yet music publishers are asking for "parity" for

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[13] A "performance" is defined as "each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (e.g., the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (e.g., a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song)." 37 C.F.R. § 380.2.

[14] Webcaster Settlement Act of 2009, Pub. L. 111-136; 123 Stat. 1926 (June 30, 2009).

[15] Pandora Media, Inc. Form 10-Q for the quarterly period ending March 31, 2014, at 27.

performance royalties for musical works to those of sound recordings.[16] We do not know exactly what the publishers mean by "parity" – whether they mean the same percentage of revenue paid for the public performance of musical works as is paid for the public performance of sound recordings– or something else, but clearly parity between sound recording and musical work royalty rates does not work where the rates established for the use of one work are already equal to or greater than 50% on an effective basis. Spotify USA Inc. currently pays around 70% of its revenue to rightsholders, with payments for the right to make available compositions receiving about 21% of the amount that the record labels get in accordance with the statutory rate. If "parity" means paying the same to publishers as it does to record labels, Spotify will be paying out more than 100% of its revenues to rightsholders, which is clearly unsustainable.

We therefore believe that the fees to be paid for both musical works and sound recordings should not be set in a vacuum. There is only such much revenue that can be paid by a licensee for the use of "music" – which encompasses both sound recordings and the musical works embodied therein. Spotify notes that the largest musical work and sound recording copyright owners are also often under common ownership (e.g., Universal Music Group and Universal Music Publishing Group, Warner Music Group and Warner/Chappell Music Publishing, etc.). Spotify values both compositions and sound recordings but is not in a position to comment on whether one set of rights is worth more than another.

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?***

Spotify believes that the consent decrees that ASCAP and BMI have each entered into with the United States Department of Justice are generally serving their intended purpose. The consent decrees permit any licensee to obtain a license to all of the works in the respective PROs' repertory. This is a pro-competitive benefit of the decree.

Simultaneously, the consent decrees limit the ability of music publishers to act collectively in a manner that harms competition by charging supra-competitive rates. Nothing should be done to undermine the restraints that the consent decrees place on anticompetitive acts of the publishers. Although technology may have changed methods of consumption and distribution of music since the time in which the consent decrees were entered into, the fundamental underlying considerations relating to concerted actions by competitors still remain the same, and it is still an important objective of public policy to ensure that anti-competitive behaviour is constrained. Spotify believed that the consent

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[16] See Yinka Adegoke, *Martin Bandier: The 2014 Billboard Power 100*, Billboard, *available at* http://www.billboard.com/biz/5869773/martin-bandier-the-2014-billboard-power-100 (Jan. 15, 2014) (quoting Sony/ATV Music Publishing chairman Bandier as saying "My biggest concern…is we wanted a fair price, that the words and music were equally as important as the recording.")

Spotify supports the Copyright Office's effort to provide Congress with recommendations for reforming the Copyright Laws to improve the market for licensing sound recordings and musical works, and we look forward to continued participation in that effort.

Respectfully submitted,

____

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Head of Licensing Business Affairs
Spotify USA Inc.

May 23, 2014

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LIBRARY OF CONGRESS

U.S. Copyright Office

[Docket No. 2015–7]

Section 512 Study: Notice and Request for Public Comment

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of inquiry.

SUMMARY: The United States Copyright Office is undertaking a public study to evaluate the impact and effectiveness of the DMCA safe harbor provisions contained in 17 U.S.C. 512. Among other issues, the Office will consider the costs and burdens of the notice-and-takedown process on large- and small-scale copyright owners, online service providers, and the general public. The Office will also review how successfully section 512 addresses online infringement and protects against improper takedown notices. To aid in this effort, and to provide thorough assistance to Congress, the Office is seeking public input on a number of key questions.

DATES: Written comments must be received no later than 11:59 p.m. Eastern Time on March 21, 2016. The Office will be announcing one or more public meetings to discuss issues related to this study, to take place after initial written comments are received, by separate notice in the future.

ADDRESSES: All comments should be submitted electronically. Specific instructions for the submission of comments will be posted on the Copyright Office Web site at *http://www.copyright.gov/policy/section512* on or before February 1, 2016. To meet accessibility standards, all comments must be provided in a single file not to exceed six megabytes (MB) in one of the following formats: Portable Document File (PDF) format containing searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The form and face of the comments must include the name of the submitter and any organization the submitter represents. The Office will post all comments publicly in the form that they are received. If electronic submission of comments is not feasible, please contact the Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, by email at *jcharlesworth@loc.gov* or by telephone at 202–707–8350; or Karyn Temple Claggett, Director of the Office of Policy and International Affairs and Associate Register of Copyrights, by email at *kacl@loc.gov* or by telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

Congress enacted section 512 in 1998 as part of the Digital Millennium Copyright Act (''DMCA'').[1] At that time, less than 5% of the world's population used the internet,[2] and bulletin board services were the popular online platforms.[3] Even then, however, Congress recognized that ''the [i]nternet . . . made it possible for information—including valuable American copyrighted works—to flow around the globe in a matter of hours,'' and, as a consequence, copyright law needed to be ''set . . . up to meet the promise and the challenge of the digital world.''[4]

In enacting section 512, Congress created a system for copyright owners and online entities to address online infringement, including limitations on liability for compliant service providers to help foster the growth of internet-based services.[5] The system reflected Congress' recognition that the same innovative advances in technology that would expand opportunities to reproduce and disseminate content could also facilitate exponential growth in copyright infringement. Accordingly, section 512 was intended by Congress to provide strong incentives for service providers and copyright owners to ''cooperate to detect and deal with copyright infringements that take place in the digital networked environment,'' as well as to offer ''greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.''[6]

Congress was especially concerned about the liability of online service providers for infringing activities of third parties occurring on or through their services. To address this issue, Congress created a set of ''safe harbors''—*i.e.*, limitations on copyright infringement liability—''for certain common activities of service providers.''[7] But the safe harbors are not automatic. To qualify for protection from infringement liability, a service provider must fulfill certain requirements, generally consisting of implementing measures to expeditiously address online copyright infringement.

Recent research suggests that the volume of infringing material accessed via the internet more than doubled from 2010 to 2012, and that nearly one-quarter of all internet bandwidth in North America, Europe, and Asia is devoted to hosting, sharing, and acquiring infringing material.[8] While Congress clearly understood that it would be essential to address online infringement as the internet continued to grow, it was likely difficult to anticipate the online world as we now know it—where, each day, users post hundreds of millions of photos, videos and other items, and service providers receive over a million notices of alleged infringement.

As observed by the House Judiciary Committee's Ranking Member in the course of the Committee's ongoing multi-year review of the Copyright Act, and consistent with the testimony of the Register of Copyrights in that hearing, the operation of section 512 poses policy issues that warrant study and analysis.[9] Section 512 has also been a focus of the U.S. Department of Commerce in recent years, which has noted ambiguities in the application of

1 Pub. L. 105–304, 112 Stat. 2860 (1998).

2 *See Internet Users,* Internet Live Stats (Dec. 1, 2015), *http://www.internetlivestats.com/internet-users/#trend* (In 1998, there were only 188 million internet users; today, there are over 3.25 billion.).

3 *See The History of Social Networking,* Digital Trends (Aug. 5, 2014), *http://www.digitaltrends.com/features/the-history-of-social-networking/* (providing a timeline for the development of social networks).

4 144 Cong. Rec. S11,889 (daily ed. Oct. 8, 1998) (statement of Sen. Orrin Hatch).

5 *See* H.R. Rep. No. 105–551, pt. 2, at 21 (1998) (noting that the DMCA, including section 512 of title 17, ''balance[s] the interests of content owners, on-line and other service providers, and information users in a way that will foster the continued development of electronic commerce and the growth of the [i]nternet'').

6 *Id.* at 49–50.

7 S. Rep. No. 105–190, at 19 (1998).

8 *See* David Price, Sizing the Piracy Universe 3 (2013), *http://www.netnames.com/digital-piracy-sizing-piracy-universe* (infringing bandwidth use increased by 159% between 2010 to 2012 in North America, Europe, and [the] Asia-Pacific, which account for more than 95% of global bandwidth use).

9 *Register's Perspective on Copyright Review: Hearing Before the H. Comm. on the Judiciary,* 114th Cong. 6 (2015) (statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office) (''We are . .. recommending appropriate study of section 512 of the DMCA ... . [T]here are challenges now that warrant a granular review.''); *id.* at 49 (statement of Rep. John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary) (''[T]here are policy issues that warrant studies and analysis, including section 512, section 1201, mass digitization, and moral rights. I would like the Copyright Office to conduct and complete reports on those policy issues .. . .'').

the safe harbor and encouraged service providers and rightsholders to discuss and pursue voluntary improvements.[10]

The present study will review the statutory requirements of section 512 and evaluate its current effectiveness and impact on those who rely upon it. The key aspects of section 512 that are the subject of this review, including notable legal and practical developments, are summarized below.

A. Overview of Section 512 Safe Harbors

Section 512 provides safe harbors from infringement liability for online service providers that are engaged in qualifying activities and that also meet certain eligibility requirements. There are four distinct safe harbors, detailed in sections 512(a), (b), (c), and (d), respectively. These safe harbors are available when a service provider engages in one or more of the following corresponding activities: (a) Serving as a conduit for the automatic online transmission of material as directed by third parties; (b) caching (*i.e.*, temporarily storing) material that is being transmitted automatically over the internet from one third party to another; (c) storing (*i.e.*, hosting) material at the direction of a user on a service provider's system or network; or (d) referring or linking users to online sites using information location tools (*e.g.*, a search engine).

A service provider that meets the relevant eligibility requirements for one or more of the safe harbors is not liable for monetary relief and is subject only to limited injunctive relief for infringing activities conducted on or through its system or network.[11] In the case of a service provider that qualifies for a safe harbor under 512(b), (c), or (d), this injunctive relief is limited to: (1) Disabling access to infringing material; (2) terminating the infringer's account(s); and (3) providing such other relief as may be necessary to address infringement at a particular online location; provided, however, that the relief is "the least burdensome [form of relief] to the service provider.'' [12] For a service provider that qualifies for the 512(a) safe harbor, the court may order only termination of an infringer's account(s) or blocking of access to a "specific, identified, online location outside the United States.'' [13]

In order to qualify for the limitation on liability provided under section 512(a), (b), (c), or (d), the service provider must comply with certain threshold requirements. Two of these requirements apply to all four safe harbors: (1) The adoption and reasonable implementation of a policy to terminate "repeat infringers''; [14] and (2) the accommodation of "standard technical measures'' that identify or protect copyrighted works and have been developed according to broad consensus between copyright owners and service providers, to the extent any such measures exist.[15] A service provider that acts as a mere conduit for online transmissions qualifies for the limitation on liability provided by section 512(a) if the provider satisfies these two threshold requirements.

Service providers seeking protection under the safe harbors in section 512(b), (c), or (d), however, must, in addition, maintain a compliant notice-and-takedown process by responding expeditiously to remove or disable access to material claimed to be infringing upon receipt of proper notice from a copyright owner or the owner's authorized agent.[16] A service provider seeking to avail itself of the section 512(c) safe harbor for user-posted content is further required to designate an agent to receive notifications of claimed infringement and provide contact information for the agent on its Web site and to the Copyright Office, which, in turn, is to maintain a public directory of such agents.[17]

The statute prescribes that a copyright owner's takedown notice must include "substantially the following'': (i) The signature of the copyright owner or an authorized agent (*i.e.*, the complaining party); (ii) identification of the copyrighted work claimed to have been infringed, or, if multiple works are on a single site, "a representative list of such works''; (iii) identification of the infringing material or activity (or the reference or link to such material) and "information reasonably sufficient'' to permit the service provider to locate the material (or the reference or link); (iv) contact information for the complaining party; (v) a statement that the complaining party has "a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law''; and (vi) a statement that the information is accurate and, under penalty of perjury, that the complaining party is authorized to act on behalf of the copyright owner.[18] A copyright owner's communication that does not substantially comply with these criteria will not serve as effective notice for purposes of the statutory process.[19] Further, under section 512(f), as discussed more fully below, "[a]ny person who knowingly materially misrepresents . . . that material or activity is infringing'' can be held liable for any damages, including costs and attorneys' fees, incurred by an alleged infringer who is injured by the misrepresentation.

In addition to responding to takedown notices, service providers that seek protection under the section 512(c) and (d) safe harbors must also act expeditiously to remove or disable access to material when they have "actual knowledge'' of infringement or, in the absence of such actual knowledge, when they have "aware[ness] of facts or circumstances from which infringing activity is apparent''—the "awareness'' standard often referred to as "red flag'' knowledge.[20] But, while service providers are not free to ignore infringement of which they have actual or red flag knowledge, section 512 at the same time provides that an online entity has no duty to "monitor[] its service or affirmatively seek[] facts indicating

[10] U.S. Dep't of Commerce Internet Policy Task Force, Copyright Policy, Creativity, and Innovation in the Digital Economy 54, 56 (Jul. 2013), *http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf* ("Copyright Policy, Creativity, and Innovation in the Digital Economy''); Dep't of Commerce Internet Policy Task Force, DMCA Multistakeholder Forum, DMCA Notice-and-Takedown Processes: List of Good, Bad, and Situational Practices 3 (2015), *http://www.uspto.gov/sites/default/files/documents/DMCA_Good_Bad_and_Situational_Practices_Document-FINAL.pdf* ("Dep't of Commerce Multistakeholder Forum Recommended Practices'').

[11] 17 U.S.C. 512(a)–(d).

[12] *Id.* at 512(j)(1)(A).

[13] *Id.* at 512(j)(1)(B).

[14] A service provider must adopt, "reasonably implement[],'' and inform subscribers and account holders of a policy "that provides for the termination in appropriate circumstances of . .. repeat infringers.'' *Id.* at 512(i)(1)(A).

[15] *Id.* at 512(i)(1)(B), (i)(2).

[16] *Id.* at 512(b)(2)(E), (c)(1)(C), (d)(3). The process for notification under the 512(c) and (d) safe harbors is set out in 512(c)(3); the process differs somewhat under the 512(b) safe harbor in that, in addition to following the requirements of 512(c)(3), the complaining party must also confirm that the content or link has been removed or disabled by the originating site or that a court has ordered that it be removed or disabled.

[17] *Id.* at 512(c)(2). Although section 512(d) does not itself expressly require service providers to designate an agent to receive notifications of infringement, it incorporates the notice provisions of section 512(c)(3), which require that notices be sent to "the designated agent of the service provider.'' The statutory scheme thus indicates that service providers operating under section 512(d) would also designate agents to receive takedown notices. *See id.* at 512(c)(3).

[18] *Id.* at 512(c)(3)(A)(i)–(vi).

[19] *See id.* at 512(c)(3)(B)(i) ("[A] notification .. . that fails to comply substantially . . . shall not be considered . . . in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.''); *see also Perfect 10, Inc.* v. *CCBill LLC,* 488 F.3d 1102, 1112–14 (9th Cir. 2007) ("*CCBill LLC''*) ("[A] service provider will not be deemed to have notice of infringement when 'the notification . .. fails to comply substantially with all the provisions of [17 U.S.C. 512(c)(3)(A)].' '').

[20] *See* 17 U.S.C. 512(c), (d).

infringing activity, except to the extent consistent with a standard technical measure.'' [21]

Finally, to qualify for the section 512(c) and (d) safe harbors, a service provider must not "receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.'' [22] The statutory financial benefit/right to control test does not incorporate a knowledge element.[23]

In addition to the general limitations on infringement liability, the statute provides specific protections for service providers that remove material in response to takedown notices, as well as for users who post material that is claimed to be infringing. Under section 512, a service provider is not liable for the good-faith removal or disabling of access to material "claimed to be infringing or based on facts or circumstances from which infringing activity is apparent''—even material not ultimately found to be infringing—so long as the provider takes reasonable steps to promptly notify the user who posted the material that it has been removed and also complies, as applicable, with a statutory counter-notification process.[24]

Section 512(g) allows a user whose content has been removed in response to a takedown notice to submit a counter notification to a service provider's designated agent requesting that the content be reposted. The counter notification must include: (i) The signature of the subscriber (*i.e.*, the counter-notifying party); (ii) identification of the material that was removed or to which access was disabled, as well as the location where it previously appeared; (iii) a statement under penalty of perjury that the subscriber has a "good faith belief'' that the material "was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled''; and (iv) the subscriber's contact information, as well as a statement that the subscriber consents to the jurisdiction of the federal district court for the relevant judicial district and agrees to accept service of process from the party who provided the takedown notice (or that party's agent).[25] To preserve its safe harbor immunity, the service provider must repost the content within 10 to 14 business days of receiving the counter notification unless the service provider first receives notice from the party who provided the takedown notice that a judicial action has been filed "seeking . . . to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.'' [26] As in the case of misrepresentations in takedown notices, under section 512(f), any person who knowingly materially misrepresents that "material or activity was removed or disabled by mistake or misidentification'' may be held liable for monetary damages, including costs and attorneys' fees.[27]

B. Key Developments

Since the enactment of section 512, stakeholders have adopted practices and systems to implement it, and courts have been called upon to interpret its provisions—from eligibility for safe harbors to the requirements for valid takedown notices to the standards that govern misrepresentations in the notification process. Some stakeholders have created best practices, entered into voluntary agreements to streamline enforcement procedures, and/or pursued other non-judicial approaches. Notwithstanding these developments, many on both sides of the equation express significant frustration with the process. A brief overview of the most salient issues follows.

Notice-and-Takedown Process

Today, copyright owners send takedown notices requesting service providers to remove and disable access to hundreds of millions of instances of alleged infringement each year.[28] The number of removal requests sent to service providers has increased dramatically since the enactment of section 512. For example, one search engine now "receive[s] removal requests for more URLs every week than [it] did . . . from 1998 to 2010 combined.'' [29] Technology has come to play a significant role in the notice-and-takedown process, as automated processes that use fingerprinting, hash values, and keyword/metadata searches can identify movies, sound recordings, and other types of content that is being posted and disseminated.[30] But regardless of increasing technological capabilities, stakeholders frequently voice concerns about the efficiency and efficacy—not to mention the overall sustainability—of the system.[31]

Many smaller copyright owners, for example, lack access to third-party services and sophisticated tools to monitor for infringing uses, which can be costly, and must instead rely on manual search and notification processes [32]—an effort that has been likened to "trying to empty the ocean with a teaspoon.'' [33] In addition to the burden of policing infringement across the internet, copyright owners complain that material they succeed in having taken down is often promptly reposted on the same site—the so-called "whack-a-mole'' problem.[34] Under section 512 as it has been interpreted, providers are not required to filter out or prevent the reposting of copyrighted content

21 *Id.* at 512(m)(1).

22 *Id.* at 512(c)(1)(B), (d)(2).

23 *See id.* at 512(c)(1)(B), (d)(2).

24 *Id.* at 512(g)(1).

25 *Id.* at 512(g)(3).

26 *Id.* at 512(g)(2)(C).

27 *Id.* at 512(f).

28 *See Section 512 of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary,* 113th Cong. 3 (2014) ("*Section 512 Hearing*") (written statement of Rep. Jerrold Nadler) (noting that in 2013, Google received notices requesting removal of approximately 230 million items); Joe Mullin, *Google Handled 345 Million Copyright Takedowns in 2014,* Ars Technica (Jan. 6, 2015), *http://arstechnica.com/tech-policy/2015/01/google-handled-345-million-copyright-takedowns-in-2014.*

29 Google, How Google Fights Piracy 15 (2013), *https://docs.google.com/file/d/0BwxyRPFduTN2dVFqYml5UENUeUE/edit?pli=1#!*.

30 *See, e.g.,* TheFlo, *White Paper: Audio Fingerprinting,* Maximum PC (Apr. 3, 2009), *http:// www.maximumpc.com/white-paper-audio-fingerprinting/* (explaining the use of algorithms to create unique "audio fingerprints'' to identify sound recordings); *What is a Hash Value?*, Pinpoint Labs (Dec. 10, 2010), *http://pinpointlabs.com/2010/12/what-is-a-hash-value/* (explaining use of hash values for text, audio, and video); Dep't of Commerce Multistakeholder Forum Recommended Practices (discussing use of automated tools to identify infringing material).

31 *See, e.g., Section 512 Hearing* at 9 (written statement of Sean M. O'Connor, Entrepreneurial Law Clinic, University of Washington (Seattle)) ("[T]here are takedown notices now filed on millions of posts every month. That is clearly unsustainable.''); Copyright Policy, Creativity, and Innovation in the Digital Economy 56 ("[R]ight holders and ISPs alike have identified respects in which [the notice-and-takedown system's] operation can become unwieldy or burdensome.'').

32 *See Section 512 Hearing* at 100 (statement of Rep. Doug Collins) ("[I]ndividual songwriters and the independent filmmakers . . . often have limited or no technical expertise or software at their disposal . .. .''); *id.* at 88–89 (2014) (written statement of Sandra Aistars, Copyright Alliance) (Independent authors and creators "lack the resources of corporate copyright owners'' and instead issue "takedown notices themselves, taking time away from their creative pursuits.'').

33 Trevor Little, *Google and Microsoft Outline the Challenges Facing Online Intermediaries,* World Trademark Rev. (Mar. 1, 2013), *http://www.worldtrademarkreview.com/blog/detail.aspx?g=DFF24612-D6F7-4ED2-BFDB-383724E93D57* (quoting symposium comments by a vice president at Fox Group Legal).

34 *Section 512 Hearing* at 35 (written statement of Paul Doda, Elsevier) (The "*same books* are repeatedly re-uploaded on the same sites hundreds of times after being taken down . .. .''); *id.* at 57 (written statement of Maria Schneider, musician) ("As fast as I take my music down, it reappears again on the same site—an endless whac-a-mole game.'').

through the use of content identification technologies or other means.[35]

Accordingly, some have proposed that the notice-and-takedown procedure be revised to become a "notice-and-stay-down" procedure—that is, once a service provider receives an effective and uncontested takedown notice for a particular work, the provider should be required to make commercially reasonable efforts to keep that work from reappearing on its site.[36] Others, however, pointing to the very substantial efforts—especially of larger service providers—to respond promptly to takedown notices, are of the view that the existing system has "scaled well" over time to address the large volume of takedown notices, and does not need to be changed.[37]

Of course, the burdens of the notice-and-takedown process do not fall on copyright owners alone. Service providers must devote the time and resources necessary to respond to the increasing number of takedown notices sent each day. Smaller providers, in particular, may find the task to be a daunting one.[38] In addition, service providers complain that some notices do not meet the statutory requirements or, as discussed below, concern materials and activities that are not in fact infringing.

Since the passage of the DMCA, courts have been called upon to address the elements required for an "effective"—*i.e.*, valid—takedown notice. Looking to section 512's requirement to provide "information reasonably sufficient to permit the service provider to locate the material," courts have generally required a high degree of specificity, such as the particular link, or uniform resource locator ("URL"), where the infringing material is found.[39] Likewise, service providers often request that the specific URL for each allegedly infringing use be included in a notice.[40] Such a requirement can be burdensome in the case of a notice that references a large number of infringements at multiple locations throughout the same site. Additionally, copyright owners question whether this level of specificity is in conflict with the statute's express language allowing complaining parties to submit a "representative list" of works alleged to be infringed "at a single online site."[41]

In addition, there is debate about whether search engine services must disable access to (*e.g.*, "de-list") entire sites that copyright owners report as consisting largely of infringing material.[42] While the legislative history of section 512(d) observes that "safe harbor status for a provider that views [a pirate] site and then establishes a link to it would not be appropriate,"[43] service providers assert that de-listing could lead to censorship, and yet still not effectively address infringement, because the site would remain online.[44]

Knowledge Standards

A good deal of litigation relating to section 512 to date has focused on the legal standards for determining when a service provider has sufficient knowledge or awareness to require it to remove or disable infringing material in order to remain eligible for the safe harbor protections of section 512(c) or (d). Courts have held "actual knowledge" to require evidence that the service provider subjectively knew that specific material on its site infringed copyright.[45] Alternatively, actual knowledge can be demonstrated with evidence that a service provider received information about specific infringing material through a statutorily effective takedown notice, *i.e.*, a notice that includes "substantially" all of the information required under section 512(c)(3).[46]

Courts have also recognized the common law doctrine of willful blindness in addressing whether a service provider has actual knowledge of infringement.[47] A service provider is considered to have engaged in willful blindness when it is "aware of a high probability" of infringement and has "consciously avoided confirming that fact."[48] Accordingly, courts have held that a service provider's willful blindness to infringement on its site and failure to remove or disable access to infringing material can disqualify it

35 17 U.S.C. 512(m); *see UMG Recordings, Inc.* v. *Shelter Capital Partners LLC*, 718 F.3d 1006, 1024 (9th Cir. 2013) (rejecting plaintiffs' argument that service provider should have "taken the initiative to use search and indexing tools to locate and remove from its Web site any other content by the artists identified in . . . notices"); *Capitol Records, LLC* v. *Vimeo, LLC*, 972 F. Supp. 2d 500, 525 (S.D.N.Y. 2013) ("512(m) and attendant case law make clear that service providers are under no affirmative duty to seek out infringement . . . [and t]his remains the case even when a service provider has developed technology permitting it to do so.").

36 *See Section 512 Hearing* at 14–15, 39, 58 (written statements of Sean M. O'Connor, Entrepreneurial Law Clinic, University of Washington (Seattle); Paul Doda, Elsevier; and Maria Schneider, musician).

37 *Id.* at 16 (statement of Annemarie Birdy, University of Idaho College of Law) ("The notice and takedown regime in [s]ection 512(c) has scaled well for enforcing copyrights in the voluminous content hosted by online service providers.").

38 *See* U.S. Dep't of Commerce, *Multistakeholder Forum: Improving the Operation of the DMCA Notice and Takedown Policy: Second Public Meeting*, Tr. 63:03–05 (May 8, 2014), *http://www.uspto.gov/sites/default/files/ip/global/copyrights/2nd_forum_transcript.pdf* (Fred von Lohmann, Google) ("[W]hat large service providers are capable of doing is very different from what smaller service providers are doing."); U.S. Dep't of Commerce, *Multistakeholder Forum: Improving the Operation of the DMCA Notice and Takedown Policy: First Public Meeting*, Tr. 34:16–38:06 (Mar. 20, 2014), *http://www.uspto.gov/ip/global/copyrights/First_Public_Meeting-Improving_Operation_of_DMCA_Notice_and_Takedown_Policy.pdf* (Ron Yokubaitis, Giganews) (describing burden of processing non-standardized notices for a "small company [of] fifty-something people").

39 *See, e.g., Wolk* v. *Kodak Imaging Network, Inc.*, 840 F. Supp. 2d 724, 747 (S.D.N.Y. 2012), *aff'd sub nom., Wolk* v. *Photobucket.com, Inc.*, 569 F. App'x 51 (2d Cir. 2014) (noting that an example of sufficient information in a notice allowing a service provider to locate the infringing material "would be a copy or description of the allegedly infringing material and the so-called 'uniform resource locator' (URL) (*i.e.*, Web site address)") (citing *Viacom Int'l, Inc.* v. *YouTube, Inc.*, 718 F. Supp. 2d 514, 521 (S.D.N.Y. 2010), *vacated in part on other grounds*, 676 F.3d 19 (2d Cir. 2012)).

40 *See, e.g., Digital Millennium Copyright Act (DMCA) Notice*, Automattic, *https://automattic.com/dmca-notice* (last visited Dec. 17, 2015); *DMCA Copyright Notifications, Tumblr*, *https://www.tumblr.com/dmca* (last visited Dec. 17, 2015); *Copyright Infringement Notification*, YouTube, *https://www.youtube.com/copyright_complaint_form* (last visited Dec. 17, 2015).

41 17 U.S.C. 512(c)(3)(A)(ii).

42 *Compare* MPAA, Comments on Office of Intellectual Property Enforcement Coordinator Development of the Joint Strategic Plan on Intellectual Property Enforcement 17 (Oct. 16, 2015), *http://www.regulations.gov/#!documentDetail;D=OMB-2015-0003-0058* ("Search engines should delist sites based on court orders or other comparable judicial determinations of infringement . . . [meaning that] no results from a particular site would appear in any search results.") *with* Google, Comments on Office of Intellectual Property Enforcement Coordinator Development of the Joint Strategic Plan on Intellectual Property Enforcement 7–8 (Oct. 16, 2015), *http://www.regulations.gov/#!documentDetail;D=OMB-2015-0003-0061* ("Google, IPEC Comments") ("[W]hole-site removal is ineffective and can easily result in censorship of lawful material . . . [and] would jeopardize free speech principles, emerging services, and the free flow of information online globally and in contexts far removed from copyright.").

43 S. Rep. No. 105–190, at 48 (1998).

44 Google, IPEC Comments, at 7–8.

45 *See, e.g., UMG Recordings*, 718 F.3d at 1025 (quoting *Viacom Int'l, Inc.* v. *YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012) ("*Viacom*")).

46 *See UMG Recordings*, 718 F.3d at 1020 ("[T]he DMCA notice protocol . . . [is] the most powerful evidence of a service provider's knowledge.") (internal quotations omitted); *cf.* 17 U.S.C. 512(c)(3)(B)(i) (stating that a notice "that fails to comply substantially" with the 512(c) notice requirements "shall not be considered . . . in determining whether a service provider has actual knowledge.").

47 *See, e.g., Viacom*, 676 F.3d at 35 ("[W]illful blindness doctrine may be applied, in appropriate circumstances, to demonstrate knowledge or awareness of specific instances of infringement under the DMCA.").

48 *Id.* at 35 (quoting *United States* v. *Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003)). For example, a service provider was found to have "blinded itself" where it encouraged users to encrypt files so that the service provider could not know the contents of particular files. *In re Aimster Copyright Litig.*, 334 F.3d 643, 653 (7th Cir. 2003) ("*In re Aimster*").

from the protections of a section 512 safe harbor.[49]

As also noted above, sections 512(c) and (d) require a service provider to disable access to material or activity if it has "red flag'' knowledge, *i.e.,* is aware of "facts or circumstances from which infringing activity is apparent.'' [50] In enacting the statute, Congress explained that "a service provider [has] no obligation to seek out copyright infringement, but it [does] not qualify for the safe harbor if it . . . turn[s] a blind eye to 'red flags' of obvious infringement.'' [51] The legislative history of section 512 also suggests Congress' view that the red flag test "has both a subjective and an objective element . . . the subjective awareness of the service provider of the facts or circumstances in question . . . [and the objective assessment of] whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances.'' [52] With regard to information location tools, for example, Congress observed that if "an [i]nternet site is obviously pirate, then seeing it may be all that is needed for the service provider to encounter a 'red flag.''' [53]

Copyright owners have argued that Congress' intent in creating the red flag test was to "require[] less specificity than the actual knowledge'' standard and to prevent service providers from qualifying for safe harbor protection when they are aware of widespread infringement.[54] Courts, however, have largely rejected the notion that a general awareness of infringement is sufficient to establish red flag knowledge.[55] Instead, courts have held that red flag knowledge requires "knowledge of specific and identifiable infringements'' because, in order to retain the protection of the safe harbor, the service provider is required to expeditiously "remove or disable 'the [infringing] material.''' [56]

In assessing these knowledge requirements, courts have also looked to the language of section 512(m), which states that "[n]othing'' in section 512 conditions the availability of safe harbor protection on "a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure.'' [57] Based on this language, courts have concluded that "the DMCA . . . place[s] the burden of policing copyright infringement . . . squarely on the owners of the copyright.'' [58]

Financial Benefit/Right To Control

Litigation regarding the Section 512(c) and (d) safe harbors has also addressed what it means for a service provider to receive a "financial benefit directly attributable'' to infringing activity where it has the "right and ability to control'' such activity.

Like the traditional standard for vicarious liability under common law, the financial benefit/right to control test has been held not to turn on a service provider's knowledge of infringement.[59] But courts have also indicated that "right and ability to control'' in the context of section 512 means that the service provider "'exert[s] substantial influence on the activities of users,''' *i.e.,* '''something more than''' the basic ability to remove or block access to infringing materials.[60] Such control may include, for example, taking an active role in the listing of infringing material on a Web site, assisting users in locating infringing files, or encouraging the uploading or downloading of particular copyrighted works.[61] These courts have reasoned that because the takedown process itself requires the ability to remove or block access, Congress must have intended a greater degree of control than just this, or it would undermine the availability of the safe harbors.[62]

Sections 512(c) and (d) also exclude service providers from safe harbor protection when they "receive a financial benefit directly attributable to the infringing activity.'' [63] While the legislative history suggests that merely requiring a periodic payment for service does not constitute a direct financial benefit,[64] courts have found such a benefit when the service provider charges a subscription fee to its users and the "infringing activity constitutes a draw for subscribers, not just an added benefit.'' [65] Financial benefit has also been found when a service provider's "ability to attract advertisers'' and the "amount of revenue'' received from advertising are "tied directly to the infringing activity.'' [66]

Repeat Infringers

Under section 512(i), a service provider seeking to avail itself of any of the safe harbors is required to "adopt[] and reasonably implement[]'' a policy to terminate "repeat infringers'' in "appropriate circumstances.'' [67] Congress, however, did not define these terms in the statute, so it has been left to courts to determine whether a service provider's repeat infringer policy is sufficient to qualify the provider for safe harbor protection. In interpreting this aspect of the statute, courts have held that a repeat infringer is a user "who repeatedly or blatantly infringe[s] copyright,'' and that such a determination may be based upon information from valid takedown notices and does not require a court determination.[68] Courts have further

[49] *See, e.g., Viacom,* 676 F.3d at 30, 35; *see also In re Aimster,* 334 F.3d at 653, 655.

[50] 17 U.S.C. 512(c)(1)(A)(ii), (d)(1)(B).

[51] H.R. Rep. No. 105–551, pt. 2, at 57 (1998).

[52] *Id.* at 53; S. Rep No. 105–190, at 44 (1998); *accord Viacom,* 676 F.3d at 31.

[53] H.R. Rep. No. 105–551, pt. 2, at 58 (1998); *see also Columbia Pictures Indus., Inc.* v. *Fung,* 710 F.3d 1020, 1043 (9th Cir. 2013) ("*Fung''*) (finding that a service provider had red flag knowledge where "material in question was sufficiently current and well-known that it would have been objectively obvious to a reasonable person that the material . . . was both copyrighted and not licensed to random members of the public'').

[54] *See, e.g., Viacom,* 676 F.3d at 31–32 (internal quotations omitted).

[55] *See, e.g., UMG Recordings,* 718 F.3d at 1022–23; *Viacom,* 676 F.3d at 32.

[56] *Viacom,* 676 F.3d at 30–31 (emphasis omitted) ("[E]xpeditious removal is possible only if the service provider knows with particularity which items to remove.'').

[57] 17 U.S.C. 512(m).

[58] *UMG Recordings,* 718 F.3d at 1022 (quoting *CCBill LLC,* 488 F.3d at 1113).

[59] *See Viacom,* 676 F.3d at 36–38 (2d Cir. 2012) ("[17 U.S.C.] 512(c)(1)(B) does not include a specific knowledge requirement'' because to "import[] a specific knowledge requirement into [17 U.S.C.] 512(c)(1)(B) renders the control provision duplicative of [17 U.S.C.] 512(c)(1)(A).''); H.R. Rep. No. 105–551, pt. 1, at 25–26 (1998) ("The financial benefit standard in subparagraph (B) is intended to codify and clarify the direct financial benefit element of vicarious liability. . . . The 'right and ability to control' language in Subparagraph (B) codifies the second element of vicarious liability.''); 3 Melville Nimmer & David Nimmer, Nimmer on Copyright 12.04[A][2] (Matthew Bender rev. ed.) ("Notably lacking from the foregoing two elements [of vicarious liability] is knowledge.'').

[60] *UMG Recordings,* 718 F.3d at 1029–31 (quoting *Viacom,* 676 F.3d at 38); *Perfect 10, Inc.* v. *Cybernet Ventures, Inc.,* 213 F. Supp. 2d 1146, 1173, 1181– 82 (C.D. Cal. 2002) ("*Cybernet Ventures''*).

[61] *Fung,* 710 F.3d at 1043, 1046; *see also Viacom,* 676 F.3d at 38 & n.13 ("[C]ontrol may exist where the service provider is 'actively involved in the listing, bidding, sale and delivery' of items.'') (quoting *Hendrickson* v. *eBay, Inc.,* 165 F. Supp. 2d 1082, 1094 (C.D. Cal. 2001)); *Cybernet Ventures,* 213 F. Supp. 2d at 1173 (finding that service provider had control where it required user Web sites to comply with "detailed instructions regard[ing] issues of layout, appearance, and content'').

[62] *See, e.g., Viacom,* 676 F.3d at 37.

[63] 17 U.S.C. 512(c)(1)(B), (d)(2).

[64] H.R. Rep. No. 105–551, pt. 2, at 54 (1998) (noting that financial benefit is not established through a "one-time set-up fee [or] flat, periodic payments for service from a person engaging in infringing activities'').

[65] *CCBill LLC,* 488 F.3d at 1117; *Ellison* v. *Robertson,* 357 F.3d 1072, 1079 (9th Cir. 2004)).

[66] *Fung,* 710 F.3d at 1045–46.

[67] 17 U.S.C. 512(i)(1)(A); *BMG Rights Mgmt. (US) LLC* v. *Cox Commc'ns, Inc.,* No. 1:14–cv–1611, 2015 WL 7756130, at *14 (E.D. Va. Dec. 1, 2015) ("*BMG Rights Mgmt.''*) (denying 512(a) safe harbor protection to service provider because it did not reasonably implement a repeat infringer policy).

[68] *CCBill LLC,* 488 F.3d at 1109; *Disney Enters., Inc.* v. *Hotfile Corp.,* No. 11–20427–CIV, 2013 WL 6336286, at *20 (S.D. Fla. Sept. 20, 2013) ("*Hotfile''*); *see also BMG Rights Mgmt.,* No. 1:14– cv–1611, 2015 WL 7756130, at *13.

held that a reasonable policy, at a minimum, must provide a mechanism to identify and keep a record of users responsible for files referenced in takedown notices and, "under 'appropriate circumstances,''' result in termination of "users who repeatedly or blatantly infringe copyright.'' [69]

Misuse of Takedown Process

Service providers and advocacy groups have raised concerns about fraudulent and abusive section 512 notices that may restrain fair use, free speech, or otherwise misuse the notice-and-takedown process.[70] Some of the concerns arise from takedown notices for content that appears to constitute an obvious fair use of a copyright work.[71] Others relate to efforts to remove criticism or commentary—such as negative reviews—under the guise of copyright.[72] While the posting party can invoke the counter-notification procedure of section 512(g) to have the material reinstated, some believe that posters may not be aware of this, or may be too intimidated to pursue a counter notification.[73] A related concern is that the improper takedown of legitimate material, even if for a limited time, may harm important speech interests—for example, if a political advertisement is wrongly removed at a critical time in a campaign.[74]

As noted above, a takedown notice must include a statement that the complaining party has a "good faith belief'' that the use is not authorized.[75] Similarly, a counter notification must include a statement that the sender has a "good faith belief'' that the material in question was removed as a result of "mistake or misidentification.'' [76] Section 512(f) provides for a cause of action and damages if a sender "knowingly materially misrepresents'' in a takedown notice that material is infringing, or, in a counter notification, was wrongfully removed.[77]

In a number of cases challenging the validity of takedown notices, courts have fleshed out the meaning and application of section 512(f). For example, courts have held that the "good faith belief'' requirement of section 512(c)(3)(A)(v) "encompasses a subjective, rather than objective standard''; that is, the sender is not responsible for an "unknowing mistake,'' even if the sender's assessment of infringement was objectively unreasonable.[78] But it has also been held that before sending a takedown notice, the complaining party must "consider the existence of fair use'' in forming the subjective good faith belief that the use is not authorized by the law.[79] The need to consider fair use may present challenges in the context of automated takedown processes relied upon by copyright owners to address large-volume infringements, including how such processes might be calibrated to accommodate this requirement and the necessity, if any, for human review.[80]

Voluntary Measures

While interested parties continue to test and clarify aspects of section 512 in the courts, some stakeholders have chosen to work together to develop voluntary protocols and best practices to avoid litigation, improve online enforcement, and protect free speech and innovation. Several of these initiatives have been undertaken with the support of the U.S. government, including the Copyright Alert System, an effort supported by the U.S. Intellectual Property Enforcement Coordinator ("IPEC''),[81] and the DMCA Notice-and-Takedown Processes: List of Good, Bad, and Situational Practices, stemming from the efforts of the Internet Policy Task Force,[82] both of which seek to improve the efficiency and effectiveness of notice-and-takedown procedures, as well as the IPEC-led Payment Processor Best Practices, which seeks to cut off revenue to sites that promote infringement.[83] Other multistakeholder initiatives include the Trustworthy Accountability Group certification process, aimed at curbing ad revenue supporting piracy Web sites,[84] and the Principles for User Generated Content Services, which sets forth agreed principles for screening and addressing infringing content.[85]

II. Subjects of Inquiry

The Copyright Office seeks public input, including, where available, empirical data on the efficiency and effectiveness of section 512 for owners and users of copyrighted works and the overall sustainability of the system if, as appears likely, the volume of takedown notices continues to increase. The Office invites written comments in particular on the subjects below. A party choosing to respond to this Notice of Inquiry need not address every subject, but the Office requests that responding parties clearly identify and separately address each

69 *CCBill LLC,* 488 F.3d at 1109 (internal citation omitted); *see also Hotfile,* No. 11–20427–CIV, 2013 WL 6336286, at *21.

70 *See, e.g., Section 512 Hearing* at 48, 63–67, 246–47 (written statements of Katherine Oyama, Google Inc.; Paul Sieminski, Automattic Inc.; and Library Copyright Alliance) (discussing misuse of takedown process).

71 *See, e.g., id.* at 65 (written statement of Paul Sieminski, Automattic Inc.) (noting concern for "companies who issue DMCA notices specifically against content that makes use of their copyrighted material as part of a criticism or negative review—which is classic fair use'').

72 *See, e.g., Automattic Inc.* v. *Steiner,* 82 F. Supp. 3d 1011, 1016 (N.D. Cal. 2015) (entering default judgment against the submitter of takedown notices for knowingly materially misrepresenting that a blog infringed its press release); *Online Policy Grp.* v. *Diebold, Inc.,* 337 F. Supp. 2d 1195, 1204 (N.D. Cal. 2004) (finding voting machine manufacturer liable under section 512(f) for "knowingly materially misrepresent[ing]'' that publication of email archive discussing technical problems with voting machines was infringing).

73 *See, e.g.,* Brief for Org. for Transformative Works *et al.* as Amici Curiae Supporting Appellee and Cross-Appellant at 16, *Lenz* v. *Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015) (Nos. 13–16106, 13–16107) (noting that creators worry about sending a counter notice because they may have to provide their real names and addresses or become subject to a lawsuit they cannot afford).

74 *See, e.g.,* Ctr. for Democracy & Tech., Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech 1 (2010), *https://cdt.org/files/pdfs/copyright_takedowns.pdf.*

75 17 U.S.C. 512(c)(3)(A)(v).

76 *Id.* at 512(g)(3)(C).

77 *Id.* at 512(f).

78 *Rossi* v. *Motion Picture Ass'n of Am. Inc.,* 391 F.3d 1000, 1004–05 (9th Cir. 2004); *accord Lenz* v. *Universal Music Corp.,* 801 F.3d 1126, 1134 (9th Cir. 2015). The *Rossi* and *Lenz* courts reasoned that to hold otherwise would conflict with Congress' intent that a copyright owner only be penalized for "knowing'' misrepresentations. *Rossi,* 391 F3d at 1004–05; *accord Lenz,* 801 F.3d at 1134.

79 *Lenz,* 801 F.3d at 1133.

80 *See id.* at 1135–36. In *Lenz,* the Ninth Circuit was "mindful of the pressing crush of voluminous infringing content that copyright holders face,'' and noted, "without passing judgment, that the implementation of computer algorithms appears to be a valid and good faith middle ground for processing a plethora of content while still meeting the DMCA's requirements to somehow consider fair use.'' *Id.* at 1135. The court further addressed how an algorithm might accommodate fair use, observing that it was "unaware of any [court] decision to date that actually addressed the need for human review.'' *Id.*

81 *See generally* Ctr. For Copyright Info., The Copyright Alert System: Phase One and Beyond (May 28, 2014), *http://www.copyrightinformation.org/wp-content/uploads/2014/05/Phase-One-And_Beyond.pdf.*

82 *See generally* Dep't of Commerce Multistakeholder Forum Recommended Practices (list of recommended practices developed by a diverse group of copyright owners, service providers, and public interest representatives).

83 *See* Intellectual Prop. Enforcement Coordinator, 2011 U.S. Intellectual Property Enforcement Coordinator Annual Report on Intellectual Property Enforcement 46 (2012), *https://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec_annual_report_mar2012.pdf* (describing a June 2011 agreement among American Express, Discover, MasterCard, PayPal, and Visa to abide by best practices to "stop sites distributing counterfeit and pirated goods from conducting financial transactions through payment processors'').

84 *See* Press Release, Trustworthy Accountability Group, Advertising Industry Launches Initiative to Protect Brands Against Piracy Web sites (Feb. 10, 2015), *https://www.tagtoday.net/advertising-industry-launches-initiative-to-protect-brands-against-piracy-Web sites.*

85 *See Principles for User Generated Content Services, http://www.ugcprinciples.com* (last visited Dec. 16, 2015).

numbered subject for which a response is submitted.

General Effectiveness of Safe Harbors

1. Are the section 512 safe harbors working as Congress intended?
2. Have courts properly construed the entities and activities covered by the section 512 safe harbors?
3. How have section 512's limitations on liability for online service providers impacted the growth and development of online services?
4. How have section 512's limitations on liability for online service providers impacted the protection and value of copyrighted works, including licensing markets for such works?
5. Do the section 512 safe harbors strike the correct balance between copyright owners and online service providers?

Notice-and-Takedown Process

6. How effective is section 512's notice-and-takedown process for addressing online infringement?
7. How efficient or burdensome is section 512's notice-and-takedown process for addressing online infringement? Is it a workable solution over the long run?
8. In what ways does the process work differently for individuals, small-scale entities, and/or large-scale entities that are sending and/or receiving takedown notices?
9. Please address the role of both "human" and automated notice-and-takedown processes under section 512, including their respective feasibility, benefits, and limitations.
10. Does the notice-and-takedown process sufficiently address the reappearance of infringing material previously removed by a service provider in response to a notice? If not, what should be done to address this concern?
11. Are there technologies or processes that would improve the efficiency and/or effectiveness of the notice-and-takedown process?
12. Does the notice-and-takedown process sufficiently protect against fraudulent, abusive or unfounded notices? If not, what should be done to address this concern?
13. Has section 512(d), which addresses "information location tools," been a useful mechanism to address infringement that occurs as a result of a service provider's referring or linking to infringing content? If not, what should be done to address this concern?
14. Have courts properly interpreted the meaning of "representative list" under section 512(c)(3)(A)(ii)? If not, what should be done to address this concern?
15. Please describe, and assess the effectiveness or ineffectiveness of, voluntary measures and best practices—including financial measures, content "filtering" and takedown procedures—that have been undertaken by interested parties to supplement or improve the efficacy of section 512's notice-and-takedown process.

Counter Notifications

16. How effective is the counter-notification process for addressing false and mistaken assertions of infringement?
17. How efficient or burdensome is the counter-notification process for users and service providers? Is it a workable solution over the long run?
18. In what ways does the process work differently for individuals, small-scale entities, and/or large-scale entities that are sending and/or receiving counter notifications?

Legal Standards

19. Assess courts' interpretations of the "actual" and "red flag" knowledge standards under the section 512 safe harbors, including the role of "willful blindness" and section 512(m)(1) (limiting the duty of a service provider to monitor for infringing activity) in such analyses. How are judicial interpretations impacting the effectiveness of section 512?
20. Assess courts' interpretations of the "financial benefit" and "right and ability to control" standards under the section 512 safe harbors. How are judicial interpretations impacting the effectiveness of section 512?
21. Describe any other judicial interpretations of section 512 that impact its effectiveness, and why.

Repeat Infringers

22. Describe and address the effectiveness of repeat infringer policies as referenced in section 512(i)(A).
23. Is there sufficient clarity in the law as to what constitutes a repeat infringer policy for purposes of section 512's safe harbors? If not, what should be done to address this concern?

Standard Technical Measures

24. Does section 512(i) concerning service providers' accommodation of "standard technical measures" (including the definition of such measures set forth in section 512(i)(2)) encourage or discourage the use of technologies to address online infringement?
25. Are there any existing or emerging "standard technical measures" that could or should apply to obtain the benefits of section 512's safe harbors?

Remedies

26. Is section 512(g)(2)(C), which requires a copyright owner to bring a federal lawsuit within ten business days to keep allegedly infringing content offline—and a counter-notifying party to defend any such lawsuit—a reasonable and effective provision? If not, how might it be improved?
27. Is the limited injunctive relief available under section 512(j) a sufficient and effective remedy to address the posting of infringing material?
28. Are the remedies for misrepresentation set forth in section 512(f) sufficient to deter and address fraudulent or abusive notices and counter notifications?

Other Issues

29. Please provide any statistical or economic reports or studies that demonstrate the effectiveness, ineffectiveness, and/or impact of section 512's safe harbors.
30. Please identify and describe any pertinent issues not referenced above that the Copyright Office should consider in conducting its study.

Dated: December 28, 2015.

Maria A. Pallante,

Register of Copyrights, U.S. Copyright Office.

[FR Doc. 2015–32973 Filed 12–30–15; 8:45 am]

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MILLENNIUM CHALLENGE CORPORATION

[MCC FR 15–06]

Report on the Selection of Eligible Countries for Fiscal Year 2016

AGENCY: Millennium Challenge Corporation.

ACTION: Notice.

SUMMARY: This report is provided in accordance with section 608(d)(1) of the Millennium Challenge Act of 2003, Pub. L. 108–199, Division D, (the "Act"), 22 U.S.C. 7708(d)(1).

Dated: December 18, 2015. **Maame Ewusi-Mensah Frimpong,** *Vice President and General Counsel, Millennium Challenge Corporation.*

Report on the Selection of Eligible Countries for Fiscal Year 2016

Summary

This report is provided in accordance with section 608(d)(1) of the Millennium Challenge Act of 2003, as amended, Public Law 108–199, Division D, (the "Act") (22 U.S.C. 7707(d)(1)).

The Act authorizes the provision of Millennium Challenge Account

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MELISSA FERRICK, individually and doing business as Nine Two One Music and Right On Records/Publishing, and on behalf of all others similarly situated, Plaintiff, v. SPOTIFY USA INC., a Delaware corporation, and DOES 1 through 10, Defendants.	Case No. **CLASS ACTION COMPLAINT FOR COPYRIGHT INFRINGEMENT** **<u>DEMAND FOR TRIAL BY JURY</u>**

Plaintiff Melissa Ferrick individually and doing business as Nine Two One Music and Right On Records/Publishing ("Plaintiff" or "Ferrick"), on behalf of herself and all other similarly situated owners of federal copyrights in nondramatic musical works ("musical compositions") that were reproduced and distributed without a license by Defendant Spotify USA Inc. ("Spotify" or "Defendant") and DOES 1-10 (collectively "Defendants") during the last three years, alleges as follows.

NATURE OF THE ACTION

1. Under the Copyright Act, there are two separate copyrights in every recorded song: one in the sound recording ("phonorecord") itself, 17 U.S.C. §102(7), and one in the musical composition embodied in that phonorecord, 17 U.S.C. §102(2). This case is brought to vindicate the rights of the owners of the copyrights in the musical compositions embodied in phonorecords that Spotify has reproduced and distributed – without a license – as part of its extraordinarily popular interactive online subscription music streaming service (the "Service").

2. Spotify launched the Service in the United States on or about July 14, 2011. Since that time, the Service has grown to over 70 million subscribers, raised close to $1 billion in private equity, and obtained a valuation in excess of $8 billion. To achieve that success, Spotify promised its subscribers that it would provide them with "[a]ll the music you'll ever need…for every moment." But Spotify knew that in order to fulfill its promise, it would either have to delay the launch of the Service (and its process for immediately ingesting and offering new music) until such time as it had obtained all necessary licenses, or it would have to employ a now familiar strategy for many digital music services – infringe now, apologize later.

3. Spotify chose expediency over licenses. Thus, while Spotify has profited handsomely from the music that its sells to its subscribers, the owners of that music (in particular, songwriters and their music publishers) have not been able to share in that success because Spotify is using their music for free.

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4. The path that Spotify should have chosen is set forth in the Copyright Act. A service like Spotify that is interested in reproducing and distributing musical compositions in phonorecords has two choices: it can negotiate direct licenses with the copyright owners of those musical compositions or it can pursue compulsory licenses under 17 U.S.C. §115. Either a direct license or a compulsory license would have permitted Spotify to make and distribute phonorecords embodying the musical compositions as part of the Service, including by means of digital phonorecord deliveries ("DPDs"), interactive streaming, and limited downloads.

5. While a license under 17 U.S.C. §115 is compulsory, it is not automatic. To obtain such a license, it was Spotify's obligation to send a notice to each copyright owner "before or within thirty days after making, and before distributing any phonorecords of the work" of its "intention" use the work. 17 U.S.C. §115(b)(1). This notice of intent (or, as it is commonly referred to, an "NOI") is not merely a ministerial formality; it is a critical first step in the compulsory licensing process that alerts the copyright owner to the use of its musical composition and, in turn, the right to be compensated for that use. Because of its significance, the failure to timely serve or file an NOI "forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement." 17 U.S.C. §115(b)(2). Even after sending an NOI, Spotify was then required to timely account to the copyright owner and pay royalties accordingly. 17 U.S.C. §115(c).

6. For the musical compositions that are at issue in this litigation, Spotify did not negotiate direct licenses and did not avail itself of the compulsory licensing procedures in the Copyright Act. Instead, Spotify chose a third path: it outsourced its licensing and accounting obligations to the Harry Fox Agency ("HFA"), a music publishing rights organization that was ill-equipped to obtain licenses for all of the songs embodied in the phonorecords distributed by Spotify. As a result, neither

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Spotify nor HFA directly licensed or timely issued NOIs for many of the musical compositions embodied in phonorecords that Spotify was reproducing and distributing on a daily basis as part of the Service.

7. The known failure by Spotify to obtain licenses for all of the musical compositions that it is exploiting caused it to recently announce that it "will invest in the resources and technical expertise to build a comprehensive publishing administration system to solve this problem." *See* Ed Christman, "Spotify Announces Database To Properly Manage Royalties," *Billboard* (Dec. 23, 2015), *available at* http://www.billboard.com/articles/business/6820925/spotify-publishing-database-royalties. That is an investment and process that Spotify should have undertaken ***before*** it decided to reproduce and distribute phonorecords embodying unlicensed musical compositions to the Service's millions of users, not over four years after Spotify launched the Service in the United States. At this point, Spotify's failure to properly obtain licenses is much more than what it euphemistically describes as an "administration system" problem; it is systemic and willful copyright infringement for which actual and statutory damages are the remedy. Therefore, Plaintiff brings this class action for copyright infringement on behalf of herself and all similarly situated owners of musical compositions that were reproduced and distributed by Defendants without a license during the last three years.

THE PARTIES

8. Plaintiff Melissa Ferrick, a resident of Newburyport, Massachusetts, is a nationally recognized singer-songwriter who has released seventeen albums over the past two decades, with a catalog of over one hundred and fifty copyrighted musical compositions. Ferrick is an eight-time Boston Music Award winner and is regarded as one of the most prolific songwriters of her generation. She tours regularly throughout North America and has shared the stage with Morrissey, Marc Cohn, Paul Westerberg, Dwight Yoakam, John Hiatt, Weezer, Tegan and Sara, Bob

Dylan, Ani DiFranco, k.d. Lang, Suzanne Vega, Joan Armatrading, and many others. Ferrick signed in the early 1990s with Atlantic Records, and in 1993 released her debut album, "Massive Blur," which was then followed by "Willing to Wait" in 1995. Critical acclaim for Ferrick's music has continued to this day. Ferrick's 2011 album "Still Right Here" debuted on Billboard's Heat-Seekers Album Chart, won an 8th annual International Acoustic Music Award, and garnered two Independent Music Award nominations. Her 2013 album, "The Truth Is," won the 2014 Independent Music Award for Alt-Country Album of the Year and her 2015 self-titled album was referred to by the Boston Globe as "one of the year's most singular albums." Ferrick has been a part time Associate Professor in the Songwriting Department at Berklee College of Music since 2013, and the Artistic Director for Berklee's Five Week Summer Program since 2009. Her songs have been streamed approximately one million times by Spotify without a license.

9. Spotify is a Delaware corporation with its principal place of business in New York, New York. Spotify owns and operates the Service – an online interactive music streaming service, which can be principally accessed at www.spotify.com. The Service consists of both an advertisement-supported service that is free to subscribers and a premium service that costs $9.99 per month and is advertisement-free. Spotify is qualified to do business in State of California, and is doing business in California with offices in Los Angeles and San Francisco. Spotify operates the Service in California, has millions of subscribers and end users in California, has entered into contracts and other transactions in California (including with record labels, publishers and developers), and generates millions of dollars in revenue from California residents.

10. The true names and capacities (whether individual, corporate, associate or otherwise) of the defendants named herein as Does 1 through 10, inclusive, are unknown to Plaintiff, who therefore sues said defendants by such fictitious names. Plaintiff will amend this Complaint to allege their true names and capacities when

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such have been ascertained. Upon information and belief, each of the Doe defendants herein is responsible in some manner for the occurrences herein alleged, and Plaintiff's and class members' injuries as herein alleged were proximately caused by such defendants' acts or omissions.

11. Plaintiff is informed and believes, and on that basis alleges, that at all times mentioned in this Complaint, Spotify and each of the Doe defendants were the agent of each other and, in doing the things alleged in this Complaint, were acting within the course and scope of such agency.

JURISDICTION AND VENUE

12. This is a civil action seeking damages and injunctive relief for copyright infringement under the Copyright Act, 17 U.S.C. §101 *et seq.*

13. This Court has original subject matter jurisdiction of this action pursuant to 28 U.S.C. §§1331 and 1338(a).

14. This Court has personal jurisdiction over Defendants because, among other things, they do continuous and systematic business in California and in this District and maintain one or more offices and employ personnel in California. Defendants have also committed acts of copyright infringement in California and have performed acts directed at and causing harm in California.

15. Venue is proper in this District pursuant to 28 U.S.C. §§1391(b) and (c) and 1400(a) because Spotify is subject to personal jurisdiction in this District and because a substantial part of the events or omissions by Spotify giving rise to the claims occurred in this District.

CLASS ALLEGATIONS

16. Plaintiff brings this action as a class action pursuant to Fed. R. Civ. Proc. 23 on behalf of herself and on behalf of a class of similarly situated copyright owners of musical compositions defined as:

> All persons or entities who own the copyright in a musical composition: (a) for which a certificate of registration has been

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issued or applied for; and (b) that was reproduced and distributed through interactive streaming and/or limited downloads by Defendants without a license during the last three years.

17. This action has been brought and may be properly maintained as a class action because there is a well-defined community of interest in the litigation and the members of the proposed class are readily and easily ascertainable and identifiable.

18. The member of the class are so numerous that joinder of all members is impracticable. Plaintiff is informed and believes, and on that basis alleges, that there are thousands of members in the class who can be readily located, identified from various databases and records (including those maintained by Spotify, the United States Copyright Office, and HFA) and through discovery, and notified of this action.

19. Plaintiff's claim for copyright infringement is typical of the claims of the members of the class, and Plaintiff's interests are consistent with and not antagonistic to those of the other members of the class she seeks to represent. Plaintiff and all members of the class have sustained damages and face irreparable harm arising out of Defendants' continued infringement as alleged herein and, thus, are entitled to recover actual damages and/or statutory damages and obtain injunctive relief to prevent further wrongful conduct by Defendants.

20. Plaintiff has no interests that are adverse to, or which conflict with, the interests of the absent members of the class and she is able to fairly and adequately represent and protect the interests of such a class. Plaintiff believes strongly in the protection of the copyrights of songwriters and music publishers. Plaintiff has raised a viable claim for copyright infringement of the type reasonably expected to be raised by members of the class, and will diligently and vigorously pursue that claim. If necessary, Plaintiff may seek leave of the Court to amend this Complaint to include additional class representatives to represent the class or additional claims

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as may be appropriate. Plaintiff is represented by experienced, qualified, and competent counsel who is committed to prosecuting this action.

21. Common questions of fact and law exist as to all members of the class that plainly predominate over any questions affecting only individual members of the class. These common legal and factual questions, which do not vary from class member to class member, and which may be determined without reference to the individual circumstances of any class member, include (without limitation) the following:

(A) Whether Defendants' reproduced and distributed musical compositions through interactive streaming and/or limited downloads without a license during the last three years;

(B) Whether Defendants' reproduction and distribution of musical compositions through interactive streaming and/or limited downloads without a license constitutes direct infringement in violation of the Copyright Act, 17 U.S.C. §101 *et seq*.;

(C) Whether Defendants' acted willfully with respect to the acts complained of herein;

(D) The basis and method for determining and computing damages, including statutory damages; and

(E) Whether Defendants' infringing conduct is continuing, thereby entitling the members of the class to injunctive or other relief.

22. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because individual litigation of the claims of all class members is impracticable. The claims of the individual members of the class may range from smaller sums to larger sums. Thus, for those class members with smaller claims, the expense and burden of individual litigation may not justify pursuing the claims individually. And even if every member of the class could afford to pursue individual litigation, the court system could not be so encumbered.

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It would be unduly burdensome to those courts in which individual litigation of numerous cases would otherwise proceed. Individualized litigation would also present the potential for varying, inconsistent, or contradictory judgments and would magnify the delay and expense to all parties and to the court system resulting from multiple trials of the same factual issues. By contrast, the maintenance of this action as a class action presents few management difficulties, conserves the resources of the parties and court system, and protects the rights of each member of the class. Plaintiff anticipates no difficulty in the management of this action as a class action.

CLAIM FOR RELIEF

(Copyright Infringement – Against All Defendants)

23. Plaintiff hereby incorporates the allegations set forth above in paragraphs 1 through 20 above, as though fully set forth herein.

24. Under §106 of the Copyright Act, the copyright owner of a musical composition has the exclusive rights to reproduce and distribute the compositions in phonorecords. 17 U.S.C. §106(1) and (3). This includes the exclusive rights to make or authorize DPDs, interactive streams, and limited downloads of the musical compositions through subscription or non-subscription online digital music services. *See* 17 U.S.C. §115(d), 37 C.F.R. §§385.10, 385.11.

25. Spotify's online interactive music streaming service, www.spotify.com, is offered to end users in the United States on an advertising-free paid subscription basis or an advertiser-supported no-subscription basis. Spotify distributes phonorecords embodying musical compositions to its end users through interactive streaming and limited downloads available on their computers and mobile devices. Plaintiff is further informed and believes, and on that basis alleges, that Spotify also makes server copies in the United States of phonorecords embodying the musical compositions at issue in this litigation.

26. In order to lawfully make and distribute phonorecords embodying the musical compositions as set forth above, Spotify must have first obtained not only a

license for each individual phonorecord from its owner(s), but also a separate license for the underlying musical composition that is embodied in each separate phonorecord from the copyright owner of such composition. Spotify can either license musical compositions directly or by obtaining a compulsory license in accordance with the terms of 17 U.S.C. §115 by serving a timely NOI. Failure to serve or file the requisite NOI "within thirty days after making, and before distributing any phonorecords of the work…forecloses the possibility of a compulsory license and, in the absence of a voluntary license, renders the making and distribution of phonorecords actionable as acts of copyright infringement." 17 U.S.C. §115(b)(1) and (2).

27. Spotify did not have and does not have a comprehensive system of music publishing administration in place necessary to license all of the songs embodied in phonorecords which it ingests and distributes by means of interactive streaming and temporary downloads. Rather than decline to distribute phonorecords embodying musical compositions that are unlicensed, however, Spotify elected instead to engage in wholesale copyright infringement.

28. Plaintiff is the registered copyright owner of all of the musical compositions listed on Exhibit A attached hereto and incorporated herein by this reference ("Plaintiff's musical compositions"). Plaintiff's musical compositions have been distributed through interactive streaming and temporary downloads by Spotify approximately one million times within the last three years. Plaintiff is further informed and believes, and on that basis alleges, that server copies thereof have also been made by Spotify within the last three years. Plaintiff's musical compositions have not been licensed by Spotify either directly or by a compulsory license in accordance with 17 U.S.C. §115.

29. Plaintiff is further informed and believes, and on that basis alleges, that the musical compositions owned by the members of the class have been distributed by Spotify through interactive streaming and temporary downloads and that Spotify

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has also made server copies thereof during the last three years, all without either a direct or compulsory license.

30. Spotify's unlawful reproduction and distribution of the musical compositions owned by Plaintiff and the members of the class as alleged hereinabove constitutes copyright infringement under the Copyright Act. 17 U.S.C. §101 *et seq.*

31. Spotify's acts of infringement have been willful, intentional, and purposeful, in disregard of and indifference to the rights of Plaintiff and the members of the class.

32. As a direct and proximate result of Defendants' infringements of Plaintiff's copyrights and the copyrights of the members of the class, pursuant to 17 U.S.C. §504(c), Plaintiff and the class members are entitled to recover up to $150,000 in statutory damages for each musical composition infringed. Alternatively, at their election, pursuant to 17 U.S.C. §504(b), Plaintiff and the class members are entitled to their actual damages, including Spotify's profits from infringement, as will be proven at trial.

33. Plaintiff and the class members are also entitled to recover attorney's fees and costs pursuant to 17 U.S.C. §505, and prejudgment interest according to law.

34. Spotify is causing, and unless enjoined by the Court will continue to cause, Plaintiff and the class members irreparable harm for which they have no adequate remedy at law. Plaintiff and the class members are entitled to an injunction under 17 U.S.C. §502 prohibiting the continued infringement of their musical compositions.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself and on behalf of all other members of the class, prays for Judgment against Spotify and the Doe Defendants, and each of them, as follows:

A. Determining that this is a proper class action maintainable pursuant to Rule 23 of the Federal Rules Civil Procedure, certifying Plaintiff as class representative and Plaintiff's counsel as class counsel;

B. For compensatory and/or statutory damages in an amount in excess of $200 million, according to proof;

C. A temporary, preliminary, and permanent injunction enjoining and restraining Defendants, and their respective agents, servants, directors, officers, principals, employees, representatives, subsidiaries and affiliated companies, successors, assigns, and those acting in concert with them or at their direction, and each of them, from continued unlicensed reproduction and distribution of the copyrighted musical compositions owned by Plaintiff and the members of the class;

D. For pre- and post-judgment interest.

E. For such fees and costs (including reasonable attorney's fees) incurred herein as permitted by law.

F. For such other and further relief as the Court deems just and proper.

DATED: January 8, 2016

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Henry Gradstein
Maryann R. Marzano
Harvey W. Geller
Daniel Lifschitz

By: */s/ Henry Gradstein*
Henry Gradstein
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury of the claim alleged in this Complaint.

DATED: January 8, 2016

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Maryann R. Marzano
Harvey W. Geller
Daniel Lifschitz

By: */s/ Henry Gradstein*
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White Paper on Remixes, First Sale, and Statutory Damages

Copyright Policy, Creativity, and Innovation
in the Digital Economy

THE DEPARTMENT OF COMMERCE
INTERNET POLICY TASK FORCE

January 2016

Message from Secretary Penny Pritzker

Since the founding of our nation, the United States has recognized the importance of copyright in encouraging creative expression by incentivizing people to produce and share the works that contribute to America's leading role as a cultural and economic powerhouse. Our copyright system plays a critical role in promoting and disseminating works of authorship and provides diverse benefits for large and small businesses, consumers, authors, artists, and workers in the information, entertainment, and technology sectors.

A healthy copyright system strikes important balances between rights and exceptions—delineating what is protectable and what is not, determining which types of uses require permission or payment, and establishing appropriate frameworks to effectively protect rights and foster creativity and innovation. These balances must be reviewed regularly to ensure they continue to function well as a foundation for America's culture and economy.

The Internet has transformed the world by introducing new ways for people to communicate, create, innovate, and conduct business in the global digital economy. The goals of our national copyright policy and our global Internet policy should work in tandem.

The U.S. Department of Commerce has played a key role in addressing Internet policy-related issues since it launched the Internet Policy Task Force in April 2010. Two years ago, the Task Force published a Green Paper on *Copyright Policy, Creativity and Innovation in the Digital Economy*—the most comprehensive assessment of digital copyright policy issued by any Administration since 1995. The review process that culminated in this White Paper serves as a testament to the importance the Administration has placed on the development of updated and balanced copyright law in the digital environment.

We hope the White Paper will stimulate discussion and lead to adoption of our recommendations. We continue to recognize the importance that copyright law plays in the digital environment and why it is necessary to achieve a result that takes into account the interests of all stakeholders. We will remain engaged and monitor these and other areas of copyright policy to ensure that our copyright system continues to adapt and thrive, furthering the Constitutional goal of "promot[ing] the Progress of Science and useful Arts."

Penny Pritzker
U.S. Secretary of Commerce

FOREWORD

This White Paper by the U.S. Department of Commerce's Internet Policy Task Force addresses important issues at the intersection of copyright law and Internet policy. It is the result of a comprehensive, multi-year review of three key topics: 1) the legal framework for the creation of remixes; 2) the relevance and scope of the first sale doctrine in the digital environment; and 3) the application of statutory damages in the context of individual file-sharers and secondary liability for large-scale online infringement.

Led by the U.S. Patent and Trademark Office (USPTO) and the National Telecommunications and Information Administration (NTIA), the Internet Policy Task Force conducted a public meeting at USPTO headquarters; received and reviewed dozens of comments from a range of stakeholders including rights holder organizations, Internet-based companies, public interest groups, libraries, academics, and individual authors and artists; and held roundtables around the country to create a record upon which to analyze those issues.The input we received over the last two years has further underscored the importance that copyright law continues to play in the digital environment.

Each section of the White Paper provides recommendations based on the stakeholder input received.In some areas, we believe now is the right time to consider legislative solutions.In others, we recommend bringing stakeholders together to develop best practices. We also recognize that the changing nature of market conditions and technology may call for future re-evaluation of some of our conclusions.

This White Paper reflects indispensable contributions from members of our staffs who organized the consultation processes and engaged in the tasks of analysis and writing. At USPTO, the project was led by Shira Perlmutter, Chief Policy Officer and Director for International Affairs, working with a team including David Carson, Susan Allen, Ann Chaitovitz, and Ben Golant. The NTIA team was led by John Morris, Associate Administrator, working with Winter Casey, Camille Fischer, and Luis Zambrano Ramos.

We appreciate the contributions of other agencies in the Administration that reviewed the White Paper and whose comments greatly improved the final draft. We are also grateful to the United States Copyright Office, and in particular to Associate Registers Karyn Temple Claggett, Director of Policy and International Affairs, and Jacqueline Charlesworth, General Counsel, for their participation in a number of our public discussions and for their valuable input on the Copyright Office initiatives mentioned in the White Paper.

Effective and balanced copyright protection is critical in today's digital environment. We are confident that the recommendations outlined in the White Paper will help advance copyright policy and ensure that the United States' creative and innovative industries can continue to strengthen our nation's culture and economy.

Michelle K. Lee
Under Secretary of Commerce for
Intellectual Property and Director,
U.S. Patent and Trademark Office

Lawrence E. Strickling
Assistant Secretary of Commerce and
Administrator, National
Telecommunications and Information
Administration

TABLE OF CONTENTS

I. Introduction

This White Paper is an outcome of the work of the Department of Commerce Internet Policy Task Force ("Task Force"). The Task Force was formed in 2010 to critically examine privacy policy, the global free flow of information, cybersecurity, and copyright in the context of innovation and the Internet economy.[1]

After extensive public consultations, the Task Force released a green paper on July 31, 2013, entitled "Copyright Policy, Creativity, and Innovation in the Digital Economy" ("Green Paper").[2] The Green Paper provides a comprehensive review of current policy related to copyright and the Internet, and identifies important issues that call for attention and development of solutions.[3] It is the most thorough and comprehensive analysis of digital copyright policy issued by any administration since 1995.

The Green Paper identified three broad areas for further work by the Task Force. The first focused on the development of policy recommendations on three specific substantive policy issues: (1) the legal framework for the creation of remixes; (2) the relevance and scope of the first sale doctrine in the digital environment; and (3) the appropriate calibration of statutory damages in the contexts of individual file-sharers and secondary liability for mass online services. The second dealt with the establishment of a multistakeholder forum aimed at finding ways to improve the technical day-to-day operation of the Digital Millennium Copyright Act's ("DMCA") notice and takedown system. The final area involved the question of what role the government could play to help improve the online licensing environment for copyrighted works.

In October 2013, the Task Force published a Notice in the Federal Register seeking comment on the specific subjects identified above and announcing a public meeting to discuss them.[4] The Task Force then held an all-day forum on December 12, 2013, at USPTO's headquarters in Alexandria, Virginia, to explore those topics.[5] Dozens of comments from industry, academia,

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[1] For a description of the Task Force and its mission, *see Internet Policy Task Force*, USPTO.GOV, http://www.uspto.gov/learning-and-resources/ip-policy/copyright/internet-policy-task-force (last visited Oct. 20, 2015). The Task Force's work on copyright policy, led by the United States Patent and Trademark Office ("USPTO") and the National Telecommunications and Information Administration ("NTIA"), has been coordinated with the Office of the Intellectual Property Enforcement Coordinator ("IPEC") in the Office of Management and Budget, and other divisions of the Executive Office of the President.

[2] The Green Paper is available at http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf (last visited Oct. 20, 2015).

[3] *See id* at 4, *et. seq*.

[4] *See* Request for Comments on Dep't of Commerce Green Paper, 78 Fed. Reg. 61337, 61339 (Oct. 3, 2013), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-10-03/pdf/2013-24309.pdf (last visited Oct. 20, 2015). *See also* Notice of Change in Public Meeting Date and Change in Public Comment Periods, 78 Fed. Reg. 66337 (Nov. 5, 2013), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-11-05/pdf/2013-26487.pdf (last visited Oct. 20, 2015), and Extension of Comment Period for Public Comments, 78 Fed. Reg. 78341 (Dec. 26, 2013), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-12-26/pdf/2013-30690.pdf (last visited Oct. 20, 2015).

[5] The webcast of the forum is available at http://livestream.com/uspto/copyright and a transcript is available at http://www.uspto.gov/ip/global/copyrights/121213-USPTO-Green_Paper_Hearing-Transcript.pdf.

public interest organizations, and individuals were submitted for consideration both before and after the forum.[6]

Between May and August 2014, the Task Force conducted four roundtables in different parts of the country to discuss the three policy issues raised in the Green Paper.[7] More than 60 people participated in these discussions as panelists, and more than 750 joined either in person or online.[8] The Task Force heard from a diverse group of stakeholders from across the United States, including composers and musicians in Nashville,[9] publishers and librarians in Cambridge,[10] independent filmmakers in Los Angeles,[11] technology companies in Berkeley,[12] and academics, industry, and public interest advocates at all four locations. The roundtables gathered stakeholder input to provide a foundation for the policy recommendations in this paper.[13]

As to the initiative on the DMCA notice and takedown process, the multistakeholder forum met six times in public session and established a smaller working group to work on specific issues. The last public meeting was held on December 18, 2014. In April 2015, the Task Force's efforts culminated in the release of a document entitled "DMCA Notice-and-Takedown Processes: List of Good, Bad and Situational Practices."[14] The document represents the outcome of months of intensive discussions by a broad range of stakeholders, including rights holders and individual creators, service providers of different sizes, and consumer and public interest representatives. The Task Force expects to convene another meeting of the multistakeholder forum at a future date to review progress in the application of the agreed-upon practices and related topics.

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[6] Comments are available at http://www.uspto.gov/learning-and-resources/ip-policy/copyright/public-comments-green-paper.

[7] *See* Notice of Public Meetings on Copyright Policy Topics, 79 Fed. Reg. 21439 (Dep't of Commerce Apr. 16, 2014), *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-04-16/pdf/2014-08627.pdf; *see also* Notice of Public Meetings on Copyright Policy Topics, 79 Fed. Reg. 34497 (Dep't of Commerce June 17, 2014) (announcing times and locations of the two California roundtables), *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-06-17/pdf/2014-14092.pdf. The notices invited members of the public to participate in the roundtables. USPTO and NTIA staff then placed participants on particular panels with the goal of ensuring a rich mix of various viewpoints.

[8] At these roundtables, USPTO and NTIA staff asked participants a series of questions on a variety of issues related to remixes, statutory damages, and the first sale doctrine in the digital environment. The goal was to further address subjects first raised in written comments submitted in response to the October 3, 2013 Public Notice. For agendas, webcasts, transcripts, and additional information on the roundtables, *see* http://www.uspto.gov/learning-and-resources/ip-policy/copyright/roundtable-discussions-remixes-first-sale-and-statutory-3.

[9] The Nashville roundtable was held on May 21, 2014, at Flynn Auditorium, Vanderbilt University Law School.

[10] The Cambridge roundtable was held on June 25, 2014, at Wasserstein Hall, Harvard Law School.

[11] The Los Angeles roundtable was held on July 29, 2014, at the Walter J. Lack Reading Room, Loyola Law School.

[12] The Berkeley roundtable was held on July 30, 2014, at Booth Auditorium, Boalt Hall, UC Berkeley School of Law.

[13] The agendas, webcasts, and transcripts for all four of these roundtables, as well as the other two Green Paper workstreams, are available at http://www.uspto.gov/learning-and-resources/ip-policy/copyrights.

[14] Information on the multistakeholder forum, including the "Practices" document, is available at http://www.uspto.gov/learning-and-resources/ip-policy/copyright/multistakeholder-forum-dmca-notice-and-takedown-system.

To advance work in the third area, determining an appropriate role for the government in facilitating the further development of the online marketplace, the Task Force published a notice[15] and convened an open meeting on April 1, 2015.[16] Based on the comments received, we are focusing on the development and use of standard identifiers for all types of works of authorship, interoperability among databases and systems used to identify owners of rights and terms of use, and a possible portal for linking to such databases and to licensing platforms. Work on these subjects is expected to continue through 2016.

Through these efforts, the Task Force has sought public input to ensure that an updated and balanced copyright system continues to thrive. As U.S. Department of Commerce Secretary Penny Pritzker said in the introduction to the Green Paper, "[e]nsuring that copyright policy provides strong incentives for creativity, while promoting innovation in the digital economy, is a critical and challenging task."[17] The tools available in the digital ecosystem have changed the nature of what creators can produce and how they share works with the public, and the ways the public can access and interact with the content. Effective and balanced copyright protection should work in tandem with the free flow of information. In fact, as the Supreme Court has recognized, "the Framers intended copyright itself to be the engine of free expression."[18]

To that end, this White Paper examines critical components of copyright policy in the digital age, and offers recommendations and suggestions to "ensure balanced and meaningful protection for intellectual property while preserving the dynamic innovation and growth that have made the Internet and digital technology so important to our economy and society."[19]

Our discussion of each issue is organized into three parts: (1) an introduction that provides a brief overview of the issue, (2) a summary of the comments and testimony received from stakeholders (without the Task Force's endorsement of any of the views presented), and (3) our conclusions and recommendations.

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[15] *See* Public Meeting on Facilitating the Development of the Online Licensing Environment for Copyrighted Works, 80 Fed. Reg. 13325 (Dep't of Commerce March 13, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-03-13/pdf/2015-05765.pdf.

[16] Webcasts of the meeting are available for viewing here: http://www.uspto.gov/learning-and-resources/ip-policy/copyright/public-meeting-facilitating-development-online-licensing. The following subjects were covered at the public forum: (1) Standard Identifiers-An Overview of the Current Landscape; (2) The Challenges: Gaps in Coverage and Areas for Improvement; (3) The Path Forward: Interoperability of Standard Identifiers and Incorporation into Databases of Rights Information—Music Sector; (4) The Path Forward: Interoperability of Standard Identifiers and Incorporation into Databases of Rights Information—Other Sectors; (5) U.K. Copyright Hub: One Model of Public/Private Cooperation; and (6) Toward a U.S. Copyright Hub?

[17] Green Paper at ii.

[18] *Harper & Row Publ'rs, Inc. v. Nation Enter.*, 471 U.S. 539, 558 (1985); Green Paper at 1-2.

[19] Green Paper at ii.

II. Overview of Conclusions and Recommendations

A. Remixes

Remixes make valuable contributions to society in providing expressive, political, and entertainment content. It is important that the copyright framework continues to allow the broad range of remixes to thrive, ensuring that a vibrant fair use space coexists with effective licensing structures. The Task Force concludes that the record has not established a need to amend existing law to create a specific exception or a compulsory license for remix uses. We have several recommendations that would make it easier for remixers to understand when a use is fair and to obtain licenses when they wish to do so. Specifically, the Task Force recommends pursuing three goals:

- The development of negotiated guidelines providing greater clarity as to the application of fair use to remixes;

- Expanding the availability of a wider variety of voluntary licensing options; and

- Increasing educational efforts aimed at broadening an understanding of fair use.

B. First Sale

The first sale doctrine provides many benefits to the public, including sharing favorite books with friends, enabling libraries to lend materials to their patrons, and providing reduced-price versions to impecunious students. We posed the question whether there is a way to preserve the doctrine's benefits in the online environment. Based on the record before us, the Task Force concludes:

- Amending the law to extend the first sale doctrine to digital transmissions of copyrighted works is not advisable at this time. We have seen insufficient evidence to show that there has been a change in circumstances in markets or technology, and the risks to copyright owners' primary markets do not appear to have diminished. Innovative business models and licensing terms provide some of the benefits traditionally provided by the first sale doctrine. The Task Force acknowledges that licensing terms can be changed, but we expect that copyright owners, as rational commercial actors, will meet the changing demands of consumers.

- The Task Force notes the concerns expressed by libraries about the loans of eBooks. The licensing agreements between eBook publishers and libraries are new and evolving, and early government intervention into the eBook market could skew the development of innovative and mutually beneficial arrangements. If over time it becomes apparent that libraries have been unable to appropriately serve their patrons due to overly restrictive terms imposed by publishers, further action may be advisable (such as convening library and publisher stakeholders to develop voluntary best practices, or amending the Copyright Act).

- The Task Force believes that there is a need to provide consumers with more clarity about the nature of the transactions they enter into when they download copies of works. We therefore recommend the creation of a multistakeholder process to establish best practices to improve consumers' understanding of license terms and restrictions in connection with online transactions involving creative works.

C. Statutory Damages

The Task Force is mindful that statutory damages have become increasingly important in cases of online infringement, where the scope of the infringing use may not be ascertainable. Our inquiry focused on the level of statutory damages that may be assessed against individual file-sharers and against online services, which can be secondarily liable for infringement for large numbers of works. The Task Force recommends the following three amendments to the Copyright Act to address some of the concerns presented and to better balance the needs of copyright owners, users, and intermediaries:

- Incorporate into the Copyright Act a list of factors for courts and juries to consider when determining the amount of a statutory damages award;

- Implement changes to the copyright notice provisions that would expand eligibility for the lower "innocent infringement" statutory damages awards; and

- In cases involving non-willful secondary liability for online services offering a large number of works, give courts discretion to assess statutory damages other than on a strict per-work basis.

Furthermore, the Task Force supports the creation of a streamlined procedure for adjudicating small claims of copyright infringement and believes that further consideration should be given to the proposal of the Copyright Office to establish a small claims tribunal. This could help diminish the risk of disproportionate levels of damages against individual file-sharers.

III. The Legal Framework for the Creation of Remix

A. Introduction

In the Green Paper, the Task Force described remixes—works created through changing and combining existing works to produce something new and creative—as part of a trend of user generated content ("UGC") that has become a hallmark of the Internet.[20] We noted that some remixes may qualify as fair uses, and that in certain contexts, licensing mechanisms have been developed as an alternative to relying on fair use. We also recognized that best practices and industry-specific guidelines have been developed to offer guidance to remix creators. We posed the questions whether the creation of remixes is nevertheless being unacceptably impeded by legal uncertainty, whether there is a need for new approaches that would make it easier to engage in remixing, and whether there are efficient ways to compensate rights holders in cases where fair use does not apply.[21]

B. Stakeholder Views

1. The Different Worlds of Remix

"Remixes" as defined in the Green Paper are a broad category including mashups and sampling with respect to music, as well as creations using other types of preexisting material.[22] The comments received in this proceeding made clear the variety of activities that are at issue. In the audiovisual field, remixes include UGC videos using preexisting audio or audiovisual material combined with new authorship, and "fan videos" that combine music with footage from television programs and motion pictures to comment on the audiovisual material or to "tell new stories."[23] With respect to visual art, remixes may include photo manipulation, digital or mixed analog/digital collage, stock photography or stock illustration, fractals, multimedia, vector files, digital wire frames, and 3D renderings.[24] Literary remixes include fan fiction, in which aficionados of works such as the Harry Potter stories or the Smallville television show write new stories to share and express their devotion to the original stories and characters, make comments about society, or hone their skills as writers.[25]

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[20] Green Paper at 28.

[21] Although this Paper discusses fair use primarily in the context of remix works, the Task Force has acknowledged the important role fair use plays in advancing the goals of copyright law more generally. *See id.* at 21-23.

[22] Some stakeholders saw "remix" as a misnomer for such a broad spectrum of works. They explained that "remix" is a term of art in the music industry referring to certain kinds of alterations made to sound recordings, typically by the recording artists or producers of the original records, such as remix of tracks (*e.g.*, to make the vocals louder or softer, amplify the bass, etc.) (Cooper (LA) at 83) or a new version such as a dance remix (NMPA *et al*., Nov. Comments at 3). The Task Force recognizes this specialized use of the term in the recording industry, but notes that the term has obtained a larger meaning in society at large. *See* LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2009).

[23] OTW Nov. Comments at 13-14.

[24] DeviantART Nov. Comments at 10.

[25] OTW Nov. Comments at 6, 12, 44, 49 and *passim*.

The Task Force also heard that the creators of remixes are a diverse group—from teenagers who create fan fiction or videos for their own amusement and that of their friends, to commercial artists, to professional DJs who create mashups that they play for large paying audiences or make available on advertising-supported websites.[26] The wide range of participants in remixing includes both amateurs who engage in noncommercial self-expression and professionals who remix for profit.[27]

In many cases, these remixes will constitute derivative works, compilations, or collective works, as defined in the Copyright Act.[28] Whether or not they fall into these categories, they are likely to be infringing unless they are authorized or qualify for a defense such as fair use.[29]

Some stakeholders urged that different treatment should be given to nonprofessional, nonprofit remixers. One participant observed that "ordinary people who are just engaging in noncommercial activity … are not going to be interested in participating in a licensing regime" and should not have to do so when they are "sharing with their friends and their fans and maybe audiences."[30] A commenter suggested that creators of fan fiction should be insulated from liability for expressive, noncommercial activities since "[o]ften the best way to learn a musical instrument or develop artistic or creative writing skill is to imitate the works of others" and copyright owners should not be concerned about such activity.[31]

A number of stakeholders, however, stressed that the lines between amateur and professional, and between noncommercial and commercial, are often blurred. A music industry representative observed that performers may be considered "noncommercial" early in their careers when they are not yet making money, but that their goal is to enter the commercial marketplace.[32] A representative of Google noted that amateur creators such as those starting out on YouTube often want to become professionals, but may find it difficult to negotiate the transition from amateur to professional given the different "clearance culture" in the professional world.[33] A university

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[26] *See* McSherry/EFF (Berkeley) at 32; Menell (Berkeley) at 13.

[27] The terms "amateurs" and "professionals" do not entail any value judgment as to the creativity or the quality of the work produced.

[28] The Association of American Publishers noted that the Task Force's broad definition overlaps with the Copyright Act's definitions of compilations, collective works, and derivative works. AAP Nov. Comments at 2-3; Adler/AAP (Cambridge) at 29-30. Other participants stated that all remixes would be "derivative works." *See, e.g.*, LaPolt (LA) at 70; Turley-Trejo (LA) at 102, Cooper (LA) at 103.

[29] As some commenters noted, other doctrines may also come into play in particular cases, including the idea-expression dichotomy, the originality requirement, the substantial similarity requirement, and the concept of *de minimis* use. *See* ASCAP Nov. Comments at 9; CA Jan. Comments at 11; MPAA Jan. Comments at 6; PK Nov. Comments at 8-12. However, there was very little discussion of those doctrines, presumably because they will not apply to the typical remix, which takes substantial portions of expressive content. Our discussion addresses those remixes that would need to be licensed if they do not qualify as fair use.

[30] McSherry/EFF (Berkeley) at 32.

[31] Menell Jan. Comments at 111.

[32] Rosenthal/NMPA (Alexandria) at 197.

[33] Von Lohmann/Google (Berkeley) at 75.

lawyer-librarian whose duties include counseling students and faculty on copyright matters observed that in the world in which she works, "the commercial/non-commercial distinction is not as bright as one would think a lot of times."[34] She stated that somebody working on a project that appears to be noncommercial may hope to make money from it at some point in the future.[35] A technology industry group made the point that consumers may also create commercial content.[36]

Copyright owners discussed another blurred line between noncommercial and commercial remixes: while ". . . many user-generated works incorporating existing works are not commercial, many of the platforms where this user-generated content is promoted to viewers are."[37] A motion picture industry representative pointed out that while a creator of UGC may be making it for enjoyment and to share freely with others, the commercial platform on which it is posted may place advertisements around it and earn revenues from its dissemination.[38]

An organization advocating on behalf of remixers expanded on the Green Paper's point[39] that advances in digital technology have made remixing existing works easier and cheaper than ever, noting that sophisticated and widely available technologies enable those with limited financial resources to create and distribute polished remixes.[40] It explained that "[r]emixes produce valuable cultural and political commentary. They are particularly attractive to groups underrepresented in American mass culture—women, nonwhites, and LGBT individuals, among others—who use remix to talk back to that culture, to identify what it's leaving out and explain what they see."[41] The primary motivation for such noncommercial remixers is not to make a profit, but to engage in self-expression.[42]

Regardless of the motivation of the remixer, however, some participants expressed concern that even entirely noncommercial activities can cause harm to the market for the original work or for licensed derivative works. A professor suggested that the relevant issue is not whether the remixer is engaging in commercial activity, but whether the rights holder has suffered

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[34] Gilliland (Cambridge) at 78.

[35] *Id.* at 79.

[36] CCIA Nov. Comments at 2.

[37] CA Jan. Comments at 6.

[38] Sheffner/MPAA (Nashville) at 152.

[39] Green Paper at 6, 28.

[40] OTW Nov. Comments at 30 (*citing* Rebecca Tushnet, *I Put You There: User-Generated Content and Anticircumvention*, 12 VAND. J. ENT. & TECH. L. 889, 903–05, 930 & note 168 (2010)).

[41] *Id.* at 3, 28-29 and 38.

[42] *Id.* at 63.

commercial harm.[43] An organization representing copyright owners came forward with examples of other types of harm involving the incorporation of preexisting works into hate speech.[44]

Professional creators and their representatives expressed the conviction that the author of an underlying work has and should continue to have the right to say no to someone who wishes to remix his or her work.[45] Many pointed to existing licensing mechanisms, which they argued can accommodate the desire to remix while permitting copyright owners to control and be compensated for the use of their works.[46] They expressed concern that permitting remixing without authorization would upset established industry practices that provide important sources of revenue. Attorneys who represent recording artists noted that maintaining approval of how their works are used is one of the most important deal points in their contract negotiations.[47]

Several copyright owner representatives urged that, at least in cases where it does not constitute fair use, an author should be entitled to forbid the use of his or her work in ways that he finds offensive, or simply does not like.[48] A few rights holders, while acknowledging that remixes can contain creative artistic expression, nevertheless viewed such expression as secondary to protecting the authors and owners of pre-existing copyrighted material, and stressed the goal of "of protecting the property interest of the original author or providing incentive for original authors to create original works."[49] At the same time, as described below, most copyright owners also acknowledged that some remixes will be protected by the fair use doctrine.[50]

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[43] Gervais (Nashville) at 148-49. *See also* Strohm (Nashville) at 148 ("it [is] possible that you could have a work that's ostensibly noncommercial that still harms the infringed work in a way that impacts its commerciality . . .").

[44] Aistars/CA (LA) at 130-31 (giving as an example the rewriting of the lyrics of "Hey Jude" to transform it into an anti-Semitic creed). *See also* CA Jan. Comments at 6.

[45] *See, e.g.*, LaPolt and Tyler Jan. Comments at 3 (asserting that recording "[a]rtists can, and should continue to be able to, deny a use that they do not agree with."); *id.* at 6-7 & apps. (appending letters from various recording artists asserting importance of "the right to say 'no'" and importance of the ability to give approval over how their music is used); LaPolt (LA) at 70-72; Muddiman/Hollywood Composers (LA) at 98-99, 118-19. *See also* AAP Nov. Comments at 3 (referring to "the general rule that such use of preexisting works requires permission from the copyright owner"); IPI Nov. Comments at 6 ("permission is a feature, not a bug, of a civil society operating under the rule of law").

[46] *See, e.g.*, Aistars/CA (LA) at 131-32; Freundlich (LA) at 79-80; Rosenthal/NMPA (Cambridge) at 17-20. *See also* discussion *below* at Part B.3 of this Section, p. 19 (Current and Developing Licensing Mechanisms).

[47] Given (Berkeley) at 49; LaPolt and Tyler Jan. Comments at 2-3.

[48] *See* CA Jan. Comments at 6 (noting that "copyright law protects creators . . .from having their works used in advertising against their will, to cast them in an unflattering light, or by groups or individuals morally or politically opposed to them"); LaPolt and Tyler Jan. Comments at 3 (discussing "past instances of performing artists and songwriters expressing frustration with political uses of their music"); Rosenthal/NMPA (Alexandria) at 187 (identifying a recording artist who never agrees to license samples of his recordings).

[49] ASCAP *et al.* Jan. Comments at 5. *See also* IPI Nov. Comments at 5-6 (asserting that remixes are "a subordinate form of creativity" and should require permission from the creator of the original work).

[50] AAP Nov. Comments at 2, 3; AAP Jan. Comments at 2-3; ASCAP Nov. Comments at 9; IPO Nov. Comments at 3; Marks/RIAA (Nashville) at 124-25; RIAA Nov. Comments at 6. *See also* Freundlich (LA) at 80-81.

2. Legal Doctrines

a. Fair Use

The Green Paper recognized that the fair use doctrine is a "fundamental linchpin of the U.S. copyright system."[51] The doctrine's flexibility ensures that it can accommodate new, unforeseen activities, but it can also create uncertainty. As noted in the Green Paper, many remixes will qualify as fair uses while others will not. Nevertheless, some will fall into a gray area where it is difficult to determine their status without potentially costly litigation.[52]

The Task Force heard from many stakeholders that the fair use doctrine is effective in permitting the creation of remixes. One public interest organization noted that fair use is flexible and robust, and that to the extent there is uncertainty, it is a worthwhile consequence of having those benefits.[53] Another such organization surveyed recent case law on fair use and concluded that the current legal framework is generally favorable to remix.[54] An organization representing copyright owners stated that "fair use fosters creativity by allowing creators to produce new cultural contributions that may not have been possible without building on or referencing existing works;"[55] and a group of music industry stakeholders support fair use to protect critical expression for which the use of underlying works is necessary.[56] Motion picture studios noted that millions of creators, both small and large, distribute transformative creative works online relying on fair use and other doctrines. They asserted that the wide availability of these transformative works, as well as the low number of infringement actions, demonstrate that the current legal framework preserves the space necessary for such activity.[57]

Other commenters, however, shared with the Task Force the challenges they experienced—either directly or on behalf of third parties—in applying the fair use doctrine to remixes, stressing that it is a complex inquiry on which courts frequently disagree.[58] Some stated that in many cases it is difficult to determine whether remixes are fair uses and that even lawyers have a hard time advising on this issue, given disparate court decisions on similar fact patterns.[59] A publishers' representative stated with respect to transformative uses that "this is an area where there's tremendous disagreement about what the law is, what the law should be, whether or not the law has been consistent, whether or not the law is clear, and whether there is a clear path to follow in

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[51] Green Paper at 21 & n.97 (citing 17 U.S.C. § 107).

[52] *Id.* at 21. *See also* Rothman (LA) at 76.

[53] McSherry/EFF (Berkeley) at 16.

[54] OTW Nov. Comments at 5-11.

[55] CA Jan. Comments at 7.

[56] ASCAP *et al*. Jan. Comments at 3.

[57] MPAA Jan. Comments at 6-7.

[58] DeviantART Nov. Comments at 17.

[59] *Id.*; Khanna & Tehranian Nov. Comments at 9-10; Menell (Berkeley) at 27-28; PK Nov. Comments at 3; Perzanowski (Nashville) at 121.

taking that area of the law and attempting to apply it here . . . ."[60] A commenter from an Internet art platform asserted that "no citizen/artist is effectively capable of applying fair use unassisted" and that current practices in the visual arts using rich digital tool sets "do not mesh with current law."[61]

While not all commenters and participants in the discussions shared the same interpretation of the law,[62] there appeared to be a near-consensus that fair use should remain the principal doctrine used to determine whether a remix is lawful. As discussed below, no alternative approach garnered significant support. Most roundtable participants speaking on behalf of remixers and users believed that fair use serves to resolve most cases appropriately and that the benefits of flexibility outweigh the costs of uncertainty.[63]

b. Guidelines and Best Practices

To address the uncertainty as to whether a particular use will be judged to be fair, one approach would be to clarify the circumstances in which the doctrine applies. As noted in the Green Paper, there have been several initiatives over the years aiming to provide greater predictability to fair use by formulating guidelines and statements of best practices.[64] In their comments and during the public meetings, many stakeholders expressed the view that guidelines or best practices can play a useful role in offering guidance to remix creators.[65]

Other participants, primarily from the rights holder community, were less enthusiastic about such initiatives. One raised the concern that guidelines and best practices could be used to expand exceptions, which the commenter said would "begin to swallow the set of rights you intend to protect."[66] Another characterized them as "really dangerous" because some users may be misled into believing that they represent the law.[67] An attorney who represents creators and copyright

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[60] Adler/AAP (Cambridge) at 63.

[61] DeviantART Nov. Comments at 16-17.

[62] It is not surprising that as a general rule, rights holders tended to view the scope of fair use more narrowly than those who spoke on behalf of users, including varying interpretations of the concept of transformative use. *Compare* the comments cited *above* at notes 50, 55-57, 60 and *below* at 146 with OTW Nov. Comments at 5-12 ("Most remixes that borrow from in-copyright works while adding creative elements of their own have strong claims to fair use."); CCIA Nov. Comments at 2-3; NMR Nov. Comments at 4.

[63] OTW Nov. Comments at 3, 62-75. *See also* McSherry/EFF (Berkeley) at 16; Courtney (Cambridge) at 70-71 ("Recent scholarship shows patterns and predictability in some of the fair use cases. … Lawyers can forecast likely outcomes where there are precedents that have analogies; that does exist."); Rosenblatt/OTW (LA) at 107 ("Fair use does a good job of making room for commentary, criticism, transformative work, and particularly for noncommercial transformative work"); Turley-Trejo (LA) at 81 ("Fair use is working, I think, to some extent, for a lot of these remixes and mash-ups . . . . [E]specially with some of the case law with fair use, it is working.").

[64] Green Paper at 22-23; *see also id.* at 29, 104.

[65] *See* Adler/AAP (Cambridge) at 48; ASCAP Nov. Comments at 12; Courtney (Cambridge) at 56-59, 71; Gilliland (Cambridge) at 60-62; Google Nov. Comments at 6; IFTA Nov. Comments at 3; Karobonik/NMR (LA) at 113-15 (but opposing a single set of guidelines); MPAA Jan. Comments at 7; OTW Nov. Comments at 78-79.

[66] Fox (LA) at 111.

[67] LaPolt (LA) at 109-10.

owners asserted that the courts already handle fair use issues well and that guidelines would be confusing and add "another layer of complexity."[68]

A university copyright advisor pointed out that guidelines may not only advise what uses are permissible or impermissible, but also explain where to be careful, and what factors to consider.[69] Another participant stressed that guidelines should be drafted in a way that makes them accessible to users and does not require interpretation by an attorney, since it is the remix creators themselves who need to use the guidelines.[70] One professor warned that the process of developing guidelines can be difficult.[71]

A number of precedents were brought to the Task Force's attention. Those precedents fall into two categories: (1) what might be called "single sector" guidelines, and (2) "negotiated" guidelines. Single sector guidelines are prepared by a community of stakeholders, generally either users or rights holders, based on what is considered appropriate and common practices within that specific community. Negotiated guidelines are characterized by the inclusion of a variety of stakeholders, including both users and rights holders, with a goal of reaching consensus on principles that are agreed by all. As noted by several commenters, there are advantages and disadvantages to each approach.

Single Sector Guidelines. Over the years, communities of users of creative works have issued guidelines or statements of best practices that set forth their views as to what kinds of activities are likely to be fair use or otherwise appropriate, and provide guidance regarding factors to be considered. The most well-known recent examples are a series of statements of best practices coordinated by the American University Center for Social Media and the AU Washington College of Law Program on Information Justice and Intellectual Property. These relate to uses of various types of works and in various contexts, including works of poetry,[72] dance-related materials,[73] orphan works,[74] and uses in visual arts,[75] documentary films[76] and online videos,[77] by journalists,[78] and in academic and research libraries.[79]

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[68] Freundlich (LA) at 117-18. *See also* Muddiman/Hollywood Composers (LA) at 118; Brown (Cambridge) at 66.

[69] Courtney (Cambridge) at 59.

[70] McDonough/FMC (Cambridge) at 67-68.

[71] Gervais (Nashville) at 143. Professor Gervais specifically referred to the classroom photocopying guidelines and the guidelines developed by American University, discussed in notes 72, 83-77, and 90 *below*.

[72] AM. U., CTR. FOR SOCIAL MEDIA *et al.*, CODE OF BEST PRACTICES IN FAIR USE FOR POETRY (2011), *available at* http://www.cmsimpact.org/sites/default/files/documents/pages/fairusepoetrybooklet_singlepg_3.pdf (last visited Oct. 5, 2015).

[73] DANCE HERITAGE COAL., STATEMENT OF BEST PRACTICES IN FAIR USE OF DANCE-RELATED MATERIALS (2009), *available at* http://www.danceheritage.org/DHC_fair_use_statement.pdf (last visited Oct. 5, 2015).

[74] AM. U., CTR. FOR SOCIAL MEDIA *et al.*, STATEMENT OF BEST PRACTICES IN FAIR USE OF COLLECTIONS CONTAINING ORPHAN WORKS (2014), *available at* http://www.cmsimpact.org/sites/default/files/documents/pages/orphanworks-dec14.pdf (last visited Oct. 5, 2015).

[75] AM. U., CTR. FOR SOCIAL MEDIA *et al.*, CODE OF BEST PRACTICES IN FAIR USE FOR THE VISUAL ARTS (2015), *available at* http://www.cmsimpact.org/sites/default/files/best_practice_rfnl.pdf (last visited Oct. 5, 2015).

One of the leaders of these projects has described them as "an effort to help practice communities claim their legal rights by formulating consensus statements of what kinds of unlicensed use of copyrighted materials are necessary and reasonable for the creative work they do."[80] An organization established to promote the acceptance of "noncommercial fanworks" pointed to these best practices statements as offering "understandable copyright

rules that individuals can respect," in contrast to what it described as the "counterintuitive and arcane" nature of the law.[81] One roundtable participant found such guidelines to be "a very helpful starting place to work when I'm working with documentary filmmakers to at least get them up to speed," but expressed concerns about the challenge of creating one set of guidelines to fit every factual scenario, especially through a multistakeholder process.[82] A university copyright advisor described guidelines as "an expression of the users that are in this community[,]"[83] observing that the guidelines are carefully crafted and include limiting

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[76] AM. U., CTR. FOR SOCIAL MEDIA *et al.,* DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE (2005), *available at* https://www.wcl.american.edu/pijip/go/film-bestpractices (last visited Oct. 5, 2015).

[77] AM. U., CTR. FOR SOCIAL MEDIA *et al.,* CODE OF BEST PRACTICES IN FAIR USE FOR ONLINE VIDEO (2008), *available at* http://www.cmsimpact.org/sites/default/files/online_best_practices_in_fair_use.pdf (last visited Oct. 5, 2015).

[78] AM. U., CTR. FOR SOCIAL MEDIA *et al.* SET OF PRINCIPLES IN FAIR USE FOR JOURNALISM (2013), *available at* http://www.cmsimpact.org/sites/default/files/documents/pages/principles_in_fair_use_for_journalism.pdf (last visited Oct. 5, 2015).

[79] AM. U., CTR. FOR SOCIAL MEDIA *et al.,* CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES (2012), *available at* http://www.cmsimpact.org/sites/default/files/documents/code_of_best_practices_in_fair_use_for_arl_final.pdf (last visited Oct. 5, 2015).

[80] Henry Jenkins, *Recut, Reframe, Recycle: An Interview with Pat Aufderheide and Peter Jaszi (Part One)* (Feb. 6, 2008) (quoting Peter Jaszi), *available at* http://henryjenkins.org/2008/02/an_interview_with_pat_aufderhe.html. A proponent of "community-based" best practices and roundtable participant argues that "[b]ringing everyone to the table almost certainly would have led to the same results as similar attempts in the past—'guidelines' offering crabbed interpretations of fair use that would not satisfy anyone" and that "the guidelines made the argument that documentary filmmakers' principles were normatively desirable understandings of fair use, even in the absence of agreement from commercial copyright owners." Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice,* 31 COLUM. J.L. & ARTS 497, 500 (2008). Other proponents of "community-based" guidelines have stated that one of the benefits of such guidelines is that they "provid[e] judges with information about community norms, which research suggests can be very influential to their decisions." Brandon Butler, *Issue Brief: Massive Open Online Courses: Legal and Policy Issues for Research Libraries* 6-7 (Ass'n of Research Libraries 2012), http://www.arl.org/storage/documents/publications/issuebrief-mooc-22oct12.pdf (last visited Oct. 5, 2015).

[81] OTW Nov. Comments at 2, 78. Google also identified best practices as being among the mechanisms that can solve "some of the legal uncertainties facing some remix creators with respect to some copyrighted works," *citing* AM. U., CTR. FOR SOCIAL MEDIA *et al.,* CODE OF BEST PRACTICES IN FAIR USE FOR ONLINE VIDEO (2008), *above* note 77. Google Nov. Comments at 6.

[82] Karobonick/NMR (LA) at 113-14. *See also* Gervais (Nashville) at 143 (referring the same best practices guidelines as "really important" and stating "the more of that we have, the more there'll be a signal from interested parties as to what shouldn't be licensed.").

[83] Courtney (Cambridge) at 56.

statements and "stories about how the community is using [the guidelines]."[84] The documentary filmmakers' statement of best practices has been described with approval as having "had a profound effect on the documentary marketplace."[85]

Others pointed out shortcomings. Book publishers stated that the AU guidelines "express the view of current general practices within the community of users . . . [and] have deliberately not sought out the views of rights holders," resulting in "a kind of self-confirmation that your own practices should be widely viewed as legitimate and sufficiently authorized."[86] In considering possible guidelines for remixes, they urged that the single sector model should not be followed and stated that guidelines produced with input from all sides would be useful, although more difficult to achieve.[87]

A similar critique was offered by a law professor and former documentary filmmaker who has studied the issue of best practices.. She observed that the group that created the documentary filmmakers' best practices was "not particularly representative of the stakeholders" because it excluded those "whose works were being used."[88] While accepting that it may be appropriate for various communities to develop their own guidelines so that "people can look at them as reference points or not," she concluded that the AU guidelines should not be adopted more broadly.[89]

Negotiated Guidelines. In contrast to single sector approaches, negotiated guidelines are developed with the participation of a mix of stakeholders, which may include authors and copyright owners, users, and other relevant intermediaries. Such negotiated guidelines have a mixed history. The most well-known were developed in 1975, during the final stages of enactment of the current Copyright Act. At the urging of the Chairman of the Subcommittee on Courts, Civil Liberties, and Administration of Justice of the House Judiciary Committee, an Ad Hoc Committee of educational institutions, authors and publishers agreed to guidelines for

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[84] *Id.* at 58-59. Another university copyright advisor also referred to the "stories" included in the guidelines, noting that they help "people who aren't that practiced in taking a set of abstractions and applying them to an actual situation . . . ." Gilliland (Cambridge) at 60-61.

[85] Henry Jenkins, *Recut, Reframe, Recycle: An Interview with Pat Aufderheide and Peter Jaszi (Part Two)* (Feb. 8, 2008) (quoting Patricia Aufderheide), *available at* http://henryjenkins.org/2008/02/recut_reframe_recycle_an_inter html, *referenced in* OTW Nov. Comments at 74. The Jenkins article also noted that the four error and omissions insurance companies most used by documentary filmmakers announced programs to cover fair use claims within 18 months after the statement was issued. *Id.*

[86] Adler/AAP (Cambridge) at 48.

[87] *Id.* at 48-49.

[88] Rothman (LA) at 115.

[89] *Id.* at 115-17. *See also*, Jennifer E. Rothman, *Best Intentions: Reconsidering Best Practices Statements in the Context of Fair Use and Copyright Law,* 57 J. COPYRIGHT SOC'Y 371 (2010). In that article, Professor Rothman identified some value in single sector best practices as documenting the needs of a particular community and serving an educational purpose, but described them as products of "wishful thinking rather than reality," potentially mischaracterizing community practices and the role of custom. *Id.* at 376-78.

classroom copying from book and periodicals in not-for-profit educational institutions.[90] Similar guidelines were prepared by music educators and music publishers relating to use of music in education settings.[91] These guidelines were reprinted with approval in the legislative history of the Copyright Act of 1976.[92] They have been relied on by a number of courts, although they are not binding and cannot replace the necessary multifactor fair use analysis.[93]

A subsequent effort to develop multistakeholder fair use guidelines for the digital age was inconclusive. The Conference on Fair Use (CONFU), convened in 1994 by the Clinton Administration's Information Infrastructure Task Force to develop guidelines for fair uses of copyrighted works in the digital environment by librarians and educators, involved a broad range of stakeholders who were unable to reach final consensus.[94] Several commenters held CONFU

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[90] U.S. COPYRIGHT OFFICE, CIRCULAR 21: REPRODUCTION OF COPYRIGHTED WORKS BY EDUCATORS AND LIBRARIANS 5-7 (Aug. 2014) (describing history of and setting forth the classroom copying guidelines), *available at* http://www.copyright.gov/circs/circ21.pdf; *see* Gervais (Nashville) at 143 (describing the photocopy guidelines as "great precedents for guidelines").

[91] U.S. COPYRIGHT OFFICE, CIRCULAR 21: REPRODUCTION OF COPYRIGHTED WORKS BY EDUCATORS AND LIBRARIANS 7-8 (Aug. 2014) (setting forth Guidelines for Educational Uses of Music), *available at* http://www.copyright.gov/circs/circ21.pdf (last visited Oct. 6, 2015).

[92] H.R. REP. NO. 94-1476 (Comm. on the Judiciary) at 68-70 (1976), *available at* http://www.copyright.gov/history/law/clrev_94-1476.pdf (last visited Oct. 14, 2015). These guidelines were endorsed by the House Judiciary Committee as "a reasonable interpretation of the minimum standards of fair use." *Id.* at 72.

[93] *See, e.g.*, *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1273-74 (11th Cir. 2014) ("We note that the Classroom Guidelines, although part of the legislative history of the Copyright Act, do not carry force of law. In any case, to treat the Classroom Guidelines as indicative of what is allowable would be to create the type of 'hard evidentiary presumption' that the Supreme Court has cautioned against, because fair use must operate as a 'sensitive balancing of interests.' As discussed, the fair use analysis must be performed on a work-by-work basis, and so we must not give undue weight to the amounts of copying set forth in the Classroom Guidelines.") (internal citations omitted); *Princeton University Press v. Mich. Document Servs.*, 99 F.3d 1381, 1390 (6th Cir. 1996) ("Although the Classroom Guidelines purport to 'state the minimum and not the maximum standards of educational fair use,' they do evoke a general idea, at least, of the type of educational copying Congress had in mind."); *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 919 (2d Cir. 1994) ("Though these guidelines are not considered necessarily binding on courts, they exist as a persuasive authority marking out certain minimum standards for educational fair uses . . . .") (citations omitted); *Marcus v. Rowley*, 695 F.2d 1171, 1178 (9th Cir. 1983).

[94] The CONFU Final Report described the outcome as follows:

> In summary, the CONFU process resulted in much discussion on the issue of fair use in a digital environment. It also resulted in the development of fair use guidelines for educational multimedia, proposals for fair use guidelines for digital images and some aspects of distance learning, the adoption of a statement of scenarios dealing with the use of computer software in libraries, and the identification and referral of two important issues for possible legislative solutions, i.e., (1) reproduction of works for the visually-impaired or other persons with disabilities, and (2) digital preservation. Though the proffered guidelines in the area of electronic reserve systems were not widely supported by CONFU participants, and it was determined by the parties involved that it was premature to draft guidelines addressing digital transmission of digital documents in the context of interlibrary loan and document delivery activities, it was felt that the discussions on these issues had been extremely valuable if not immediately fruitful.

BRUCE A. LEHMAN, U.S. PATENT AND TRADEMARK OFFICE, THE CONFERENCE ON FAIR USE: FINAL REPORT TO THE COMMISSIONER ON THE CONCLUSION OF THE CONFERENCE ON FAIR USE 17 (1998), *available at* http://www.uspto.gov/sites/default/files/documents/confurep_0.pdf (last visited Oct. 6, 2015).

up as an example of a process that failed.[95] Nevertheless, as the Green Paper observed, despite the lack of consensus, the discussions, guidelines, and draft proposals that resulted may serve as useful resources.[96]

More recently, a group of rights holders and online platforms announced the Principles for User Generated Content Services ("UGC Principles"), intended to "foster an online environment that promotes the promises and benefits of UGC Services and protects the rights of Copyright Owners."[97] An organization representing copyright owners described the UGC Principles as a "set of recommendations that work toward the goals of eliminating infringing content on UGC services, encouraging uploads of wholly original and authorized user-generated audio and video content, accommodating the fair use of copyrighted content on UGC services, and protecting legitimate interests of user privacy."[98] The UGC Principles state that filtering technology used to block content should be implemented in a way that accommodates fair use.[99]

Several roundtable participants and commenters suggested an even greater government role in the creation of fair use guidelines relating to remix, with the Copyright Office and/or the Patent and Trademark Office developing the guidelines.[100] Some participants were opposed to such an endeavor, however, with one lawyer representing copyright owners warning that unsophisticated users might misinterpret such guidelines as representing the law.[101] Book publishers proposed that "the Task Force work with stakeholders to clarify how remixes and mashups fit within the Copyright Act's taxonomy of compilations and derivative works," or that the Copyright Office

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[95] Courtney (Cambridge) at 56; Crews (LA) at 139-40.

[96] Green Paper at 22. *See also* Adler/AAP (Cambridge) at 49 (noting that although CONFU had "difficulties" in developing guidelines, "at least … everybody had the opportunity to participate and they had the opportunity to make their views known and to share them, and there was a real opportunity for dialogue.").

[97] PRINCIPLES FOR USER GENERATED CONTENT SERVICES, http://www.ugcprinciples.com (last visited Oct. 14, 2015) [*hereinafter* "UGC PRINCIPLES"]. The companies supporting the principles include CBS Corp., Crackle, Dailymotion, Fox Entertainment Group, Microsoft Corp., MySpace, NBC Universal, Sevenload, Sony Pictures, Viacom, Veoh Networks, Inc., and The Walt Disney Company and Youku. *Id.*

[98] CA Jan. Comments at 11-12. A public interest organization pointed to a separate set of "UGC Fair Use Guidelines" developed by a number of nonprofit advocacy groups—the *Fair Use Principles for User Generated Video Content*—as a "good starting point" for discussions (albeit on the topic of notice and takedown under the DMCA rather than on remix), and characterized the UGC Principles as being "much less protective of fair use." CIS/EFF Nov. Comments at 11 & n.32. Another organization has claimed that the UGC Principles "offered no guidance concerning how the copyright enforcement [the UGC Principles supporters] called for might avoid entangling remixes or other fair uses." CDT Nov. Comments at 12.

[99] UGC PRINCIPLES, note 97 *above*, para 3d. One commenter has noted that while Google and its YouTube subsidiary did not sign onto the UGC Principles, YouTube's Content ID system follows the UGC Principles. Menell Nov. Comments at 94. Google has said that "Content ID is a supplement to, not a substitute for, fair use." Google Nov. Comments at 4.

[100] AAP Nov. Comments at 3; CA Nov. Comments at 11-12; Turley-Trejo (LA) at 119; Rothman (LA) at 116. Rothman also suggested the possibility that the Copyright Office issue opinion letters at the request of users who are not certain whether a particular use is fair, which could be used to demonstrate good faith. *Id.* at 117.

[101] LaPolt (LA) at 109-10. *See also* Freundlich (LA) at 117-18 ("I have complete fear of any guidelines that come with the Copyright Office imprimatur because I think the courts are working fine within the guidelines of Section 107 . . . . I think the courts would be confused by any other statement of guideline by the Copyright Office.").

conduct a notice-and-comment proceeding culminating in a circular or other statement of best practices.[102]

A majority of those commenters and roundtable participants who addressed negotiated guidelines spoke of them with approval, although some expressed ambivalence. One professor described them as "great precedents" that "carry a lot of weight" and a commenter cited them as a useful model in the context of the DMCA notice and takedown process.[103] But another participant dismissed them as having "utterly failed to meet their goals."[104] The ambivalence was captured by one commenter observing that a number of sources have developed competing guidelines. She remarked that "having a unitary source of information" to help lay persons understand the law "seems good," but also noted the danger of creating "quasi law," a violation of which would be considered infringement.[105]

c. Possible Changes in the Law

There was little support for the possibility of revising the Copyright Act itself, either by creating a compulsory license, or a new specific exception.[106] One academic presented a detailed proposal for a compulsory license for musical mash-ups that could incorporate portions of multiple works, on the ground that such remixes are being made anyway, and a compulsory license would enable money to flow to the creators.[107] He argued that this would avoid the risk-taking caused by the uncertainty of the status of remixes under existing law[108] as well as the potentially prohibitive costs of obtaining licenses for works with multiple samples.[109]

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[102] AAP Jan. Comments at 4.

[103] Gervais (Nashville) at 143; ASCAP Nov. Comments at 11-12.

[104] Crews (LA) at 139-40 (referring to both the 1976 guidelines and the CONFU process discussed *above*, notes 94-96 and accompanying text).

[105] Rosenblatt/OTW (LA) at 122.

[106] Some commenters and participants did suggest changes in other areas of the law that the Task Force is examining, as ways to alleviate concerns that might impede the creation of remixes. These changes generally involved amending the statutory damages regime and/or the DMCA notice and takedown regime. *See, e.g.*, CDT Comments at 11; Engstrom (Berkeley) at 27; McSherry/EFF (Berkeley) at 17; U. Mich. Lab at 3. We discuss statutory damages in Section V of this paper. The multistakeholder forum addressing improvements to the DMCA notice and takedown system, established pursuant to the Green Paper, agreed on a statement of good, bad and situational practices. DMCA NOTICE-AND-TAKEDOWN PROCESSES: LIST OF GOOD, BAD, AND SITUATIONAL PRACTICES, http://www.uspto.gov/sites/default/files/documents/DMCA_Good_Bad_and_Situational_Practices_Document-FINAL.pdf (last visited Oct. 14, 2015).

[107] Under this proposal, the compulsory licensee would pay a royalty based on the amount of current mechanical compulsory license to make and distribute sound recordings of musical works, which would be divided among the holders of rights in the various musical works and sound recordings included in the mash-up. Menell (Berkeley) at 27-31; Menell Jan. Comments at 113-18.

[108] Menell (Berkeley) at 27-28.

[109] Menell Jan. Comments at 116; *see also* Strohm (Nashville) at 125-26.

No other roundtable participant supported this proposal, however, with one characterizing it as "a solution in search of a problem."[110] Remix advocates observed that one does not need permission to engage in fair use and should not be required to obtain a compulsory license,[111] and creators stressed the importance of retaining the right to say "no" to uses of their works that do not qualify as fair, especially when they find them offensive.[112]

One commenter and participant suggested that a 2012 Canadian exception for noncommercial UGC could serve as a model for statutory reform in the United States, asserting that it would encourage noncommercial fan fiction and related creative activity.[113] The only response to the suggestion was opposition from motion picture studios, arguing that the statute goes beyond fair use in several respects.[114] There was no further support for or discussion of a specific exception for remixes, apart from statements opposing any new exceptions in general.[115]

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[110] McSherry/EFF (Berkeley) at 32. In its written comments, the American Association of Independent Music voiced general "support [for] the creation of licensing mechanisms where remixes can be created under a compulsory licenses [*sic*], subject to the terms of the license and what musical copyrights are made available[;]" but did not address Professor Menell's specific proposal or explain how such a license would work or why it favored this approach. A2IM Nov. Comments at 4.

[111] McSherry/EFF (Berkeley) at 31; Courtney (Cambridge) at 37. *See also* AAP Nov. Comments at 2 (stating that the legal uncertainty surrounding fair use should not be resolved by compulsory licensing and that existing and developing market-based solutions, evolving with technological advances and new business models, can address remix issues).

[112] Aistars/CA (LA) at 129-30; ASCAP *et al.* Jan. Comments at 3-4; Carnes (Nashville) at 129; Cooper (LA) at 83-84, 104-05 ("[Y]ou can't get licenses for everything, but that's okay. . . . There are another billion songs you can go get to create whatever you want to create. Why is my property so important to you that you only can do your creation with my property?"); Given (Berkeley) at 49 ("The ability to control one's creative work is paramount."); LaPolt (LA) at 71-72; Muddiman/Hollywood Composers (LA) at 98, 118-19. Strohm noted that "one of the rights we have as rights holders is the right to turn something down if we just don't approve of the use for ideological reasons, or for aesthetic reasons for that matter. And that's the stumbling block I always run into is how would you structure a compulsory framework that still gave creators the right to say no if it was something that was truly objectionable to their ideology or aesthetic?" Strohm (Nashville) at 126. *See also* note 48 *above* and accompanying text.

[113] OTW Nov. Comments at 79 (quoting PETER S. MENELL, THIS AMERICAN COPYRIGHT LIFE: REFLECTIONS ON RE-EQUILIBRATING COPYRIGHT FOR THE INTERNET AGE, at 113 (Oct. 30, 2013); Tushnet/OTW (Alexandria) at 196-97. That exception provides that it is not copyright infringement to use an existing work, after it has been published or made available to the public, in the creation of a new work, or to authorize an intermediary to disseminate it, when the use or authorization is done solely for noncommercial purposes and the new work does not have a substantial adverse effect on the exploitation or potential exploitation of the existing work or its existing or potential market. *See* Canada Copyright Act, R.S.C. 1985, c. C-42, Section 29.21, *available at* http://laws-lois.justice.gc.ca/eng/acts/C-42/page-20 html (last accessed on Oct. 15, 2015).

[114] MPAA Jan. Comments at 7, n.30.

[115] *See, e.g.*, A2IM Nov. Comments at 4; AAP Nov. Comments at 2, 3; ASCAP *et al.* Jan. Comments at 2, 4; CA Jan. Comments at 11; CEA Nov. Comments at 7; IPI Nov. Comments at 4, 6; NMPA Nov. Comments at 4.

To sum up, the vast majority of commenters and participants who addressed the issue believed that, while not perfect, the current legal framework works, and did not believe it advisable to create a new exception or a compulsory license.[116]

3. Current and Developing Licensing Mechanisms

Regardless of their views of fair use, commenters acknowledged that not all remixes will qualify. In such cases (assuming that no other defense applies), remixers who do not want to run afoul of the law will need to seek permission from the copyright owners.

The Green Paper noted that because remixes often use multiple copyrighted works as source material, they can raise daunting licensing issues.[117] Many commenters agreed, stating that identifying, locating, and negotiating with owners of works can present difficulties and impose high transaction costs.[118] One professor's research found that, for small musicians not affiliated with a label, there are barriers and inefficiencies in the system.[119] Another professor agreed that "the market isn't working very well for certain types of commercial remixes."[120] Others noted that in cases involving multiple samples, it can be particularly cost-prohibitive and impractical to clear the necessary rights.[121] A professor referred to a "royalty stacking problem," where a musical recording has a large number of samples and the cumulative demands for royalties from the different owners of those samples can exceed 100 percent of the remixer's revenues.[122]

Copyright owners and their representatives pointed out that the marketplace is responding to remixes by creating new licensing mechanisms.[123] Among those discussed during the roundtables were licensing through intermediaries such as Kindle Worlds and YouTube, as well as direct and micro-licensing initiatives at various stages of development.[124]

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[116] *See, e.g.*, Courtney (Cambridge) at 38 ("[N]obody really wants compulsory licensing in this area."); Given (Berkeley) at 33 (noting that with one exception, "there is a large consensus among us here" against a compulsory license).

[117] Green Paper at 28.

[118] *See, e.g.*, FMC Nov. Comments at 9-10; CIS/EFF Nov. Comments at 2; Menell at 115-16 ("When we have a tremendous number of parties, each possessing 'exclusive rights,' the transaction costs skyrocket."). *See also* notes 119-122 *below.*

[119] DiCola (Alexandria) at 160. *See also* FMC Nov. Comments at 9-10 (asserting that there is a "chilling effect" on the development of remixes and describing instances in the sampling context) (citing KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING (Duke Univ. Press ed., 2011)).

[120] Gervais (Nashville) at 121.

[121] Menell (Berkeley) at 13; Strohm (Nashville) at 126, 137 and 150-151.

[122] DiCola (Alexandria) at 160-61.

[123] *See, e.g.*, ASCAP *et al.* Jan. Comments at 4-5; CA Jan. Comments at 8-10; MPAA Jan. Comments at 6; NMPA Nov. Comments at 5-6; RIAA Nov. Comments at 6-7; Rosenthal/NMPA (Cambridge) at 17 ("The answer to all of this is the free market."), 18-19.

[124] *See, e.g.*, Aistars/CA (LA) at 131-32 (referring to Amazon's Kindle Worlds, which licenses fan fiction and lets authors share in the revenue generated); Marks/RIAA (Nashville) at 138-140 (description of music industry micro-licensing); Rosenthal (Cambridge) at 18-20.

Google described the intermediary licensing currently engaged in by YouTube.[125] YouTube has completed licensing agreements with many music publishers, the major record labels, and a number of independent labels, as well as with motion picture studios and television networks.[126] Its Content ID system identifies videos that include works designated by copyright owners, who have the option to permit the file to remain available and "monetize" it (i.e., share in the advertising revenue received in connection with the work), block the file altogether, mute the copyright holder's audio, or track the video viewership statistics.[127] If the video remains on YouTube, the uploading users become, in effect, the beneficiaries of the copyright owner's license without having to seek out the copyright owner and obtain permission.[128] A Google representative stated that "[n]ot only has [private licensing] gotten rights holders compensated, but it has also enabled an enormous amount of this new creativity that we've seen online."[129]

Bulk licensing of remixes has taken place in other contexts as well. A music attorney described a small "free market mashup" initiative that was operated by ESL Music, a record label.[130] ESL offered to a collective of deejays the right to use all of its releases to create remixes, which ESL would then market for use in commercials and motion pictures, sharing the revenues with the remixers.

A micro-licensing platform is also now under development by the recording and music publishing industries, intended to provide a streamlined licensing mechanism for small users, such as the app developer who wants to use a clip of music in the background or a wedding videographer recording a ceremony.[131] Record companies explained the platform as a central online destination where such users can go "to make the transaction and get the license that they need."[132] The music industry decided it was worth the time and expense to build such a platform because it would make such licensing simple and cost-effective, providing compensation for uses that might otherwise be unlicensed.[133] A university representative affirmed the need for establishing this type of micro-licensing for a variety of works in situations where a fair use defense is not available and there is not massive distribution or large potential license fees.[134]

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[125] Google Nov. Comments at 2-6. *See also* Von Lohmann/Google (Berkeley) at 73-75.

[126] Google Nov. Comments at 3. *See also* NMPA *et al.* Nov. Comments at 5-6; Rosenthal (Cambridge) at 18.

[127] Described in the Green Paper at 29. *See* also Google Nov. Comments at 3, 5-6 (describing Content ID functions).

[128] Google Nov. Comments at 3. *See also* Marks/RIAA (Nashville) at 125.

[129] Von Lohmann/Google (Berkeley) at 73.

[130] Rosenthal/NMPA (Cambridge) at 19.

[131] ASCAP *et al.* Jan. Comments at 5 & n.11 (citing Ed Christman, *RIAA & NMPA Eyeing Simplified Music Licensing System, could Unlock "Millions" in New Revenue*, BILLBOARD, June 13, 2013, *available at* http://www.billboard.com/biz/articles/news/record-labels/1566550/riaa-nmpa-eyeing-simplified-music-licensing-system-could) (last visited Oct. 15, 2015); Marks/RIAA (Nashville) at 138-40.

[132] Marks/RIAA (Nashville) at 140.

[133] *Id*. at 139. *See also* ASCAP *et al.* Jan. Comments at 5.

[134] Gilliland (Cambridge) at 25.

Several commenters also mentioned Creative Commons as another licensing mechanism through which creators can authorize remixes of their works subject to certain restrictions.[135]

Overall, the Task Force heard that rights holders, both on their own and through intermediaries, are actively engaged in licensing various remix uses, and that these licensing efforts are expanding.[136] Several roundtable participants and commenters urged that the market should have more time to develop before new legislative or regulatory solutions are considered.[137]

One proposed approach focused on voluntary collective licensing, where organizations representing large numbers of rights holders operate as one-stop shops to license rights for numerous works. Voluntary collective licensing is well-established for some uses of some types of works,[138] and several participants and commenters endorsed it as a promising vehicle for the licensing of remixes. One commenter suggested that a transaction-facilitating organization similar to a performing rights society or the Harry Fox Agency could facilitate remix licensing.[139] It noted, however, that "the success of a transaction-facilitating clearinghouse is dependent on the availability of a centralized information database so that the clearinghouse could efficiently and accurately make sure the correct rights holders are compensated."[140] An attorney who represents recording artists agreed that such a mechanism would be a good idea,

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[135] ASCAP *et al.* Jan. Comments at 4; CA Jan. Comments at 9; Freundlich (LA) at 80; LaPolt Jan. Comments at 5; NMPA *et al.* Nov. Comments at 20; Rosenthal/NMPA (Cambridge) at 21. *See also* Green Paper at 29, 88-89. *But see* CrComm Nov. Comments at 2 ("The fact that some authors choose to apply open licenses, whether from Creative Commons or other sources, to some of their works, is not a "fix-all" solution to the ambiguities of fair use.").

[136] *See* ASCAP Nov. Comments at 9-10 ("[C]onsidering the financial benefit to copyright owners for the use of their works, marketplace solutions will be created, if they do not exists [*sic*] already, to address licensing concerns."); MPAA Nov. Comments at 1-2, 5 ("To the extent interest in remixes continues to grow, creators of both underlying works and remixes will experiment further with business models that meet consumer demand while compensating the content creators.").

[137] *See, e.g.*, AAP Nov. Comments at 3 (stating that "it is unnecessary and inappropriate to consider enactment of a . . . specific limitation or exception to broadly authorize the creation of 'remixes' or 'mashups;'" and that "publishers would encourage stakeholders to continue collaborating to develop market solutions . . . ."); Dare/Oracle (Berkeley) at 23 ("[T]he market should do it. And I don't think we're ripe at this point for a legislative solution to come in."); Rosenthal/NMPA (Cambridge) at 19-20 (suggesting that the small "free market mashup collective" discussed *above* may be a model for a more large-scale licensing regime, which should be explored before considering legislative or regulatory action). *See also* Dina LaPolt, Jay Rosenthal & John Meller, *A Response to Professor Menell: A Remix Compulsory License Is Not Justified*, 38 COLUM. J.L. ARTS 365, 371 (2015) ("In fact, current music industry practice shows that this marketplace is already functioning, and for those newer art forms—like mash-ups—the market must be given sufficient time to develop, and this development is already underway.").

[138] For a description of the music performing rights societies and their licensing, *see* U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE; A REPORT OF THE REGISTER OF COPYRIGHTS at 32-34 (2015), *available at* http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf. Another major collective licensing organization, the Copyright Clearance Center ("CCC"), licenses certain reproduction and distribution rights in books, journals, newspapers, magazines, and other kinds of works. CCC Nov. Comments at 2-3, 6; Green Paper at 88. *See also* COPYRIGHT CLEARANCE CENTER, http://www.copyright.com/content/cc3/en/toolbar/aboutUs.html (last visited Oct. 15, 2015).

[139] FMC Nov. Comments at 10.

[140] *Id.*

but echoed the point that a database of ownership rights would be necessary and observed that creating it would pose obstacles.[141] A composer-songwriter in the business of aggregating music catalogs acknowledged the difficulty of establishing a new collective licensing organization, but observed that the sophisticated technology available today is likely to make the task easier, including establishing the necessary global rights database.[142]

4. The Relationship between Licensing and Fair Use

Discussions concerning the relationship between licensing and fair use focused on two themes: first, the need for licensing to co-exist as an alternative to asserting fair use in borderline cases and second, the concern that as licensing expands, the availability of fair use could contract.

A number of participants stressed the important role that licensing can play in permitting remixes that do not fall within the scope of fair use.[143] There was considerable support for the point that adequate and attractive licensing mechanisms, in conjunction with fair use, can contribute to fostering creativity.[144] In the words of one professor, "we need to provide room for market experimentation to help license mash-ups while protecting this fair use zone."[145] Many rights holders, while acknowledging that some remixes will qualify as fair use, nevertheless emphasized the role of licensing in cases of uncertainty.[146]

The Task Force heard a variety of views as to current practices when works fall into the gray area. One participant expressed concern that because of the legal uncertainty, rational actors with viable fair use defenses will elect to seek licenses rather than risk statutory damages penalties in

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[141] Cooper (LA) at 124-25.

[142] Muddiman/Hollywood Composers (LA) at 127-28.

[143] Curtis (Nashville) at 130-31 (favoring licensing scheme such as micro-licensing and questioning "whether we even need to get to the fair use analysis in a lot of these gray areas."); Marks/RIAA (Nashville) at 119, 125 (a combination of licensing and legal doctrines are working well to permit remix). A user advocate also noted that "[f]air use isn't everything[;]" and "exists for those cases where licensing might be impossible." Karobonik/NMR (LA) at 94; Rothman (LA) at 96.

[144] *See* citations in note 143 *above*; Perzanowski (Nashville) at 140-41 (supporting reduction of transaction costs and enabling creators to obtain licenses in a low cost and efficient manner, as long as they are for uses that require permission).

[145] Rothman (LA) at 96.

[146] *See, e.g.*, AAP Nov. Comments at 2 ("[T]here are an increasing number of licensing mechanisms available in the market to facilitate the legal creation of such combination works that would not qualify as fair use. This is an important practical and creative consideration in light of the Task Force's observation that the applicability of fair use to any particular such combination of original expression from preexisting works is subject to 'legal uncertainty…given the fact-specific balancing required by fair use.'" [footnote omitted]"); MPAA Jan. Comments at 7 ("The availability of licenses is … a valuable method by which parties can avoid unnecessary disputes . . . ."); Stehli/HoriPro (Nashville) at 146-47 ("… if they think it's fair use, they can take it and proceed accordingly or if they feel that it's a fair use they can go ahead and license it just to be safe."). *See also* LaPolt (LA) at 89 (describing a conversation with Weird Al Yankovic, during which he said, "If I'm going to defend my fair use analysis, I'd rather just get permission and if they say no, they say no. I'll find someone else to give me permission").

the event they are found to infringe.[147] Several academics and public interest groups agreed and made the point that fair use uncertainty should not always be resolved in favor of licensing.[148]

Library groups and some academics also expressed concern about the impact of available licensing on the application of the fair use defense. They cautioned that the development of mechanisms to license remixes might be relied on by courts to conclude that the fourth factor—"the effect of the use upon the potential market for or value of the copyrighted work"—disfavors a finding of fair use.[149] One professor responded that when considering this factor, courts focus not simply on whether a license option exists, but also on whether the defendant's activity would reasonably be expected to be licensed by rights holders.[150]

C. Conclusions and Recommendations

1. Overview

The Task Force heard descriptions of two very different worlds. One is the domain of noncommercial remixers, such as vidders, who use preexisting music for their soundtracks, or fan fiction writers who view their works as homage to the original author. Based on the comments we received, these remixers often may not seek licenses, whether due to reliance on fair use or a lack of awareness of copyright law.[151] They may believe that there is no need to obtain permission to engage in expressive activity, even when that activity draws on the creative expression of others.

On the other hand, when professional artists and authors engage in remix activities, their use is typically commercial and competitive. Many appropriation artists, hip-hop artists, parodists, music remixers, and mash-up artists create commercial remixes and intend to earn a profit. They

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[147] Khanna-Tehranian Nov. Comments at 3-4, 12-13.

[148] CIS/EFF Nov. Comments at 4 ("[T]he combination of fair use's uncertainty and statutory damages forces many remixers to pay unnecessary license fees simply to avoid the risk of suit and an adverse judgment"); Rosenblatt/OTW (LA) at 86-88 (noting that fair use exists to allow people to make commentary without getting the original author's permission, but arguing that legal uncertainty permits overreaching by copyright owners).

[149] *See* LCA Jan. Comments at 2 (where rights holders license rights for uses such as those for which fair use is claimed, the existence of such licensing "could tip the fourth factor, and conceivably the fair use calculus, against the user.") and 3 (warning about "the dangers of encouraging licensing regimes that would supersede fair use"); Perzanowski (Nashville) at 141 (noting that "an expanding licensing market can correspond to sort of a shrinking scope of fair use[]" and asserting that "it should remain the case that there are uses that don't require permission."); *id.* at 142 (stating that "courts would have to be incredibly careful about how they think about the fourth factor, in particular"). *See also* Courtney (Cambridge) at 37 (expressing general concern "about the proliferation of licensing as a detriment to fair use.").

[150] Gervais (Nashville) at 144 (referring to the Second Circuit's discussion of the fourth factor in *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 929-30 (2d Cir. 1994)).

[151] *See above*, notes 30-31 and accompanying text. The Task Force notes that to the extent a remixer is making a fair use of a copyrighted work, the remixer is not required to ask the copyright holder permission for such use.

generally are aware of copyright law, sometimes relying on fair use but sometimes seeking permission from the creators and copyright owners whose works they use.[152]

Despite these differing perspectives, the two worlds are not sealed off from each other. First, fair use is not the sole province of noncommercial actors; it is regularly relied upon by publishers, motion picture studios, and other copyright owners. While a remix prepared for commercial gain may be less likely to fall within the scope of fair use than a purely noncommercial one, the commercial nature of the defendant's activity is only one factor considered in determining whether or not a use is fair.[153] Similarly, some noncommercial remixers can and do take advantage of licenses, and as licensing becomes easier, there is reason to believe that more will do so in cases where their uses are not clearly fair. So both fair use and licensing will always be relevant in both worlds, albeit to different extents.

Second, many amateur creators aspire to become professionals, and virtually all professional creators were at one time amateurs. While professional authors and copyright owners may focus more on permissions and licensing and may be less tolerant of unauthorized uses, those tendencies do not establish an unbridgeable gulf. If and when a remix creator makes the transition to becoming professional, she may be more likely to view the world from a rights holder's perspective. Attitudes and approaches are not immutable but tend to vary depending on the creator's changed circumstances.

In any event, both remix worlds make valuable contributions to society in providing expressive, political, and entertainment content. It is important that the copyright framework continues to allow both to thrive, ensuring that a vibrant fair use space coexists with effective licensing structures. The recommendations set out below are intended to safeguard that goal.

2. Recommendations

Commenters and participants mentioned three alternatives for achieving greater certainty: a specific exception for remixes, a compulsory license, and voluntary licensing, whether individual or collective.[154] The Task Force concludes that enhanced voluntary licensing options should play a significant role in permitting remixes alongside fair use in appropriate cases, as discussed below.[155] We do not recommend enactment of either an exception or a compulsory license for remix, and note that there was virtually no support for either option among stakeholders.

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[152] *See above* note 146.

[153] *E.g.*, *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 576-79 (1994) (discussing the application of factors set forth in Section 107 of the Copyright Act).

[154] *See above*, Parts B.2.c (Possible Changes in the Law), pp. 17-19, & B.3 (Current and Developing Licensing Mechanisms), pp. 19-22.

[155] *See* discussion *below*, Part C.2.b (Improve Voluntary Licensing Options).

Specific Exception. The sole proponent of a UGC specific exception offered the recent Canadian law as a model.[156] No further support was offered for such an exception, and the record does not establish a need for this change in the law.

The Task Force cannot recommend abandoning the multifactor approach of fair use in favor of a UGC exception similar to that in Canada. We believe that fair use, which requires consideration of the purpose of the use, the nature of the copyrighted work, the amount of the work used, and its effect on the market or potential market, represents a nuanced and balanced approach that has worked well in the United States. While some circumstances may justify abrogating the normal right of copyright owners to say no to use of their work in a remix, such as when the refusal to license is based on a desire to censor critical commentary, the fair use doctrine more appropriately draws these distinctions.

Compulsory License. The compulsory license proposed by Professor Peter Menell would offer certain advantages.[157] In his words, "[s]uch a regime would not resolve the inevitably case-specific fair use questions, but it could offer a sweet spot in which copyright owners, remix artists, and fans could participate in a market-based system for more fairly allocating value among creators."[158] It would provide compensation to the copyright owners whose works are remixed, and permit remixers to make derivative works without navigating the uncertain waters of fair use.

The Task Force does not believe, however, that the case has been made to abandon fundamental market principles for the more drastic approach of a statutorily imposed license. While there are a handful of compulsory licenses in the Copyright Act, they have been enacted sparingly as exceptions to the normal structure of exclusive rights.[159] For example, the section 115 compulsory license, which Professor Menell uses as his model, was enacted in 1909 in response

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[156] *See* note 113 *above* and accompanying text.

[157] *See above* notes 107-109 and accompanying text.

[158] Menell Jan. Comments at 116.

[159] U.S. CONST., art. I, § 8, cl. 8. *See WPIX, Inc. v. IVI, Inc.*, 691 F.3d 275, 281-282 (2d Cir. 2012) ("In 1999, Congress noted that in 'creating compulsory licenses, it is acting in derogation of the exclusive property rights granted by the Copyright Act to copyright holders, and that it therefore needs to act as narrowly as possible to minimize the effects of the government's intrusion on the broader market in which the affected property rights and industries operate.' S. Rep. No. 106-42, at 10 (1999)"); PAUL GOLDSTEIN, 1 GOLDSTEIN ON COPYRIGHT § 1.14.2, at 1:54 (Walters Kluwer ed., 3rd ed. 2015) (statutory licenses "reflect the conclusion that, in certain narrowly defined circumstances, the public interest in free access to copyrighted works, or in access at a statutorily controlled price, outweighs the producers' interests in appropriating the value that consumers attach to these works"); David Ladd *et al.*, *Copyright, Cable, the Compulsory License: A Second Chance*, 3 COMM. & L. 3 at 6, 59 (1981); Robert P. Merges, *Compulsory Licensing vs. the Three "Golden Oldies*, POL'Y ANALYSIS No. 508 (Cato Inst., D.C.), Jan. 15, 2004, at 4 ("Compulsory licenses, being creatures of federal statute, tend to be less flexible and more susceptible to political manipulation than market-based transactions. The costs that are saved by a compulsory license in the short run are usually more than offset by the inefficiencies that it causes over time."). *See also Fame Publ'g Co. v. Ala. Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir. 1975) (interpreting the 1909 Copyright Act) ("We begin by noting that the [Section 115] compulsory license provision is a limited exception to the copyright holder's exclusive right to decide who shall make use of his composition. As such, it must be construed narrowly, lest the exception destroy, rather than prove, the rule.").

to what was perceived as one company's monopoly of the piano roll market.[160] We have seen no evidence that a similar monopoly exists today for remixes or their licensing. The other compulsory licenses were enacted to address market failure in cases involving such large numbers of works that individual negotiations were not feasible, and are generally available to users that are commercial or professional entities.

The proposed license would also break with precedent in allowing the creation of derivative works. The existing statutory licenses permit only acts of reproduction, distribution, and/or public performance of the licensed work without alteration.[161] As noted by a number of commenters, this departure from the norm would give composers and recording artists no say when someone makes an objectionable use of their work, even when it does not fall within the scope of the fair use defense.[162] A statutory license that permits changes to an author's work without her consent would be unprecedented. The record does not support the statutory license proposal.

We note some additional practical concerns. First, the proposed license would be of limited use as it relates solely to music, and therefore would address only one area of remix activity.[163] Pre-1972 sound recordings, which are not protected by federal law, would fall outside the scheme but could lead to state law liability.[164] Second, it would require a universal database of musical works and recordings—a desirable goal, but hard to achieve.[165] Finally, it is unclear how uses of the remixes would be tracked and revenue fairly divided.[166] The Section 115 license is itself a

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[160] Robert Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1309-10 (1996); 2 GOLDSTEIN, *above* note 159, at § 7.2.1.1 at 7:15 & n.11 (2008 supp.).

[161] *See* 1 GOLDSTEIN, note 159 *above*, § 1.14.2, at 1:54 (statutory licenses are enacted in response to "the public interest in free *access* to copyrighted works, or in *access* at a statutorily controlled price") (emphasis added). The section 115 mechanical license does permit "making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner." 17 U.S.C. § 115(a)(2) (2015).

[162] *See above* notes 44, 45, 48 & 112 and accompanying text.

[163] Dare/Oracle (Berkeley) at 34 ("There's really not music separate. So much of what I see is video plus the music.").

[164] Green Paper at 83; Ravas/MLA (Berkeley) at 36-37.

[165] U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE: A REPORT OF THE REGISTER OF COPYRIGHTS at 62-67, 123-124 (2015). *See also* pp. 21 *above*. *See generally* Transcript, U.S. Pat. & Trademark Off., Public Mtg. on Facilitating the Dev. of the Online Licensing Dev. for Copyrighted Works 90-122 (April 1, 2015), http://www.uspto.gov/learning-and-resources/ip-policy/copyright/public-meeting-facilitating-development-online-licensing (last visited Oct. 15, 2015); Webcast, The Path Forward: Interoperability of Standard Identifiers and Incorporation into Databases of Rights Information—Music Sector, Public Mtg. on Facilitating the Dev. of the Online Licensing Env't for Copyrighted Works, U.S. Pat. & Trademark Off, April 1, 2015, http://helix-1.uspto.gov/player/20150401_OnlineLicensingPt4.html (last visited Oct. 15, 2015). To address this concern, Menell suggests requiring copyright owners to opt-in to be paid. Menell (Berkeley) at 42.

[166] As to revenue, the proposed compulsory license recommended a Copyright Office rulemaking to provide a formula for dividing revenue among the musical composition and sound recording owners. Menell Jan. Comments at 117. It will be difficult to devise any formula that could allocate the royalties based upon the actual value of each sampled work, when in the marketplace, a license to remix Bob Dylan's "Like a Rolling Stone" (selected by Rolling

historical anomaly in various respects,[167] and has been criticized on many grounds, including for inadequately compensating authors and rights holders.[168]

In sum, with respect to proposals both for a specific remix exception and for a compulsory license, we conclude that the record has not established a need to amend existing law.[169] Rather than making fundamental changes in the copyright landscape, we believe that improving it through greater clarity and enhanced licensing options can support a healthy environment for the creation and dissemination of remixes.

While some remixes may clearly fall on one side or the other of the fair use line, the status of others will be uncertain. The Task Force believes it would be valuable to lessen this uncertainty and at the same time to ease the ability to license works. Our recommendations address the challenges described above, making it easier for remixers to understand when a use is fair and to obtain licenses when they wish to do so.

Specifically, the Task Force recommends pursuing two goals: (1) the development of negotiated guidelines providing greater clarity as to the application of fair use to remixes, and (2) availability of a wider variety of licensing options.

a. Provide Greater Clarity for Fair Use: Guidelines and Best Practices

Although fair use is a fundamental linchpin of the copyright system, it may be difficult for prospective users of copyrighted works to predict whether a fair use defense will succeed or fail in areas where there is not yet established precedent.[170] While many stakeholders see a benefit from voluntary guidelines or statements of best practice, views as to their feasibility vary, in part

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Stone magazine as the greatest song of all time. *See 500 Greatest Songs of All Time*, ROLLING STONE, April 7, 2011, http://www rollingstone.com/music/lists/the-500-greatest-songs-of-all-time-20110407/bob-dylan-like-a-rolling-stone-20110516) would cost far more than a license to remix an obscure song with minimal sales or acclaim.

[167] *See Music Licensing Reform: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. On the Judiciary*, 109th Cong. 136 (2005) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office) (characterizing the section 115 compulsory license as "an anomaly"), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-109shrg22919/pdf/CHRG-109shrg22919.pdf (last visited Oct. 16, 2015).

[168] Rosenthal/NMPA (Cambridge) at 41, 44; Stehli/HoriPro (Nashville) at 127; *Music Licensing Under Title 17: Hearing Before the Subcomm. on Courts, Intell. Prop. & the Internet of the H. Comm. On the Judiciary*, 113th Cong. 27-28 (2014) (statement of David Israelite, President and Chief Executive Officer, National Music Publishers' Association), *available at* http://judiciary house.gov/_cache/files/6e799edc-1cb8-4365-a9bb-e48c32b91353/113-105-88240.pdf (last visited Oct. 16, 2015).

[169] We acknowledge that some stakeholders expressed concerns that market uncertainties and the legal regime create significant hurdles for artists who use remixes as a form of cultural expression. *See above,* notes 41-42 and accompanying text. However there was very little support in the record for either an exception or compulsory license, including from those expressing these concerns. *See above* Part B.2.c (Possible Changes in the), pp.17-19. We believe the recommendations outlined below will help foster an environment that will better allow the development of non-infringing remixes.

[170] *See* Green Paper at 21; discussion *above* at Part B.2.a (Fair Use), p. 10.

due to the limited authority of single sector guidelines and the inherent difficulty of developing multilateral ones.[171]

While it is easier for groups composed only of users, or only of rights holders, to reach consensus on what practices qualify as fair uses, such statements can encounter resistance from those who were not part of the process and draw criticism that they represent a preferred outcome rather than objective, balanced statements.[172] On the other hand, while guidelines that represent a consensus among stakeholders may carry greater weight, the ability to achieve such consensus cannot be taken for granted. The CONFU process gives an indication of this challenge, and the current environment may be even more difficult given the considerable disagreement as to the proper interpretation of the fair use factors.[173]

To some degree, such concerns may reflect unrealistic expectations. Best practices and guidelines cannot be comprehensive codes enumerating everything that can be done in a particular realm of activity. A more modest endeavor, aiming to identify what conduct can be agreed on as permissible or impermissible, can serve a valuable function. Such a process would leave gaps in that there will be some conduct as to which no guidance is offered, either because the fair use status is too unclear or because stakeholders hold divergent views. This does not mean that the outcome is not worthwhile. While the guidelines may be legally persuasive, they would not be definitive and traditional fair use analysis would still apply on a case-by-case basis as courts deem proper and necessary.

With that in mind, the Task Force encourages stakeholders to develop guidelines and best practices for remixing, either independently or with the government serving as the convenor. While such an exercise is likely to focus on fair use as the principal doctrine governing remixes, other copyright doctrines may also inform the discussion, such as the idea-expression dichotomy and the doctrine of de minimis taking.[174] Beyond developing guidelines, more educational efforts aimed at broadening an understanding of fair use would be valuable.[175]

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[171] *See* discussion *above* at Part B.2.b (Guidelines and Best Practices), pp. 11-17.

[172] *See above* at notes 86-89 and accompanying text.

[173] *See above* at p. 15 (discussing CONFU) & notes 58-60 and accompanying text (discussing fair use).

[174] *See above*, note 29.

[175] The Copyright Office has recently published a fair use index collecting cases involving fair use and describing their outcomes. US COPYRIGHT OFFICE FAIR USE INDEX (last updated September 2015), http://copyright.gov/fair-use/; *see also* Green Paper at 23 (noting the public utility of a fair use index established and maintained by the US Copyright Office). As articulated in the Intellectual Property Enforcement Coordinator's *2013 Joint Strategic Plan on Intellectual Property Enforcement*, the goal of the fair use index is to "make fair use more accessible to authors of the 21st Century, ease confusion about permissible uses, and thereby encourage the production of a greater variety of creative works." U.S. INTELL. PROP'Y ENFORCEMENT COORD'R, 2013 JOINT STRATEGIC PLAN ON INTELLECTUAL PROPERTY ENFORCEMENT, 18 (2013), https://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipec-joint-strategic-plan.pdf (last accessed Oct. 16, 2015). This project provides useful public education and can make a valuable contribution to clarifying a doctrine that plays a key role in determining the legality of remixes.

The Task Force offers the following observations:

- The most useful and authoritative guidelines will generally be developed by groups composed of all relevant stakeholders, including authors and copyright owners as well as users of various types.[176]

- To maximize the legitimacy and credibility of negotiated guidelines, the conveners should be disinterested parties who can encourage participation by a broad cross-section of relevant stakeholders. One possible choice would be one or more government bodies with expertise in the subject matter.

- Guidelines are more likely to be successful if they are tailored to specific types of remix uses and/or works, since both the relevant stakeholders and the best practices will vary. Moreover, the process of developing guidelines and best practices can be time consuming, and narrowing the focus of each project will help to ensure that those who participate are able to see it through.

- The goal need not be (and probably could not be) a comprehensive code that defines all activities that are lawful and all that are not. One possible outcome could be guidelines that identify those activities that can be agreed to be clearly fair use or clearly not fair use.

- Because the primary audience will be laypersons rather than lawyers, statements should be drafted in plain English and offer concrete, real-world examples.[177]

- Guidelines and best practices should be periodically reviewed and updated as law and technology evolve, in order to stay current and continue to provide useful guidance. For example, the classroom photocopying guidelines are now nearly 40 years old, and teaching by digital means raises issues that were not considered in 1976.

b. Improve Voluntary Licensing Options

The Task Force sees licensing mechanisms as an important alternative path, either for those remixes that do not qualify for fair use or those whose status is unclear. A remixer who determines that obtaining a license is preferable to the risk of litigation should have the option to take the less risky course of action.

The Task Force has heard that rights holders are embracing the opportunity to open up new revenue streams and accommodate those that wish to create remixes. The record indicates that they are actively engaged in licensing of a variety of remix uses, and that those efforts are

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[176] *See* Green Paper at 23. Statements drafted solely by one side, whether by groups of rights holders or groups of users, can also provide meaningful guidance to a community by expressing the views of these groups as to what ought to be lawful, or documenting actual practices and norms (but the statements would likely have less influence in both political and legal proceedings). *But see above* at note 85.

[177] *See* discussion *above* at note 70.

expanding in ways designed to make licensing simpler and more cost-effective.[178] But many authors and rights holders will also insist on their right to say no to a license request, especially when the prospective licensee is seeking permission for a use that the author or rights holder considers offensive.[179] The participation of rights holders in the licensing of UGC on YouTube indicates that a licensing scheme that respects those principles can make many millions of works (including remixes) available to the public while providing licensing income to authors, performers and copyright owners.[180]

We understand the concerns expressed by some stakeholders that availability of a license could have a negative impact on a fair use defense.[181] It is important to recognize, however, that while the availability of a remix licensing option would be relevant to the fourth fair use factor, it would not be dispositive.[182] A leading case on this subject, *American Geophysical Union v. Texaco, Inc*., eschews a mechanical application of the fourth fair use factor that would disfavor fair use whenever the subject use could have been licensed.[183] We agree with the professor who drew the conclusion from the *Texaco* case that when the defendant is asserting fair use based on a normative purpose that is favored under the first fair use factor,[184] the availability of a license

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[178] *See* discussion *above* at Part B.3 (Current and Developing Licensing Mechanisms), pp. 19-22.

[179] *See above*, notes 44-48, 112 and accompanying text.

[180] *See* YOUTUBE, STATISTICS, https://www.youtube.com/yt/press/statistics.html (last visited Oct. 5, 2015) ("as of July 2015, there are 8,000+ partners using Content ID — including many major network broadcasters, movie studios and record labels — who have claimed over 400 million videos, helping them control their content on YouTube and make money on videos containing copyrighted material."). *See also* Google Nov. Comment at 4 ("The system has created a new source of revenue for copyright owners, as well as for YouTube. In fact, today Content ID 'claimed' videos account for more than one-third of all monetized YouTube views. Content ID benefits YouTube creators, as well. When copyright owners choose to monetize or track user-submitted videos, it allows creators to remix and upload a wide variety of new creations built on that existing content, without having to independently seek out licenses for it."); notes 126-129 *above* and accompanying text.

[181] *See* discussion above at note 149.

[182] As the court noted in *Princeton Univ. Press v. Michigan Doc. Svs., Inc.*, 99 F.3d 1381, 1387 (6th Cir. 1996), "even the availability of an existing system for collecting licensing fees will not be conclusive" with respect to the fourth factor. However, "[i]t is sensible that a particular unauthorized use should be considered 'more fair' when there is no ready market or means to pay for the use, while such an unauthorized use should be considered 'less fair' when there is a ready market or means to pay for the use." *Id.* at n.4 (quoting *Texaco*). The Senate Report on the Copyright Act of 1976 observed that "the existence of organizations licensed to provide photocopies of out-of-print works at reasonable cost is a factor to be considered." S. REP. NO. 94-473, at 64 (1975), *available at* http://copyright.gov/history/law/clrev_94-473.pdf (last visited Oct. 16, 2015).

[183] While the Second Circuit relied in part on the existence of a licensing option to hold that a particular use was not fair, it did so based on the conclusion that, on the facts before it, it would have been reasonable to license the use. The court stated that "not every effect on potential licensing revenues enters the analysis under the fourth factor," noting that courts traditionally have considered "only traditional, reasonable, or likely to be developed markets when examining and assessing a secondary use's "effect upon the potential market for or value of the copyrighted work." In other words, the fact that the plaintiff is prepared to license the defendant's use does not necessarily mean that the unlicensed use has had a cognizable adverse impact on the market for the work. *American Geophysical Union v. Texaco Inc.,* 60 F.3d 913, 929-30 (*Texaco*) (2nd Cir. 1994), *cert. denied sub nom. Texaco v. American Geophysical Union,* 516 U.S. 1005 (1995) (internal citation omitted).

[184] The "purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C.S. § 107(1) (Lexis 2015).

normally should not defeat a fair use defense.[185] That conclusion is consistent with numerous cases (including *Texaco*) that have recognized that there is likely to be no cognizable market harm under the fourth factor when the defendant's use consists of a critical review or a parody.[186]

The Task Force expects that the marketplace will continue to develop a variety of options, including micro-licensing and possibly collective licensing platforms, to enable efficient licensing of pre-existing works for use in remixes. We agree with commenters that open licenses, like Creative Commons licenses, can provide a viable approach for remixes in some circumstances.[187] We are separately exploring issues relating to whether and how the government can facilitate the further development of a robust online licensing environment, focusing on the use and interoperability of standard identifiers, and a possible portal for linking to such databases and to licensing platforms.[188] The outcome of that inquiry may also help further improved licensing of remixes.

i. <u>Micro-Licensing</u>

As described above, the recording and music publishing industries are currently developing a micro-licensing platform for small scale uses of their members' works. Since many remix creations are multi-media and use a variety of pre-existing works, the Task Force encourages other rights holders to set up similar micro-licensing platforms.[189] The ultimate goal could be a single platform where users could obtain a license for remixes involving any type of work.[190] This could include both noncommercial and small-scale commercial uses, which otherwise may not be economical to license. Providing a simple way to license these transactions would provide revenue for rights holders, while enabling the user to get permission at an affordable cost.

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[185] *See* note 150 *above*. *See also Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1276 (11th Cir. 2014) ("We note that it is not determinative that programs exist through which universities may license excerpts of Plaintiffs' works .... [T]he ability to license does not demand a finding against fair use").

[186] See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 591-92 (1994); *Texaco*, 60 F.3d at 930; *A.V. ex. rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 643 (4th Cir. 2009); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2d. Cir. 2006); *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1274-75 (11th Cir. 2001); *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 110 (2d Cir. 1998); *Castle Rock Ent. v. Carol Publ'g Grp*, 150 F.3d 132, 145-46 (2d Cir. 1998); *New Era Pubs. Int'l ApS v. Carol Pub. Grp*, 904 F.2d 152, 160 (2d Cir. 1990).

[187] *See* note 135 and accompanying text, *above.*

[188] *See* Dep't of Comm. *et. al*, Notice of Public Mtg. on Facilitating the Dev. of the Online Licensing Env't for Copyrighted Works, 80 Fed. Reg. 13325 (March 13, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-03-13/pdf/2015-05765.pdf (last visited Oct. 16, 2015).

[189] Such platforms should of course be tailored in a manner consistent with the antitrust laws.

[190] Connecting creative sectors' licensing offers was one of the motives for the establishment of the Copyright Hub being developed in the United Kingdom. The Copyright Hub is "a portal established and operated by industry to make licensing easier, especially for low-value, high-volume requests, by linking to a network of private and public copyright exchanges, rights registries and other copyright-related databases, with the government playing a facilitating and advisory role." Notice of Public Mtg., note 188 *above*, at 13227.

ii. Collective Licensing

Voluntary collective licensing may offer another path forward. Rights holders could use existing collective licensing organizations or establish new ones to engage in the licensing of remixes.[191] The single-label "collective" described at the Cambridge roundtable[192] provides an example of the type of licensing that could be organized on a larger scale, enabling remixers to obtain permission to remix works and then monetize the result, sharing the revenue with the owner of the pre-existing material.

iii. Intermediary Licensing

Intermediary licenses offer solutions that can benefit the intermediary, the original rights holder, and the creator of the remix.[193] The intermediary obtains a license to make the underlying work available and the ability to earn revenue from advertising placed alongside the work, without any risk of liability. The original rights holder obtains a share of that revenue. And the creator of the UGC is authorized to make available to the public, on the licensed platform, the UGC incorporating the original work.[194] In fact, the Task Force notes that the UGC creator is not limited to the licensed platform, but can also make the UGC available from another location by "embedding" it, satisfying the desire of many remixers to offer their creations on their own blogs, social media pages, etc.[195]

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[191] The current antitrust consent decrees may restrict ASCAP and BMI from engaging in this activity. The Department of Justice is in the process of reviewing those consent decrees, and ASCAP and BMI have requested that the decrees be revised to give them greater latitude in licensing. *See* U.S. Dep't of Justice, *Antitrust Consent Decree Review—ASCAP & BMI (2014)* (Sept. 22, 2015), http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html (last visited Oct. 16, 2015).

[192] Discussed *above* at p. 20.

[193] Discussed *above* at pp. 19-20. In addition to YouTube, other UGC platforms have offered licensing programs similar to YouTube's using other, similar technology. *See, e.g.* News Release, *Warner Music and Dailymotion Enter Strategic Video Distribution and Revenue Partnership*, http://investors.wmg.com/phoenix.zhtml?c=182480&p=irol-newsArticle&ID=952496 (last visited Oct. 16, 2015); *SoundCloud Partners with Zefr for Content ID and Monetisation*, COMPLETE MUSIC UPDATE, April 13, 2015, http://www.completemusicupdate.com/article/soundcloud-partners-with-zefr-for-content-id-and-monetisation/ (last visited Oct. 16, 2015); *Content Protection*, DAILYMOTION, http://www.dailymotion.com/legal/contentprotection (describing partnership with Audible Magic matching content uploaded to Dailymotion with that provided by media industry companies to Audible Magic) (last visited Oct. 20, 2015).

[194] In some circumstances the creator of the UGC may also be able to share in the advertising revenues. *See* YouTube Help, *Monetizing Eligible Cover Videos,* https://support.google.com/youtube/answer/3301938?hl=en (last visited Oct. 16, 2015).

[195] *See* RIAA Nov. Comments at 6-7. Embedding involves the placement on a webpage of a link to the content that one wishes to appear on that a webpage. The embedded content is not actually placed on the webpage or stored on the server hosting the webpage, but is streamed to the user directly from the source (in this case, YouTube). However, to the user it appears that the content is on the webpage itself. *See* YouTube Help, *Embed Videos and Playlists*, https://support.google.com/youtube/answer/171780?hl=en (last visited Oct. 16, 2015); HMTLGoodies, *How To Add a YouTube Video to Your Web Site*, http://www htmlgoodies.com/tutorials/web_graphics/article.php/3480061/How-To-Add-a-YouTube-Video-to-Your-Web-Site htm (last visited Oct. 16, 2015).

The Task Force believes that these licenses can be a promising model for other remix platforms and other kinds of creative content.[196] Whether that promise will materialize will depend upon the willingness of rights holders to license additional platforms, the willingness of other platforms to develop or acquire the necessary technology, and the willingness of remix creators to use such platforms for the dissemination of their remixes.

c. Sharing of Revenues Generated by Remixes

As a number of commenters observed, models are beginning to develop for sharing the revenue generated by remixes between the owner of the pre-existing work and the remix creator.[197] There is increased recognition that there need not be a zero-sum game in which only the original author or only the creator of the remix receive any revenue from its exploitation. The commercial appeal of a remix may be due in part to the appeal of the underlying work and in part to interest in what the remixer has added. Such works can reach new audiences, creating opportunities for both creators to reap profits.

Because existing law permits parties to make such arrangements by contract, no change in the law would be necessary in order for such arrangements to flourish.

3. Relationship to Other Task Force Recommendations

Some of the recommendations made in Section V below, and future work in connection with the Task Force's work on facilitating the development of the online licensing environment,[198] may also help alleviate concerns raised by both users and owners with respect to the treatment of remixes.

In particular, remix creators or their advocates have expressed concern that given the unpredictability of fair use determinations, the threat of high statutory damages can stifle lawful activity. If the reforms the Task Force recommends below relating to statutory damages are carried out, the likelihood that remixers will face the prospect of high awards should be significantly reduced. In setting statutory damages, courts and juries would be required to consider good faith attempts to engage in fair use as well as lack of commercial intent, and a

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[196] The Task Force recognizes that certain stakeholders have concerns about the terms offered under such licenses, *see, e.g.*, Nicole Laporte, *A Million YouTube Views Won't Pay Your Rent, But TubeStart Could Help*, FAST COMPANY, Sept. 24, 2013, http://www fastcompany.com/3018123/a-million-youtube-views-wont-pay-your-rent-but-tubestart-could (last visited Oct. 16, 2015); PJ Wassermann, *My Songs got 151,781 Plays on YouTube. I received $10…*, DIGITAL MUSIC NEWS, Jan. 28, 2015, http://www.digitalmusicnews.com/permalink/2015/01/28/songs-got-151781-plays-youtube-received-10 (last visited Oct. 16, 2015); Leslie Kaufman, *Chasing Their Star, on YouTube*, THE NEW YORK TIMES, Feb. 1, 2014, *available at* http://www nytimes.com/2014/02/02/business/chasing-their-star-on-youtube html?_r=1. *See also* DiCola (Alexandria) at 200-01. The Task Force neither takes a position nor comments on this issue.

[197] Such models (*e.g.*, Kindle Worlds, and the single-label "collective") were discussed in the text *above* at notes 124, 129 & 130. Although remix creators do not currently share in the revenue generated by most of the new works on YouTube, creators of cover song videos of eligible songs are able to share the revenues that those videos generate on a pro rata basis with the music publisher. YouTube Help, *Monetizing Eligible Cover Videos,* https://support.google.com/youtube/answer/3301938?hl=en (last visited Oct. 15, 2015).

[198] See discussion *above* at note 188.

major obstacle to the innocent infringement defense would be removed. Together, these changes should give remixers greater comfort about their prospects in the event they are found to have infringed.

In addition, as many commenters and participants have noted, the establishment of a small claims tribunal with a lower statutory damages cap would enable remix creators in many cases to avoid the risk of high awards.[199]

We also note that the multistakeholder forum convened by the Task Force to improve the notice and takedown process under Section 512 of the DMCA identified several "good practices" worth mentioning here.[200] Among these are measures to make the takedown and counter-notice mechanisms on websites easy to find and understand, directions on providing a clear, "plain English" explanation of who can submit a DMCA notice and counter-notice, and other ways to improve the efficiency of the current system.[201]

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[199] *See* discussion *below* of small claims in the statutory damages context in Section V.C.2.d., p. 99.

[200] DMCA NOTICE-AND-TAKEDOWN PROCESSES: LIST OF GOOD, BAD AND SITUATIONAL PRACTICES (2015), *above*, note 14.

[201] *Id.* For example, Point I.A.6 (Good General Practices for Service Providers) should ensure that where a takedown notice for a remix has been withdrawn, or a counter-notification has been served, the remix will be reposted in a timely fashion. In addition, Point I.C.3 (Good General Practices for Notice Senders) will lessen the likelihood that a takedown notice will be sent for remixes that make fair use of the underlying content or that a remix will be erroneously removed because it shares certain metadata (*e.g.*, a title) with another work. Likewise, Part II.B (Bad General Practices for Notice Senders) should discourage submission of an invalid takedown notice to silence criticism or without a good faith belief that use of the material complained of is not authorized by law (including fair use).

IV. First Sale Doctrine and Digital Transmissions

A. Introduction

The first sale doctrine, as codified in Section 109 of the Copyright Act, is a limitation on the scope of the distribution right that allows the owner of a physical copy of a work to resell or otherwise dispose of that copy, including by transfer of ownership, without the copyright owner's consent. As noted in the Green Paper, the first sale doctrine does not permit the distribution of a work through digital transmission where copies are created, because the reproduction right is implicated.[202]

The Green Paper described a 2001 report by the Copyright Office, which concluded that extending the first sale doctrine to cover digital transmissions was not advisable given the fundamental differences between the transfer of a physical copy and an online transmission.[203] The Copyright Office stressed that digital transmissions have a greater potential impact on the market for creative works and increase the risk of piracy by enabling the easy proliferation of perfect copies. It considered whether some of those concerns might be addressed by rules or technology ensuring that the sender's copy of the work is destroyed following the transmission, but concluded that such solutions were unavailable at that time.[204]

In the Green Paper, the Task Force observed that business models for the distribution of certain types of works often structure the transaction as a license rather than a sale. [205] In a world of increasingly digital distribution, this could render the first sale doctrine meaningless for works only offered in digital format and could make the resale market obsolete.[206] We posed the question whether there is a way to preserve the doctrine's benefits in the online environment, allowing the equivalent of sharing favorite books with friends or providing reduced-price

[202] Green Paper at 35. *See also, e.g.,* AAP Nov. Comments at 5 ("first sale doctrine does not apply to any digital copies of copyrighted works"); AIPLA Jan. Comments at 3; BSA Jan. Comments at 2; Curtis/Creator's Freedom Project (Nashville) at 94-95 ("In the digital world distribution doesn't actually exist. All distribution in the digital world is copying, reproduction."); Digital Liberty Jan. Comments at 1; ESA Nov. Comments at 1-2; MPAA Jan. Comments at 8; NMPA Nov. Comments at 8; RIAA Nov. Comments at 7SGA Nov. Comments at 6; ; SIIA Jan. Comments at 3-4,16; WGAW Jan. Comments at 3; stakeholders who were inclined to support application of the first sale doctrine to at least some digital transmissions accepted that this would involve "extending first sale into the digital environment in some fashion." *See, e.g.,* CDT Nov. Comments at 14; Cobb Nov. Comments at 1; Dennis Nov. Comments at 1; Schwartz Nov. Comments at 1, 3. This section focuses on the distribution of a work via digital transmission, which typically involves making a copy of the work. The first sale doctrine permits the owner of a lawfully made copy of a work to resell or otherwise dispose of that copy, including a copy in a digital format, without the copyright owner's consent when the action does not implicate the reproduction right (*e.g*., a person who lawfully owns a copy of a work installed in a hard drive can transfer the hard drive, including its contents, to someone else). *See* discussion *below* at Part C.4.c. (Sales of Consumer Devices and Products), pp. 63-65.

[203] Green Paper at 35-36, *describing* U.S. COPYRIGHT OFFICE, A REPORT OF THE REGISTER OF COPYRIGHTS PURSUANT TO § 104 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT SECTION (2001) ("the Copyright Office Report"), *available at* http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf.

[204] The Copyright Office Report at 98-100.

[205] Green Paper at 36-37.

[206] *Id.* at 36-37, 101-02.

versions to impecunious students, including through market offerings.[207] Finally, we asked whether there have been any changes in technological capabilities since 2001 that would alter any of the Copyright Office's conclusions.[208]

B. Stakeholder Views

1. Benefits of the First Sale Doctrine

All commenters agreed that the first sale doctrine confers important benefits on consumers and society as a whole.[209] As discussed below, commenters and participants offered a range of views and information on the extent to which those benefits may continue to be enjoyed in a world where copies of works are acquired, or access to them is obtained, by means of digital transmission.

a. Resale or Gift

One principal benefit that the first sale doctrine confers upon the owner of a copy of a work, such as a book, a CD or a DVD, is the ability to resell or give away that copy without having to obtain the permission of the copyright owner. Resale allows for efficient reallocations of goods from those that value them less to those value them more. For example, the first sale doctrine enables businesses, such as used book and secondhand record stores, to resell previously owned copies at prices lower than the prices of new ones.

A number of commenters noted that resale businesses can reach purchasers who would not be willing or able to pay the full price of a new copy,[210] and that competition from used copies helps to keep prices of new ones affordable. They identified two ways in which the doctrine helps the market for new copies and services: first, it increases the value of the initial copy because purchasers know that they can recoup some of the cost by reselling it;[211] and, second, owners of copies of works in older formats (*e.g.*, videocassettes or CDs) will be more willing to "upgrade" to newer formats and platforms if they can partially offset the cost by selling their older

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[207] Green Paper at 37. Although Section 109 applies to the transfer of ownership of digital works in a physical form, such as CDs or DVDs, the Task Force focuses here on works embodied in digital files that are transmitted either by wired or wireless Internet connections, such as Video-On-Demand a la carte movies and television programs, MP3 files, eBooks, software, and videogames.

[208] *Id.* The Task Force also noted that the recent Supreme Court decision in *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. ___, 133 S. Ct. 1351 (2013) (holding that the first sale doctrine applies to copies lawfully made and purchased with the authorization of the copyright owner anywhere in the world) could have an impact on the ability of rights holders to offer their works on different terms in different countries. Green Paper at 37. None of the comments or roundtable discussions suggested that *Kirtsaeng* controls the analysis of the first sale doctrine in the context of digitally transmitted works.

[209] *See, e.g.*, AAP Nov. Comments at 5.

[210] *See* ScreenPlay Jan. Comments at 4-6; ReDigi Nov. Comments at 4. *Cf.* PK Nov. Comments at 13; CDT Nov. Comments at 12.

[211] CIS/EFF Nov. Comments at 13; McSherry/EFF (Berkeley) at 84 (observing that ability to resell copies may make consumers more willing to purchase copies in the first place, since they know that they can resell the copies if they don't like what they have purchased); ScreenPlay Jan. Comments at 5.

formats.[212] As an association of technology companies put it, "the first sale doctrine promotes free and open commerce by moving products from those who value them less to those who value them more."[213]

b. Lending or Rental

The first sale doctrine also allows the owner of a physical copy of a work to lend it to another person.[214] This means that an individual may lend a DVD to a family member or a friend, and a library may lend a book to a patron.[215] Public interest groups also observed that lending may enhance markets because borrowers might become fans of a particular author or genre and purchase additional titles.[216] Entrepreneurs (*e.g.*, video rental services) may also engage in the business of lending copies.[217] A roundtable participant stated that the first sale doctrine permits third parties to develop new and innovative means of delivering creative works to consumers, noting that it was the first sale doctrine that enabled Netflix to offer rentals of DVDs of movies and enabled textbook rental services to come into being.[218] As with the secondary market for used copies of works, the rental market can reach customers who may be unable or unwilling to pay the full price for the purchase of a new copy.[219]

c. Other Benefits

Other benefits resulting from the first sale doctrine were identified by some commenters, particularly the doctrine's effect on preserving works that might otherwise be lost to posterity, and the safeguards it may provide for personal privacy. Thus, a public interest group described the preservation of both digital devices and media as critical because it enhances the chance of at least one copy of a work surviving as time and generations pass, and allows "the serendipitous discovery of works that plays a key role in cultural transmission." [220] A library group added that

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[212] CDT Nov. Comments at 13.

[213] CCIA Nov. Comments at 3.

[214] As noted in the Green Paper, however, section 109(b) "contains a carve-out prohibiting the rental of computer programs and sound recordings, except in limited circumstances by nonprofit libraries or educational institutions." Green Paper at 35, n.189.

[215] *See* PK Nov. Comments at 13. *See also* AAP Nov. Comments at 5 ("With respect to books, it is because of the first sale doctrine that U.S. libraries can lend physical books in their collections to the public . . . ."). Libraries are discussed at greater length below, Part 2 (First Sale) II.C.3.a and, III.C.1.

[216] CIS/EFF Nov. Comments at 14.

[217] CDT Nov. Comments at 13; PK Nov. Comments at 13.

[218] Siy/PK (Alexandria) at 101.

[219] CDT Nov. Comments at 12 (first sale doctrine "enables secondary markets that provide lower-priced options for consumers—from secondhand purchase to library borrowing to commercial rental to hand-me-downs from family or friends"); ScreenPlay Jan. Comments at 4 (including "99-cent video rentals from kiosks" as an example of ways in which the first sale doctrine gets "works out into the hands of people that the first seller may consider too marginal").

[220] PK Nov. Comments at 14 ("Preservation also is a natural benefit of the first sale doctrine. . . . Indeed, it is only the first sale doctrine that permits books to be passed down through the generations—without it, a father would infringe copyright if he left his personal library to his children in his will."). *See also* CIS/EFF Nov. Comments at 14

loss or corruption of digital information can be "just as profound, if not more so, as those that face older formats" given that the data can be unique to a time and place and thus irreplaceable or expensive to regenerate.[221]

Some commenters and participants also observed that the first sale doctrine can protect privacy by making it difficult to track the identities of consumers who have obtained copies of particular works.[222] They explained that the right to read anonymously is protected by the ability to obtain works from decentralized, secondary distributors who have little incentive to track their movement.

One public interest organization noted that "the first sale doctrine is older than this statutory codification, and finds its source in the common law."[223] It stated that "the doctrine goes further than merely limiting a copyright owner's distribution rights, and more comprehensively assures that the owner of a copy is able to exercise all the incidents of chattel ownership over her property, by modifying, repairing and displaying it, in addition to alienating it."[224] A number of other stakeholders, in contrast, described the purpose of the first sale doctrine as ensuring the alienability of tangible personal property—i.e., the physical object in which a work is fixed.[225]

2. Comparison to Online Marketplace

In the online world, consumers enjoy works either by downloading files or by viewing or listening to them by streaming.[226] These new markets have become a major source of revenue for

("Items no longer available for sale in a primary market may be available in secondary markets, or preserved in personal or institutional libraries. Similarly, first sale provides the underpinnings for the preservation of our cultural commons.").

[221] LCA Jan. Comments at 5.

[222] *See* CIS/EFF Nov. Comments at 14; PK Nov. Comments at 15-16 (*citing* Aaron K. Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. Rev. 889, 897-901 (2011)); Samuelson (Berkeley) at 82; Siy/PK (Alexandria) at 102.

[223] PK Nov. Comments at 16.

[224] *Id*.

[225] *See* AAP Nov. Comments at 4, note 8 (noting that the principle that the first-sale doctrine applies to the copy of a work embodied in a physical object is subject to further modification in cases involving works that are acquired pursuant to licenses); ASCAP *et al*. Jan. Comments at 5 (first sale doctrine is only appropriate in the physical realm); Bridge/Disney (Los Angeles) at 145 ("first sale is a limitation on the distribution right that is really there to facilitate the alienation of physical property, and that's not what we're talking about here"); Digital Liberty Jan. Comments at 2 ("The purpose of the [first sale] doctrine is to recognize the difference between the physical object and the underlying copyright").

[226] *See* discussion below at notes 251-252. The licenses often state that the licensee does not "own" downloaded copies and may not sell or otherwise transfer them to others. *See, e.g.,* Amazon's *Kindle Store Terms of Use*, ¶ 1, http://www.amazon.com/gp/help/customer/display html?nodeId=201014950 (last updated Sept. 6, 2012); Barnes and Noble's *NOOK Store Terms of Service*, ¶ 4(a), (c), http://www.barnesandnoble.com/include/nook_store_terms_of_service.asp (last updated April 1, 2015); the *Google Play Terms of Service*, ¶ 6, https://play.google.com/about/play-terms html (last updated Dec. 10, 2014); and Vudu's *Terms of Service*, http://www.vudu.com/termsofservice.html (last updated Sept. 29, 2014).

copyright owners.[227] Consumers can also order physical copies of works online, and the first sale doctrine continues to govern their ability to dispose of those copies.

Commenters offered views and information on these two current models of online transmission and how the models do and do not offer benefits similar to those offered by the first sale doctrine. The Task Force heard that consumers' ability to engage in acts traditionally within the scope of the first sale doctrine is increasingly controlled by licenses.[228] Many stakeholders extolled the benefits of licensing, which they say enables more flexible and often lower-cost forms of access to works, but others criticized this shift as giving copyright owners too much control and often binding consumers to opaque contractual terms without clear notice.

a. Download Offerings

Copyright owners presented a case that flexible options are being offered to consumers for downloading copies of works that may replicate or go beyond the benefits offered by the first sale doctrine. In many cases consumers have the option to share copies with family and friends, and students have the ability to obtain reduced-price copies of textbooks.[229] They may also be able to sample works under a "try-before-you-buy" model,[230] similar to the sampling made possible through lending.

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[227] For example, Price Waterhouse estimates that in 2013, consumers spent more than $22.4 billion on online video game content. ESA Nov. Comments at 4. As of 2012, digital revenues accounted for approximately 60% -- over $ 4 billion—of the recording industry's revenues. RIAA Nov. Comments at 1. The Copyright Alliance stated that as of 2013, over 15 million households had signed up for accounts with UltraViolet, a service that offers "a broader, multiple access framework for viewing films and television shows." CA Jan. Comments at 15. Publishers referred to "copyrighted content that millions of U.S. consumers are constantly downloading or streaming on Amazon, Spotify, Scribd, etc." AAP Jan. Comments at 5. According to BMI, "There are at least ten billion plays of conditionally downloaded music each year…" BMI Nov. Comments at 12. Additional information was provided by commenters other than copyright owners. For example, the Consumer Federation of America reported the following information about the recorded music industry: "By 2012, digital singles were being downloaded at the rate of almost 1.4 billion per year in the U.S. alone, a compound annual growth rate of over 150% per year. Digital album sales were more than half of CD sales." CFA Nov. Comments at 20. Professor Menell stated that as of March 2013, Spotify reported 6 million paying subscribers and a total of 24 million active users worldwide. Menell Jan. Comments at 58.

[228] CDT Nov. Comments at 14 ("As more and more copyrighted works are distributed in digital form, more and more of the market for copyrighted works is no longer subject to first sale. As the Green Paper noted, the prospect of a media market without meaningful first sale protections is moving closer to reality: '[i]n a world of increasingly digital distribution, the traditional field of application of [*sic*] first sale doctrine may disappear'") (quoting Green Paper at 37).

[229] See discussion *above* in Parts B.1.a (Resale or Gift), p.36, & B.1.b (Lending or Rental), p. 37.

[230] Dare (Berkeley) at 87 (noting that software companies offer options such as "a try and buy so you pay something or you pay nothing to try it for 30 days, then you pay your commercial fee"). There are other examples of instances where consumers are given the opportunity to sample a work for free. *See* Amazon, *Kindle Samples*, https://www.amazon.com/gp/help/customer/display html?nodeId=201612700&tag=kwab-20; (last visited Sept. 23, 2015); Barnes & Noble, *Can I try a NOOK Book sample?*, https://help.barnesandnoble.com/app/answers/detail/a_id/2037/kw/nook%20book%20sample (last visited Sept. 23, 2015); (Greg Sandoval , *iTunes song samples may double in length*, CNET (Aug. 30, 2010, 2:42 PM), http://www.cnet.com/news/itunes-song-samples-may-double-in-length/.

i. Sharing/Lending

- Many book publishers, at least for a portion of their catalogue, permit the sharing of eBooks between multiple devices and among friends. Amazon, a leading eBook seller, offers a "Family Library" option which allows two adults and up to four children of the same household to share books, apps, and audiobooks on devices with Kindle software.[231] Another service, Nook, allows books to be stored on up to six devices or apps.[232] Both services can permit the lending of an eBook to another account holder for a period of up to 14 days, during which the lender would not have access to the work (partially replicating the circumstances surrounding the lending of a physical book).[233]

- For motion pictures, rights holders described various online services, including cloud storage options that "provide . . . multi-copy, multi-format access to content anywhere, at any time, by multiple members of a household and on multiple devices and platforms."[234] They noted that "[a] rapidly evolving array of services currently offer consumers access to movies and TV programs in a variety of forms (e.g., hard copy, digital download, on-demand transmission, and streaming) through a variety of business models (e.g., purchase, rental, and subscription)."[235]

- Online music and other content services allow the sharing of playlists with friends and "family plans" that permit the streaming of music to members of a subscribing family or making of multiple copies on their devices.[236]

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231 *See* Amazon, *About Family Library*, http://www.amazon.com/gp/help/customer/display html?nodeId=201620400 (last visited Sept. 23, 2015).

232 *See* Barnes and Noble's *NOOK Store Terms of Service*, ¶ 4(a), http://www.barnesandnoble.com/include/nook_store_terms_of_service.asp (last updated April 1, 2015).

233 *See* Amazon, *Lend or Borrow Kindle Books*, http://www.amazon.com/gp/help/customer/display html?nodeId=200549320 (last visited Sept. 23, 2015); Section 4(b) of the Barnes and Noble *NOOK Store Terms of Service*, http://www.barnesandnoble.com/include/nook_store_terms_of_service.asp (last updated April 1, 2015). *See also* AAP Nov. Comments at 6 and note 20; IFTA Nov. Comments at 4; Zagaja Jan. Comments at 6.

234 MPAA Jan. Comments at 9; *see also* CA Jan. Comments at 15.

235 MPAA Jan. Comments at 9, referring to wheretowatch.org for a list of licensed services.

236 RIAA Nov. Comments at 8 (noting that "under the iTunes system, users can have and enjoy a purchased recording on 10 devices simultaneously. *See* http://support.apple.com/kb/ht4627."); *see also* Apple, *Family Sharing*, http://www.apple.com/icloud/family-sharing/?cid=wwa-us-kwg-features-com (last visited Sept. 23, 2015). Spotify permits subscribers to share entire playlists for free, NMPA Nov. Comments at 8, and share accounts with family and friends. *See* Tom Warren, *Spotify Family Lets You Share a Subscription From $14.99 per Month; Available Worldwide in the Coming Weeks*, THE VERGE (Oct. 20, 2014, 6:19 AM), http://www.theverge.com/2014/10/20/7013227/spotify-family-shared-premium-subscription-pricing-features. *See also* "Family Sharing" section of Apple, http://www.apple.com/legal/internet-services/itunes/us/terms.html (last updated June 30, 2015) (sharing for a variety of kinds of works).

ii. Lower-Priced Copies

One rights holder group observed that the "legal digital marketplace presents consumers with a myriad of options for acquiring copies of music and other cultural works—typically at a price point far below what would be spent for a physical equivalent."[237] Examples were given as follows.

- *Textbooks*. Publishers stated that rentals and sales of electronic textbooks are offered at prices considerably below the cost of purchasing hard copies.[238] They also offer opportunities to purchase e-chapters instead of entire books, allowing students to pay less for what they need.[239]

- *Music*. A representative of the recording industry remarked that digital albums have been generally sold at lower prices than physical albums, and that this has led to a drop in the prices of CDs as well.[240] The Consumer Federation of America provided more broad-based statistics on price savings, reporting that for recorded music, "[b]illions of singles and streaming spins replace hundreds of millions of albums, resulting in billions of dollars of cost savings for music that can be enjoyed in a variety of new ways."[241]

- *Software*. Software publishers noted that they often offer their products at reduced prices for particular markets. This may include "academic" versions for students; "OEM" (original equipment manufacturer) versions packaged with hardware, sold through hardware manufacturers; and site licenses, allowing the use of software by a set of related users, at per-user discounts.[242]

In contrast, another commenter stated that he found examples of video games, music, and books that were licensed at an equivalent price to the physical product.[243]

Copyright owners stressed that being able to license without transferring ownership of the copies transmitted to consumers is indispensable to the new, flexible ways in which creative works are

[237] RIAA Nov. Comments at 8.

[238] *See* AAP Nov. Comments at 6 & note 17 (referring to "widespread availability of online e-textbook rentals" and referring to a service "offering innovative rental packages at significant cost savings, for example, 'access to as many as 6 e-textbooks for [150 days for] $200.'"); SIIA Jan. Comments at 6-7 ("The average eTextbook costs significantly less than a new version of that same print textbook. For example, the digital version of the widely used textbook, 'Biology' by Sylvia Mader and Michael Windelspecht, published by McGraw-Hill Education, costs $120. Its traditional print counterpart is priced significantly higher at $229. Many eTextbooks are also available for rental by students—a business model that further lowers students' textbook spending and has begun to reduce the market share of the traditional used book market.").

[239] AAP Nov. Comments at 6 & n.18.

[240] Marks/RIAA (Nashville) at 90.

[241] CFA Nov. Comments at 31-32.

[242] SIIA Jan. Comments at 5. *See also* Kupferschmid/SIIA (Cambridge) at 188; BSA Jan. Comments at 3.

[243] Perzanowski (Nashville) at 84-85 (citing instances where obtaining copies online costs no less than buying hard copies).

made available. They identified in particular the potential impact on pricing. Software publishers asserted that "[a]ny change in the copyright law that made the first sale defense applicable to these software licenses would . . . jeopardize the future availability of discounted software to those markets."[244] They explained that if the licensee were deemed to own the copy and therefore could, under the first sale doctrine, resell it in the secondary market, the publisher would have to set a higher initial price in order to recoup its investment.[245] Otherwise, for example, lower-priced versions intended for particular (e.g., educational) markets might be resold to users in commercial markets, where the price is much higher.[246] For textbook publishers as well, one "significant factor in the reduced eTextbook price is the secondary market. Because the publisher of a print textbook has to factor in the likelihood that the book will be resold by the original student buyer, either directly to another student or indirectly through a campus bookstore offering used books, the publisher has to set a higher price for the new print book in order to recoup its investment."[247]

In addition, in the software area in particular, copyright owners noted the ongoing relationships that licensing makes possible. Software publishers explained that licensees generally receive benefits pursuant to licenses to which they would not be entitled if the transaction were a sale. A license establishes a relationship that continues long after the initial transfer of a copy, and may include the provision of patches and other updates to improve functionality and fix security vulnerabilities, as well as new versions of software. One organization stated that application of the first sale doctrine to software could endanger their ability to deliver such updates, etc., since it would involve accessing the consumer's computer—something that a license would permit but that could otherwise give rise to liability.[248] Cloud computing providers noted the increasing importance of licensing, as software is updated and adapted to the user's needs on a regular basis.[249]

b. Access-Based Services

Many participants and commenters described a marketplace that is evolving from services involving the distribution of copies to those in which consumers are offered different levels of access at a choice of price points.[250] Copyright owners outlined a number of ways in which they provide content online, largely by means of "access models" under which consumers pay a monthly subscription fee to enjoy all content that is offered by a service or a single fee for on-

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[244] SIIA Jan. Comments at 6.

[245] *Cf. Id.* at 7.

[246] *See* BSA Jan. Comments at 3.

[247] SIIA Jan. Comments at 7-8.

[248] BSA Jan. Comments at 2-3.

[249] *Id.*; SIIA Jan. Comments at 4-6.

[250] *See, e.g.*, Bridge/Disney (LA) at 145; CA Jan. Comments at 15; MPAA Nov. Comments at 5; MPAA Jan. Comments at 9. *See also* CA Jan. Comments at 14; Sheffner/MPAA (Nashville) at 98. *But cf.* McSherry/EFF (Alexandria) at 139 ("the people that I represent want to not just access goods, they want to mess with them, they want to change them, they want to recreate them, they want to make, they want to do things with them that then in turn will spur further innovation").

demand (pay-per-view) enjoyment. These models do not trigger application of the first sale doctrine, as no copies are sold or otherwise disposed of in the first place.

- *Music*. Record companies observed that the "clear trend towards subscription streaming services and other cloud-based business models enables consumption of copyrighted materials in ways that make possession of the copy by the consumer far less significant, or even irrelevant."[251]

- *Motion pictures*. Motion picture studios described research showing a shift in consumer preferences, with interest in access rather than ownership, reinforced by statistics on revenue trends.[252] They also noted the multiplicity of price points, "from free online viewing or free mobile viewing to downloads of movies for prices that are similar to DVDs,"[253] or a subscription to a streaming service for "eight or nine dollars a month."[254]

- *Books*. Books are offered to consumers to read online through subscription services such as 24Symbols, Scribd, and Entitle. [255]

- *Games*. Computer and video game publishers offer software platforms, including web portals, cloud and streaming services, that enable game play in the online environment.[256]

- *Computer software*. Software publishers explained that the industry is in transition from licensing software installed on devices to accessing it through the cloud and to other licensing models, such as subscriptions.[257]

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[251] RIAA Nov. Comments at 8; Marks/RIAA (Nashville) at 73 (there is "a trend, frankly, toward access and away from ownership if you're looking at the market"). *See also* NMPA Nov. Comments at 10. One of the three major music labels, Warner Music Group, recently announced that revenue from streaming music had for the first time exceeded income from downloads. Warner Music Group, *Warner Music Group Corp. Reports Results for Fiscal Second Quarter Ended March 31, 2015*, (May 11, 2015), http://www.wmg.com/news/warner-music-group-corp-reports-results-fiscal-second-quarter-ended-march-31-2015-20696.

[252] Sheffner/MPAA (Nashville) at 98; Sheffner/MPAA (Berkeley) at 118-19. Sheffner described this as part of a larger phenomenon that extends beyond access to or ownership of works of authorship, noting that there are "business models where people, for example, they don't own tools anymore, they have these websites where you can go and rent tools from somebody." *Id*. at 119. *See also* SIIA Jan. Comments at 11 (quoting an article predicting that "[t]he next few decades will witness a massive decline in ownership. Renting, not owning, will become the primary way people [] consume").

[253] Bridge/Disney (LA) at 145. An industry representative observed consumers have the option of "renting" a movie online for a 48-hour period for one relatively low price of about $5.99 or of acquiring a download for a price of about $15.00. Sheffner/MPAA (Nashville) at 74-75.

[254] Sheffner/MPAA (Nashville) at 74-75.

[255] AAP Jan. Comments at 9; Adler/AAP (Cambridge) at 184. For additional details, *see First Sale Under Title 17: Hearing Before The Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary* , 113th Cong., 2d Sess. 151, 153-54 (2014) (Statement of the American Association of Publishers), *available at* http://judiciary.house.gov/_cache/files/8fc16abf-b2ed-4bf6-b5a2-108dfecbe09e/113-98-88109.pdf.

[256] ESA Nov. Comments at 3.

[257] Simon/BSA (Alexandria) at 83, 122.

Copyright owners and some observers stressed that industry policies in this area are evolving, at least in part in response to the demands of the marketplace.[258] They emphasized that for those consumers who still want to own copies, that option remains available, as most types of works continue to be distributed in physical formats.[259]

Participants and commenters, including but not limited to copyright owners, identified various consumer benefits from these access-based models. These included a greater variety of different options for enjoying content; more flexibility; and the ability to choose a lower price for only the amount of access desired.[260] One professor favoring an expanded first sale doctrine acknowledged that licensing, subscription and rental models "do in fact play a really important role in getting consumers access to content for a lower price. And oftentimes consumers aren't interested in owning things forever."[261]

The Center for Democracy and Technology, while acknowledging the existence of scenarios where it would be appropriate to extend first sale principles, also noted the lack of applicability of first sale for subscription-based access models:

> Consumers often buy access to large libraries of content via subscriptions, or buy cloud-based services in which they have an ongoing relationship with the provider rather than conducting a one-time transaction that feels like a single "purchase." Spotify and Netflix streaming are leading examples from the music and movie marketplaces. Increasingly, then, consumers' access to content need not involve ownership. For these new business models, the first sale doctrine would fit awkwardly if at all.[262]

3. Lost First Sale Benefits

Commenters identified two primary respects in which the online marketplace fails to provide the benefits traditionally offered by the first sale doctrine. First, several expressed concern that reliance on licensing terms is not a full substitute for statutory guarantees, especially as these terms can be changed. Second, the licensing model does not replicate the ability of consumers to resell their copies, which enables the existence of a secondary market. In addition, some raised questions with respect to impacts on library lending, preservation, and privacy.

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[258] *See, e.g.*, Adler/AAP (Alexandria) at 126; Kupferschmid/SIIA (Alexandria) at 131; MPAA Jan. Comments at 9; MPAA Nov. Comments at 1; Villasenor (Alexandria) at 111 ("we've had just really a few years to watch the digital markets develop and I think we'll see a great wealth of higher degrees of flexibility in the solutions that are offered downstream.").

[259] *See, e.g.,* Bridge/Disney (LA) at 145.

[260] *See, e.g.,* CA Jan. Comments at 13-15; CDT Nov. Comments at 15; ESA Nov. Comments at 3; MPAA Nov. Comments at 5; MPAA Jan. Comments at 9; NMPA Nov. Comments at 10; Perzanowski (Nashville) at 85.

[261] Perzanowski (Nashville) at 85.

[262] CDT Nov. Comments at 14, 15. *See also* Newhoff (Cambridge) at 176 ("the whole idea of ownership at all is actually, even as we're speaking, becoming something of an anachronism. People are moving toward . . . a desire for a subscription-based relationship"); *id.* Newhoff (Cambridge) at 222 (predicting that because of access-based models, "it's quite possible that my kids and future generations aren't even going to download anything anymore").

a. The Shift from Statutory Guarantees to Rights Holder Permission

Several commenters, primarily from the academic and public interest communities, stressed that the benefits permitted under licenses could not fully replace those provided by the first sale doctrine.[263] A professor concluded that "true ownership needs to remain on the menu," as the lower prices are accompanied by restrictions on what the acquirer of the copy may do.[264]

Another commenter observed that "currently, all of the comparable [first-sale permitted] activities fall into a 'licensing' scheme controlled by the copyright holder . . . . Permission-based market substitutes [for first-sale benefits] are clumsy, at best. . . . Permission may be revoked on a whim."[265] A public interest organization stated that while there are examples of the online marketplace providing functionalities that mimic analog activities facilitated by first sale, the revenue-maximizing strategy of copyright owners will not always be consistent with the existence of secondary markets, lending, and other attributes associated with the doctrine.[266] Others argued that the shift from ownership to licensing gives all the power to copyright owners, to the detriment of consumers who are left owning less in the digital environment.[267] A professor expressed concern about the degree of control that content owners and platforms may be able to exercise over users, including the ability to monitor users' habits, enabling and disabling access or terminating accounts.[268] One library group noted concerns about "the use of contract terms to circumvent limitations in the Copyright Act."[269]

The Center for Democracy and Technology described the role of the first sale's doctrine as follows:

> [F]irst sale tends to limit the amount of control rightsholders can exercise over how downstream users engage with their works, because it prevents rightsholder from having privity of contract with all downstream users or purchasers. This means more freedom for users and more full enjoyment of copyrighted works. Rightsholders can't force book purchasers to read chapters in a specific order, or prohibit purchasers from framing or mounting an artwork as they see fit.[270]

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[263] *See, e.g.*, CDT Nov. Comments at 13-14.

[264] Perzanowski (Nashville) at 85.

[265] ScreenPlay Jan. Comments at 6-7. *See also* SCI/EFF Nov. Comments at 19 ("Shifting to licensing gives all the power-for the extraordinarily long copyright term-to copyright holders to decide the conditions of use for vast portions of our cultural commons.").

[266] CDT Nov. Comments at 13 ("the premise and raison d'etre of the first sale doctrine is that rightsholders will not always believe it is in their self-interest to do so. The revenue-maximizing strategy of rightsholders will not always be consistent with the existence of secondary markets, lending, etc.").

[267] CIS/EFF Nov. comments at 17; PK Nov. Comments at 22.

[268] Niva Elkin-Koren, *Can Formalities Save the Public Domain? Reconsidering Formalities for the 2010s*, 28 BERKELEY TECH. L.J. 1537, 1550 (Symposium 2013), attached as Appendix C to Samuelson Jan. Comments.

[269] LCA Nov. Comments at 7.

[270] CDT Nov. Comments at 13 (footnote omitted).

b. Loss of Resale and Lending Markets

Proponents of expanding the doctrine argued that the same principle that applies to resales or loans of physical copies should apply to resales taking place through digital transmission, and that the means by which the copy is distributed should not make any difference.[271]

In contrast, many authors and rights holders questioned the continued viability and relevance of secondary markets, given the new business models outlined above. A writer-filmmaker concluded that "the digital age has all but obviated the need for a secondary market," noting that the access offered to consumers online, along with "the incredible pricing … begs the question as to what a secondary market actually would look like."[272] Book publishers observed that the "diversity of distribution models for eBooks, such as streaming, subscriptions, downloads, rentals, etc., many permitting access on multiple devices, raises the question of whether the equivalent of physical resale for the online environment is even necessary or desirable."[273] Motion picture studios concurred, concluding that the "diversity of models for providing access undermines calls for sanctioning 'resale' in the digital environment" and that "this diversity would likely be threatened by an expansion of the first sale doctrine, which should remain a physical concept."[274] Music industry representatives questioned the need for a digital first sale doctrine in light of the already low cost of obtaining copies of or access to music, asserting that the market has already taken account of the lack of a secondary market for digitally transmitted music.[275]

c. Other Issues Raised

i. Library Lending

A number of commenters, including libraries, publishers, and authors, discussed limitations on what libraries may do with digital materials, including eBooks. Libraries voiced concern about the shift from owning physical copies to the new licensing paradigm for eBooks,[276] and warned

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[271] PK Nov. Comments at 12-13; ScreenPlay Jan. Comments at 6; ReDigi Nov. Comments at 4.

[272] Newhoff (Cambridge) at 176. *See also* Shems/GAG (Cambridge) at 192 ("for $1.25, they don't need to have that secondary market, being able to take it off their computer and resell it."). Another roundtable participant stated that "I don't really have any interests to represent," and agreed that "the secondary market concept is kind of going away, especially with the current pricing regime, which seems very fair for the convenience of accessing something on any of your devices anywhere you are." Harrison (Cambridge) at 154, 177-78.

[273] AAP Nov. Comments at 7.

[274] MPAA Jan. Comments at 9 (footnote omitted).

[275] NMPA Nov. Comments at 10 ("The ability to buy a download for 99 cents on average, the ability to subscribe to a portable music service for $10 per month, the ability to stream music over computers and portable devices for free, and the availability of music services designed specifically for public libraries suggests [that] the market is clearly providing a range of products and services at a reasonable cost that allow wide access to and the sharing of music."); Marks/RIAA (Nashville) at 89 ("It may be a $10 a month, you know, for every recording that's ever been released, it may be something for 99-cents. There's just a variety of different models out there. And so I'm not sure that I see that expectation of needing to have this first sale in the music space.").

[276] *See* discussion below, Part C.4.a (Library Lending), p. 60.

that their traditional role of lending books could be endangered.[277] Publishers touted the flexibility inherent in a licensing model, and individual authors stated that the rights of creators should be respected in any discussion about library uses.[278]

Libraries traditionally rely on the first sale doctrine to make books available to "those willing and able to wait their turn for the limited loans and use of library materials."[279] Several libraries reported that some eBooks are not made available to libraries at all, due to the reluctance of publishers to permit them to access and lend digitally formatted books.[280] One librarian stated that "when journals and books go into an e-book format, sometimes the license makes us incapable of loaning,"[281] another objected to the high costs of licensing eBooks from major publishers,[282] and others noted that some licenses place severe limits on the activities of libraries with respect to digital content,[283] including restrictions on the number of times an eBook may be loaned.[284] A public librarian expressed concern about time limitations, stating that they "mean that we should not even invest in books that may be good but not popular enough."[285]

A library consortium reported that some small and medium sized publishers "agree to a reasonable interpretation of First Sale in the digital realm" (as set forth in a Statement of Common Understanding) and permit it to buy eBooks and treat them as it would treat print copies, with a one-copy to one-user requirement. The consortium concluded that licensing can provide library users with useful access to eBooks (for example, allowing multiple uses of a title while it is still in hot demand), but cannot serve as a permanent means to preserve a library's collection.[286]

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[277] *See* discussion below, Part C.4.a (Library Lending), p. 60.

[278] *See* AAP Jan. Comments at 8. *See also* Bahnsen Nov. Comments at 1; Cherry Nov. Comments at 1.

[279] Califa Nov. Comments at 1.

[280] Schwartz Nov. Comments at 2 (pointing out that Kindle Singles are sold to consumers but not made available to libraries). *See also* Ohio Library Nov. Comments at 1; Juneau Nov. Comments at 1. It appears that since those comments were submitted in November 2013, the practices of publishers have changed and all major publishers are now willing to license eBooks to libraries (we have also noticed changes in publishers' licensing terms since the comments were submitted). AAP Jan. Comments at 8; Robert C. Maier, *Big Five Publishers and Library Lending*, AMERICAN LIBRARY ASSOCIATION, http://www.americanlibrariesmagazine.org/wp-content/uploads/2015/04/BigFiveEbookTerms042215.pdf (last updated Apr. 22, 2015). Issues still remain, however, with respect to the terms under which publishers will permit library lending. See the discussion immediately below.

[281] Courtney (Cambridge) at 157.

[282] Juneau Nov. Comments at 1.

[283] Schwartz Nov. Comments at 2 (pointing out that Kindle Singles are sold to consumers but not made available to libraries).

[284] Califa Nov. Comments at 1 ("libraries are stuck with titles [that] are subject to restrictions of all kinds, including titles that disappear after 26 checkouts from the library's virtual shelves"). As noted below, see text at note 289, publishers justified restrictions on the number of times a books may be lent by asserting that such restrictions approximate the number of times a book will be lent before it is retired from circulation due to deterioration.

[285] Naylor Nov. Comments at 1.

[286] Califa Nov. Comments at 1.

A university copyright advisor asserted that libraries often are required to pay higher prices for eBooks than consumers. He also expressed concerns regarding limitations on the number of times an eBook may be checked out and distinguished public libraries from academic libraries, where certain books are checked out hundreds of times, including books on reserve which may be checked out for only an hour at a time.[287] A school librarian stated that "popular items tend to be borrowed hundreds of times without the book falling apart and being unusable," implicitly rejecting the argument that libraries retain books in their collections only after a relatively small number of loans.[288]

Publishers responded by stressing that lending of eBooks can have a greater impact on the marketplace than traditional library lending. They asserted that libraries will typically replace a physical book with a newly purchased copy after it has been loaned 25 or 26 times, due to deterioration in the book's condition. Unlike the traditional model where a library lends a book to one reader at a time, and readers have to visit the library in order to check out a book, eBooks can be loaned an indefinite number of times and simultaneously to multiple readers, each of whom can borrow the eBook remotely without having to visit the library. As a result, "the whole model of library lending is different today because of technological changes, because of economic changes, for a variety of reasons."[289]

Publishers also noted that due to antitrust considerations, they cannot jointly agree upon library e-lending policies.[290] As a result, publishers have come up with a variety of approaches intended to replicate the effects of the traditional lending model for hard copy books. Some require lending to only a single user at a time. Some have a limit on the number of loans or the time period in which loans may be made, requiring a new license once the limit has been reached.[291] While publishers acknowledged that such "market-based solutions are not yet fully-developed," they urged that "the recent momentum behind these endeavors should not be halted by awkwardly and impractically attempting to graft a doctrine crafted for the physical environment onto the online environment."[292]

ii. Preservation

Library associations asserted that publishers "frequently include terms in their [eBook license agreements] that restrict libraries' ability to exercise their rights under sections 107 (fair use) [and] 108 (library exceptions)" of the Copyright Act.[293] They referred to a study concluding that digital materials are subject to risks of loss, corruption, and destruction at least as profound as the

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[287] Courtney (Cambridge) at 169-70.

[288] Brosan Nov. Comments at 1.

[289] Adler/AAP (Cambridge) at 162-63. *See also* AAP Nov. Comments at 6.

[290] Adler/AAP (Cambridge) at 164.

[291] *Id.* at 164-68, referring to his 2014 Congressional Testimony (see citation above in note 255).

[292] AAP Nov. Comments at 6; *see also* AAP Jan. Comments at 8.

[293] LCA Nov. Comments at 7.

risks facing older formats.[294] They stated that many publishers will not have the financial incentive, or the institutional stability, to preserve digital materials for the long term, while libraries collectively seek to preserve all aspects of cultural heritage, not just materials with potential economic value. Accordingly, they argued that the copyright system must encourage these preservation activities.[295] Publishers themselves were cognizant that the market may not fully address library preservation concerns, but suggested that this issue should be addressed in the context of section 108 of the Copyright Act, which provides a specific exception for libraries.[296]

Outside of the library context, other commenters and roundtable participants raised issues relating to preservation of digitally transmitted media. Some asserted that, contrary to common assumptions about "digital" lasting forever,[297] digitally transmitted works may be lost because necessary distribution technologies become obsolete and cease functioning.[298] One academic responded that in an age "where almost everything we own is going to be in a cloud-based system," digital information is unlikely to degrade or disappear and the issue will be "managing a world in which all of our information is digital and in the cloud."[299] A motion picture industry representative observed that through licensing, the industry has come up with a solution for consumers whose copies on DVDs or similar media become damaged: services that permit the consumer to obtain a new download for free.[300] Another commenter worried that if a distributor of digital content goes out of business or ceases distribution, works may be lost to the public.[301]

iii. Privacy

Citing "the right to read anonymously," one commenter noted that the first sale doctrine protects privacy by "making it impossible for rightsholders to track the identities of all consumers who have obtained copies of their works."[302] Another warned that without a digital first sale doctrine, any transfer of ownership of a copy can be "affirmative knowledge of readership . . . removing a source of easy anonymization that could otherwise protect individuals who might be persecuted for seeking information about their conditions or beliefs."[303] A similar concern was expressed by

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[294] LCA Jan. Comments at 4-5 (referencing Timothy H. Vines *et. al.*, *The Availability of Research Data Declines Rapidly with Article Age*, 1 CURRENT BIOLOGY 24, pp. 94-97 (Jan. 2014), *available at* http://www.sciencedirect.com/science/article/pii/S0960982213014000 (last visited Dec. 2, 2015)).

[295] *Id.* at 5.

[296] *See* AAP Jan. Comments at 8.

[297] Those assumptions were articulated by rights holders in support of their assertions that the resale of digital copies would have a much greater impact on the primary market than has the resale of physical copies. *See* below at Part B.4.a (Potential Effect on Primary Markets), p. 51.

[298] *See*, *e.g*., Schwartz Nov. Comments at 2; LCA Jan. Comments at 4; Siy/PK (Alexandria) at 100; Butler (Alexandria) at 147; CDT Nov. Comments at 12.

[299] Villasenor (Alexandria) at 148.

[300] Sheffner/MPAA (Cambridge) at 214-15.

[301] *See* CDT Nov. Comments at 12.

[302] *Id.* at 13.

[303] PK Nov. Comments at 15-16.

a librarian, who stated that "[w]ith licenses there's a lot of surveillance, there's a lot of tracking that goes on with who owns what and where it goes."[304]

One professor, however, observed that whenever one acquires a book electronically, the transaction "would leave all sorts of footprints" that would make the transaction less private even if a digital first sale doctrine were in place. Accordingly, in his view, while there may be privacy implications when copies are obtained by means of digital transmission, this is the same whether or not the first sale doctrine applies.[305]

iv. Issues Relating to Sales of Consumer Devices and Products

Two other issues were raised by some commenters that were not specifically presented for comment by the Task Force's public notices:[306] sales of consumer products incorporating functional software, and sales of devices containing copies of works.

One of the most notable trends in technology in recent years is the digitization of everyday products. Consumer goods such as automobiles, refrigerators, and thermostats, are now sold with operational software to perform such functions as navigation and climate control.[307]

Several commenters and roundtable participants expressed concern over the possibility that manufacturers might assert that software embedded in consumer devices is only licensed and may not be resold as part of a sale of the device.[308] Examples given of licenses restricting resale appeared to relate to software used on computers and related equipment rather than to everyday consumer goods operated with the assistance of preloaded software.[309] The Digital Right to Repair Coalition stressed the importance of allowing subsequent purchasers of such goods to diagnose and repair them by accessing and using the software.[310]

A separate issue raised was whether consumers who have lawfully downloaded copyrighted music, eBooks, motion pictures or other content onto their devices may lawfully include that

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[304] Klossner (Berkeley) at 90-91.

[305] Villasenor (Alexandria) at 104-05.

[306] *See* Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, 78 Fed. Reg. at 61338-39.

[307] *See, e.g.,* AIPLA Jan. Comments at 6; Kari/Arbitech (LA) 159-160 & 172-74; Evans/Adobe (Berkeley) at 96.

[308] *See, e.g.,* AIPLA Jan. Comments at 6; Samuelson (Berkeley) at 92. One participant observed that if a purchaser of a device did not enter into a license agreement, then that purchaser is not bound. He concluded that "there's a difference between a unilateral license which someone might claim you're party to and a contractually binding license which you have explicitly agreed to." Villasenor (LA) at 173-74.

[309] ORI Nov. Comments at 3-5 (ORI also stated (without offering any specific information) that at present, "manufacturers of computer and telecommunications equipment misuse software license agreements to interfere with resale," and cautioned that as more products are distributed with pre-installed software, such as cars and consumer appliances, this situation will become more widespread). *See also* Kari/Arbitech (LA) at 174.

[310] *See generally* DRTR Nov. Comments. *See also* PK Nov. Comments at 16; McSherry/EFF (Berkeley) at 93-94 (noting that someone had sent her an email stating that the Nook eBook reader comes with a license agreement that forbids a purchaser from servicing his own device).

content when they dispose of the devices. One academic commenter noted that individuals who give an old computer or iPod to a friend or family member will not realistically seek permission from all of the copyright owners whose works are contained in it.[311] There was little discussion of this issue, which involves the transfer of ownership of a physical object containing copies of copyrighted works, rather than the distribution of the copies themselves by means of digital transmission.

4. Risks of Extension of First Sale Doctrine

a. Potential Effect on Primary Markets

Most of the copyright owner groups that commented in this proceeding cited the conclusions in the Copyright Office Report, especially the reasons why physical media and digitally transmitted media should be treated differently for Section 109 purposes.[312] The Copyright Alliance pointed to statements in the Copyright Office Report about the ability to make perfect digital copies, concluding that a resale market for such copies would compete for market share with new copies. It stated that there have been no changes in technology that call those conclusions into question and asserted that extending the first sale doctrine to "used" digital goods would result in serious economic harm.[313] Music industry groups similarly stressed that a digital first sale doctrine would allow users to distribute perfect copies of works to others without the copyright owner receiving any compensation, "making piracy undetectable" and stifling the online marketplace.[314] An app developer concurred, observing that if purchasers who decide they do not want to keep his app are permitted to resell it, they can make it available for sale at a lower price and destroy his market.[315]

Book publishers cited the Copyright Office Report's observation that unlike used physical books that are subject to wear-and-tear, "used" digital copies can be as desirable as new ones, and their ability to "compete for market share with new copies is thus far greater."[316] Motion picture and television directors observed that such harm to the marketplace affects not only copyright owners, but also others, such as directors, whose income depends in part on revenues generated from authorized reuse of motion pictures.[317] Songwriters endorsed the Copyright Office Report's conclusion that "the risk that expansion of section 109 will lead to increased digital infringement

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[311] *See* Samuelson (Berkeley) at 91-92 ("I think from the standpoint of most people to be able to give away an old computer, to give away my iPod to my sick grandmother is something that actually also is important. And I'm not going to get in touch with every single one of the software companies that might have licensed software for that machine."). *See also* Courtney (Cambridge) at 192-93.

[312] The Copyright Office Report, *above* note 203, at 82-83.

[313] CA Jan. Comments at 16-17. *See* the Copyright Office Report at 82-83.

[314] NMPA Nov. Comments at 9 (quoting the Copyright Office Report).

[315] Standfield (Berkeley) at 125 ("[T]here is no distinction between the used software and the new software…it's identical.").

[316] AAP Jan. Comments at 7 (quoting the Copyright Office Report at 82-83). *See also* AAP Nov. Comments at 4; NMPA Nov. Comments at 8-9 (digital copies of music degrade over time).

[317] DGA Jan. Comments at 3.

weighs heavily against such an expansion."[318] A public interest group noted that the fear of "runaway infringement" is not exclusive to digital first sale and occurs when new technologies enter the market.[319]

b. Loss of Market Flexibility

A number of copyright owners also asserted that they would be unable to offer consumers the benefits from licensing discussed above, including the ability to tailor products, features, and prices to the needs of different customers, if the first sale doctrine applied to the copies involved in such transactions.[320] One observed that the first sale doctrine imposes a "one size fits all" model that logically would lead to a higher price even when a consumer wishes to make only limited use of the work.[321] For example, if a purchaser of a student edition of a book or software had the legal right to resell the copy to any willing purchaser, the publisher would face significant disincentives to offer that edition to students at a reduced price due to the likelihood of unfair competition from the resale of the student edition in the open market.[322] Publishers warned that online subscription services that offer access to eBooks, such as Scribd, Entitle, and Amazon's Kindle Library, could not exist if there were a digital first sale doctrine.[323]

5. "Forward and Delete" Technology

The Task Force asked whether there have been any advances in technology that will ensure that an original copy of a work is automatically deleted once another copy has been transmitted to another person.[324] As described above, some commenters suggested that such technology should be part of a solution, involving at least partial extension of the first sale doctrine to digital transmissions.[325] Only a few, however, provided any specifics.[326] One commenter suggested that

[318] SGA Nov. Comments at 6.

[319] *See* PK Nov. Comments at 29 ("Every type of media now faces the same pressures as before – it has long been possible for video-rental infringement to wreak havoc on the movie industry – and yet, . . . this has failed to happen.").

[320] *See* ESA Nov. Comments at 4-5 (quoting the Copyright Office Report at 91-92); RIAA Nov. Comments at 8; CDT Nov. Comments at 15; AAP Nov. Comments at 7; MPAA Nov. Comments at 5-6; CA Jan. Comments at 14-15.

[321] *See* SIIA Jan. Comments at 4. *See also* discussion *above* in text at note 260.

[322] *See* SIAA Jan. Comments at 7-8. *See also* BSA Jan. Comments at 3.

[323] Adler/AAP (Cambridge) at 184.

[324] *See* Request for Comments on Department of Commerce Green Paper, 78 Fed. Reg. at 61339 (Oct. 3, 2013), note 4 *above*.

[325] *See, e.g.*, PK Nov. Comments at 27; ScreenPlay Jan. Comments at 8-10; ReDigi Nov. Comments at 8; CDT Nov. Comments at 15.

[326] One company asserted that "[f]or many years, now, the basic "'forward-and-delete"' technology has been available," citing to legislation that was proposed but not enacted several years ago, the Copyright Office Report and the recording industry's 1999 Secure Digital Music Initiative. ScreenPlay Jan. Comments at 8-9. In contrast, a group of copyright ownersstated, "While theoretically a technology could be developed that eliminates all copies after the original has been redistributed, this is not currently a practical reality with sufficient security to be viable for commercial works of entertainment." CA Jan. Comments at 16.

the technology used to control the lending of eBooks and music between users could be employed to manage the transfer of the ability to access digital copies of works.[327]

The only existing technology brought to the Task Force's attention was that deployed by ReDigi, which is the subject of an ongoing copyright infringement suit filed by record labels. In a 2013 opinion, the district court concluded that while ReDigi's technology could detect whether, once a copy of a work was transmitted by a seller, any additional copies were retained on the seller's computer or attached devices, it did not delete the copies detected but simply prompted the seller to do so voluntarily. Nor could it detect copies that the seller had made on other computers or devices prior to the sale.[328]

The technology has evolved, however, since that time. In its comments in this proceeding, ReDigi asserted that "systems now exist that allow digital files to be secured … and provide the transfer of single instances of those protected files, while rendering ancillary copies inoperable." It characterized "forward and delete" methods as "old-fashioned" due to the availability of "instantaneous transactions, where copies are never made as part of a transaction between a buyer and seller," and stated that such technology "is in use and exists today."[329] Based upon ReDigi's statements as well as the brief description in the district court's opinion,[330] it appears that the new version does not involve "distribution" of a file. If that is the case, the analysis of ReDigi 2.0 under existing law might be different, and it remains to be seen how the courts may address this technology, or other technical approaches that may be developed.[331]

Copyright owners remained skeptical about the effectiveness of any "forward and delete" technology. Publishers asserted that there is no practical way to guarantee that the transfer of digital files would not result in unauthorized additional copies.[332] Others expressed doubt

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[327] Zagaja Jan. Comments at 3.

[328] *Capitol Records, LLC v. ReDigi, Inc*, 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013). The district court held that defendant's forward and delete system was not shielded by the first sale doctrine in section 109 because, among other things, it involved new copies which were not "lawfully made under this title." The court granted the plaintiffs partial summary judgment, finding ReDigi liable on some but not all of the plaintiffs' claims, with triable issues on others. The case is still pending.

[329] ReDigi Nov. Comments at 8. At the Alexandria Public Meeting, ReDigi's CEO stated that "ReDigi 2.0" involves a consumer directly initially downloading a digital music file into ReDigi's cloud server. Following a sale, there is an "exchange of title and keys between buyers and sellers. No files are copied, no files are moved, et cetera." Ossenmacher/ReDigi (Alexandria) at 132-33.

[330] 934. F. Supp.2d at 646 n.3 (The district court described ReDigi 2.0 as "new software that, when installed on a user's computer, purportedly directs the user's new iTunes purchases to upload from iTunes directly to the Cloud Locker. Accordingly, while access may transfer from user to user upon resale, the file is never moved from its initial location in the Cloud Locker.").

[331] *See* DGA Jan. Comments at 3 ("Although the first sale doctrine does not permit the owner of a copy of a copyrighted work to make copies, technologies are being developed that may facilitate the ability of consumers to transfer digital files without copying, allowing them to transfer ownership of goods purchased both online and offline.").

[332] AAP Jan. Comments at 9 & n.34 (noting that "Given the fact that many users of digital content (typically, but not always, pursuant to an authorizing license) can currently download multiple copies on multiple devices (desktop computer, laptop, tablet, e-reader, smart phone, etc.) or access copies through remote cloud storage, the practical

whether it could ever be certain that a "reseller" of a digitally transmitted copy did not retain a copy.[333] Publishers of software and digital content argued that even if an absolutely effective "forward and delete" technology were to be available, it would be just a matter of time before it was hacked.[334] Some commenters and participants added that a "forward-and-delete" system would not mitigate the harm caused by the retransmission of perfect digital copies, which would substitute in the market for copies that otherwise would have been purchased from rights holders or their authorized distributors.[335]

6. Solutions Proposed by Stakeholders

Several advocates of an expanded first sale doctrine proposed solutions that would broaden its application while preserving the benefits of the new business models. The Center for Democracy and Technology identified a "policy conundrum" in that "[a]llowing first-sale principles to go completely extinct in digital markets is undesirable. But so is forcing digital content to be distributed via 'ownership' models in order to permit resale, when the market is embracing subscription and service-based distribution models." It urged finding ways to extend the first sale doctrine into the digital world without foreclosing business models where it does not fit, proposing the development of criteria for distinguishing scenarios where it would be appropriate to extend first sale principles from those where it would not. Possible criteria would be to apply a "digital first sale rule" only to purchases of digital content but not to non-purchase models, permitting resale when the seller's copy is deleted.[336] Another public interest organization similarly suggested that allowing "nonduplicative transfers" (i.e., transmission of a digital download to a third party, followed by the deletion of the download from the transmitter's devices) would ensure that owners of copies can resell them while preventing the multiplication of copies.[337]

The American Intellectual Property Law Association suggested that Congress consider distinguishing between the kinds of works that historically have been subject to first sale in the

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likelihood that any technology could ensure compliance with a 'forward and delete' requirement is virtually nil, and the copyright owner's ability to monitor or enforce such compliance is essentially non-existent.").

[333] *See* Tepp/U.S. Chamber (Nashville) at 87; SIIA Jan. Comments at 16; NMPA Nov. Comments at 9 (observing that "a person's claim to have transmitted only a single copy and not retained a back up is extremely difficult to prove or disprove, making piracy undetectable.").

[334] SIIA Jan. Comments at 16. *See also* AAP Jan. Comments at 9 (citing to Professor Villasenor, at the Alexandria Public Meeting, and noting that it is "not clear that technology can ensure that backup copies are deleted and there will always be individuals that will crack such safety measures and increase online piracy to the detriment of creators that deserve compensation for their works.").

[335] *See*, *e.g*., Tepp/U.S. Chamber (LA) at 150, 164-65 (observing that "to the extent what you're asking should we have a forward and delete model in furtherance of what's arguably a secondary market, I would argue that's not a secondary market at all because, as you know, the quality of the digital file does not degrade and is instantly transferable over unlimited distances, so it's going to substitute one for one for sales in the primary market."); SIIA Jan. Comments at 16. *See* Part B.4.a (Potential Effect on Primary Markets), p. 51 *above*, for a discussion of the effects on the market of such sales.

[336] CDT Nov. Comments at 15.

[337] PK Nov. Comments at 27.

analog world and those that have only existed in the digital space.[338] Others remarked that the Task Force should explore alternative statutory language, such as "carving out rights for 'possessors' of works 'lawfully made and acquired.'"[339]

7. Consumer Expectations and Contract Terms

In the case of services that deliver copies of works to consumers online, concerns were raised about consumers' understanding of the nature of the transaction. These services often utilize end-user license agreements (EULAs)[340] setting forth what rights the consumer will enjoy with respect to the work, including whether he owns the copy that is transmitted and what he may do with it.[341] The license is in the form of an agreement presented online, to which the consumer typically confirms his consent by clicking on a "button" or box on the screen. Because it would be impractical for each transaction with a consumer to be individually negotiated, EULAs are necessarily standard-form agreements.[342]

Some public interest groups described EULAs as "contracts of adhesion" because consumers have no ability to negotiate terms and conditions and may even be unaware of their existence.[343] They urged the Task Force to "explore ways of limiting copyright holders' ability to use license agreements to require the public to waive the rights and protections afforded by the Copyright Act."[344] Motion picture studios pointed out that courts have upheld such online licenses. They remarked that EULAs often expand the rights that users obtain beyond those provided in the Copyright Act, and there is no reason why private parties cannot agree on how to calibrate the

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[338] AIPLA Jan. Comments at 5 (noting that books, movies and sound recordings are "works for which there exists a widespread and reasonable expectation of resale and transfer rights," and contrasting those types of works with computer software, which has traditionally been licensed).

[339] CIS/EFF Nov. Comments at 18.

[340] A EULA is a legal agreement between the provider of an online service or manufacturer of software and the purchaser of the service or software that stipulates the terms of usage. EULAs can take the form of "shrinkwrap" agreements (for software), "browserwrap" agreements (for website usage), and "clickwrap" agreements (for online notices needing affirmative consent). *See* Aaron Rubin and Anelia V. Delcheva, *Implementing and Enforcing Online Terms of Use*, SOCIALLY AWARE BLOG (Oct. 6, 2014), http://www.sociallyawareblog.com/2014/10/06/implementing-and-enforcing-online-terms-of-use/.

[341] As already noted, at notes 251-252, many of the new online services offering creative content do not involve transfers of ownership.

[342] *See* AAP Jan. Comments at 5 ("Standard EULAs enable efficient access to the copyrighted content that millions of U.S. consumers are constantly downloading or streaming on Amazon, Spotify, Scribd, etc. Just as in the world of physical goods and related consumer services, where basic contract agreements for renting or purchasing an automobile, a refrigerator or a night's lodging at a hotel typically are not negotiated anew with each consumer, negotiating individual contracts would add transaction costs and delays that negate the efficiencies of digital availability that are essential to expanding access to copyrighted works.") (footnote omitted).

[343] CIS/EFF Nov. Comments at 17.

[344] *See id.* at 17-18. *See also* McSherry/EFF (Alexandria) at 137-38 ("We're talking about EULAs, because we can talk all day long about what we want to do with the statute, but, you know, what the statute may giveth, the contract terms will taketh away. . . . So, we have these mass contracts of adhesion, to which everyone is agreeing without knowing what they include, without knowing what they're binding themselves to.").

contours of an acceptable use.[345] A software industry representative noted that such licenses are not a recent development; even when software was distributed only on discs and other physical media, the longstanding industry practice has been to structure the transactions as licenses rather than sales.[346] A number of rights holders observed that EULAs are commonplace in a wide variety of consumer transactions.[347]

One public interest group asserted that provisions barring redistribution of copies are at odds with the ordinary expectations of consumers, and that the terms of such licenses conflict with the general understanding of "buying" and "owning" copies.[348] Others argued that consumers rarely read or understand EULAs, which are long and complicated.[349] Commenters and participants noted that it is common for online services to feature a "buy" button that a consumer must click on in order to initiate a download,[350] and offered differing views as to what consumers believe when they are presented with such a button. Several academics and public interest groups claimed that consumers expect that when they click on the button, they will "own" the copy.[351] On the other hand, some copyright owner representatives expressed doubts, opining that in the particular contexts in which these transactions take place, consumers are likely to understand that they are paying for something that falls short of ownership.[352] One rights holder pointed out that

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[345] MPAA Jan. Comments at 9 (citing cases).

[346] SIIA Jan. Comments at 5 ("For several decades, the software industry has relied on a licensing model for the distribution, maintenance, and updating of its software products and services to and for its customers."). While there can be genuine issues in particular cases as to whether a transaction amounts to a license or a sale, *see* Green Paper at 36 & note 196, if the transaction is governed by a license the first sale doctrine does not apply. *But see* PK Nov. Comments at 22-26 (questioning whether current case law is consistent with the seminal first sale case of *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908)); ORI Jan. Comments at 4-5.

[347] *See, e.g.*, Adler/AAP (Cambridge) at 204-06 (referring to standardized car rental agreements and mass-market licenses); Kupferschmid/SIIA (Cambridge) at 208-10 (referring to credit card and cellphone agreements and observing that "this is not just a copyright problem at all. As a matter of fact, it's not even primarily a copyright problem. . . . This is a more generic consumer issue").

[348] PK Nov. Comments at 21-24.

[349] *See* Ossenmacher/ReDigi (Alexandria) at 118-19 ("50-page EULAs, license agreements people don't understand or know how they work"); Siy/PK (Alexandria) at 127 ("[H]ow many people here, and even granting that this particular crowd is more likely than others, have read the iTunes terms of service, have read the Amazon terms of services -- right?"); McSherry/EFF (Berkeley) at 100-01 ("[T]he hours that people would spend reading EULAs figuring out and trying to figure them out, you know, I just don't think that's the kind of national investment that we want people to be making . . . ."); McSherry/EFF (Alexandria) at 138.

[350] Lowney Nov. Comments at 1; Courtney (Cambridge) at 192; Villasenor (LA) at 151; Samuelson (Berkeley) at 107.

[351] *See, e.g.*, Perzanowski (Nashville) at 85 ("When I pay the 14.99, it's not a shiny button that says license now, it says buy now, it says purchase now, it says own this. That means something to consumers."); McSherry (Berkeley) at 84; Samuelson (Berkeley) at 107-08; Courtney (Cambridge) at 192-95. Professor Villasenor agreed that "the big fat 'buy' button deceives consumers." Villasenor (LA) at 154-55, 157. *See also* Evangelho Nov. Comments at 1.

[352] Sheffner/MPAA (Cambridge) at 200-02 ("If you ask people when you go to a site to buy a movie or a book or a song, I think they pretty much understand that you're not actually buying the copyright. What you are doing is you're purchasing or buying a license which permits you to do certain things."). *See also* Branch (LA) at 157-58 ("I'm not sure that the consumers have the expectation that when they hit the buy button for some music that they're thinking about how they're going to resell it. . . . We're looking at consumer expectation when they buy, and by pressing the

the language used on webpages that offer digital content is written not by copyright owners, but by the online services (e.g., Amazon and iTunes) that have the direct relationship with the public.[353]

Regardless of whether the "buy" button is misleading, and regardless of who is responsible for its use, commenters and participants on all sides agreed that consumers are entitled to clarity and that more should be done to communicate what rights they are or are not getting when they enter into a transaction involving digital transmissions of copies.[354] As one professor stated, "people facing consumers have not done a particularly good job or as good a job as they could in making clear to consumers what rights they have or do not have in the content[,]" concluding that if consumers were accurately informed of their ownership rights, "then the market would lead to pressures that would lead content owners and distributors to provide more flexible offerings of content . . . ."[355] Copyright owners agreed that more could be done,[356] with some stating that they already try to explain to consumers that what they are paying for is not a purchase, but a license.[357] Book publishers noted that providing clear terms on websites and in EULAs will help further stimulate development of a variety of business models, and concluded that they and their retailers should strive to clarify whether eBooks are licensed or sold and make key terms easy to see and understand.[358] Several parties remarked that consumer education in this area is necessary and may help alleviate any confusion.[359] One rights holder group urged that any Federal

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buy button in electronic format, I'm not sure any consumer is expecting to resell that in the next hour."); Bridge/Disney (LA) at 155-56.

[353] Sheffner/MPAA (Cambridge) at 226-227. *See also* Adler/AAP (Cambridge) at 219-21 (observing that for antitrust reasons, decisions with respect to how to present a "buy" button could not be made collectively).

[354] PK Nov. Comments at 24-25 ("While copyright holders are under no legal obligation to sell copies of their works, they should be required to be clear if they are not selling copies at all, providing consumers with the information necessary to make their purchasing decisions wisely."); Courtney (Cambridge) at 195 ("Maybe we should stop using the word 'purchase' and 'buy' in our contracts where we're dealing with this, and actually explicitly explain, you're leasing these. You're leasing these songs, you're leasing these e-books, at best, and you can't sell them in a yard sale, and there is no e-book or MP3 used market yet."); Villasenor (LA) at 151-52 ("If there's a button that says 'buy' and a consumer presses the button and finds that he or she in fact owns nothing, I think there's a pretty reasonable argument that there's at least not a particularly forthright disclosure regarding the consumer's rights."); Ossenmacher/ReDigi (Alexandria) at 118-19.

[355] Villasenor (LA) at 151-52. *See also* John Villasenor, *Rethinking a Digital First Sale Doctrine in a Post-Kirtsaeng World: The Case for Caution*, CPI ANTITRUST CHRON., May 2013(2) at 9.

[356] Adler/AAP (Cambridge) at 221 ("it probably would make more sense for the copyright owner to inform all the distributors that these are the types of things you need to make sure that our customers . . . know."); Sheffner/MPAA (Berkeley) at 121 (stating that there can "be improvement in the way that these things are described so the consumer knows exactly what he or she is getting[,]" but also maintaining that that "doesn't mean that saying that you buy access to a movie or a piece of software or piece of music is necessarily misleading.").

[357] *See, e.g.*, Dare/Oracle (Berkeley) at 86-87; Kupferschmid/SIIA (Cambridge) at 208.

[358] AAP Jan. Comments at 5 ("to avoid any undue assumptions that eBooks must be acquired and used in exactly the same way as physical books, publishers and their retailers should strive to clarify whether eBooks are licensed or sold to consumers and make key terms easy to see and understand.").

[359] *See, e.g.*, PK Nov. Comments at 25; Villasenor (LA) at 151-52.

Government effort to examine consumer expectations and EULAs should not be limited to or focused solely on offerings of copyrighted works.[360]

C. Conclusions and Recommendations

1. Overview

The Task Force has heard that the current online marketplace provides some of the benefits traditionally provided by the first sale doctrine. Others, including the ability of a consumer to resell a purchased copy or to lend it without restriction, are not replicated.[361] Based on the evidence presented, however, it is difficult to measure the value of this loss, or to weigh it against the overall consumer benefits of today's digital offerings. At the same time, the risks to copyright owners' primary markets as described by the Copyright Office in its 2001 Report do not appear to have diminished, or to have been ameliorated by the deployment of effective new technologies. And an expanded first sale doctrine could curtail at least some of the flexibilities of new business models. Accordingly, we cannot at this time recommend extending the first sale doctrine to apply to digital transmissions of copyrighted works.

2. Benefits of the First Sale Doctrine Provided by the Current Online Marketplace

The record created by the comments and roundtable discussions on this topic indicates that the marketplace for online delivery of works is providing a number of the benefits of the first sale doctrine to varying degrees. A number of popular online services permit copies to be shared with or lent to family and friends, although sharing features do not necessarily mirror the ease of the first sale doctrine.[362] Other services offer rental of copies or access-based equivalents.[363] While they generally do not permit transfers of ownership of a digitally transmitted copy, they typically do deliver a principal benefit of secondary markets—lower prices than for the purchase of new copies.[364]

Online services also have the potential to offer advantages not available in the physical world.[365] Consumers today have many more options to obtain access to and copies of creative works in a wide variety of formats and on a wide variety of terms and price points. These include both permanent and temporary downloads and streaming services, with offerings that can be tailored to the consumer's needs and resources. As noted above, these offerings may not always be

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[360] SIIA Jan. Comments at 11.

[361] *See* text at note 233.

[362] *See* discussion *above,* Part B.2.a.i (Sharing/Lending). For example, some digital lending programs are limited to members of a household or to a 14 day time period, while a physical copy of a book under the first sale doctrine can be lent to any person for any period of time.

[363] *See* discussion *above,* Part B.2.b (Access-Based Services), p. 42.

[364] *See* discussion *above,* Part B.2.a.ii (Lower-Priced Copies), p. 41.

[365] *See* discussion *above,* Parts B.2.b (Access-Based Services), p. 42 & B.4.b (Loss of Market Flexibility), p. 52.

perfect substitutions for the first sale doctrine, but they offer options and benefits to consumers that do not exist with physical copies.

Several commenters correctly observed that copyright owners are not compelled to extend those benefits and will only do so as long as it is in their own interest.[366] But these types of offerings seem widespread, well-established as a feature of the online market, and responsive to consumer demands. The Task Force expects that copyright owners will continue to recognize that their markets will grow as they find innovative ways to meet the changing demands of consumers. As rational commercial actors, they presumably have a strong financial interest in satisfying their customers and therefore in improving the online experience through new technologies, features, and products as well as attractive pricing. Nevertheless, while a significant number of works continue to be available in physical formats, the rising trend of digital-only goods may well require future analysis of the impact on consumers of a shift from a statute-based to a permission-based regime.

3. Consumers' Inability to "Resell" Downloaded Copies

One core benefit of the first sale doctrine is not replicated in the online marketplace. A consumer who has obtained a copy of a work from a digital transmission is not entitled to sell, freely share, or give away that copy by transmitting it to a third party, as he could do in the world of physical copies. It is difficult, however, to determine the value of this lost benefit.

Little empirical evidence of the lost value to consumers was presented to the Task Force on this point. While some consumers might be interested in reselling digital files, we do not know how many, for which types of works, or what the prices would be. There is also little data from the physical world on which to base a comparison, although it is reasonable to assume that used copies cost less to consumers. The Task Force would have liked to have seen information as to how many consumers have taken advantage of the right to resell their books, CDs or DVDs, why they do so,[367] or the value of those copies.[368] Data on the savings consumers have realized from purchasing used copies also would have been useful, although it is reasonable to assume that the price of used copies (other than rare editions) is usually considerably lower than the price of new ones. This makes it difficult, based on the record, to evaluate what consumers have lost due to their inability to resell downloaded copies.

While we do not have sufficient data to conduct an authoritative cost-benefit analysis of the trade-offs between the consumer benefits from the first sale doctrine and from licensed online services, a few conclusions can be drawn. In the online marketplace, more and more consumers

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[366] *See* discussion in text *above* at p. 45 and in notes 265-268.

[367] For example, it may well be that one of the motivations for selling used copies is to eliminate the clutter caused by the accumulation of books and other objects that take up space. This motivation would be considerably reduced in the online environment.

[368] The only information provided to the Task Force appears to be a statement in the comments of ReDigi Inc. that "[a]ccording to Commerce Department figures, video rental in the United States is a $9.5 billion industry. Video game retailer GameStop (GME) reported nearly $2.4 billion in 2009 revenue from used game sales." ReDigi Nov. Comments at 4.

are gaining access to and receiving copies of creative works through licensed services that offer a variety of options at a variety of price points (including, in the case of subscription services, virtually unlimited access to large numbers of works for a monthly fee). Many of these prices appear to compare favorably to the cost of new physical goods.[369] Whether consumers who would have purchased used books, CDs, etc., but now go online to obtain copies or gain access are overall better off is not clear. (Of course, consumers still have the option to purchase used physical copies of many works, either online through merchants such as eBay or offline through a used book sale or retail outlet.)

4. Other Concerns Raised

a. Library Lending

As described above,[370] libraries have raised issues relating to licensing terms and restrictions on their ability to lend eBooks to patrons. Libraries fulfill their public interest mission by providing their patrons with a wide range of eBook choices, and should be able to continue to meet the educational and informational needs of their patrons in the digital age. Libraries are also facing increasing economic hurdles posed by declining funding with increasing requests for access.[371] On the other hand, to the extent that libraries transmit the newest eBooks and other digital materials to recipients without any limits, publishers have legitimate concerns that they could effectively become market competitors.[372]

The Task Force heard that each major publisher has a different set of terms and conditions for library eBook lending, and antitrust constraints prevent them from establishing standard practices or uniform contracts.[373] Thus, while libraries might prefer to face a uniform set of publisher policies in order to simplify administration of their lending programs, the prospects for an industry-wide outcome are slim.

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[369] *See, e.g.*, note 238 *above* (information as to comparative prices of a digital textbook and its traditional print counterpart). Additional information reflecting low prices was provided for music, *see* note 275 *above*, and motion pictures, *see* text at and in notes 252-254.

[370] *See* Part B.3.c.i (Library Lending), p. 46 *above*.

[371] "Today's public libraries are grappling with a 'new normal' of flat or decreased funding, paired with increased demand for public library technology resources." The American Library Association reports that "Twenty-three states reported cuts in state funding for public libraries from 2010–2011 to 2011–2012. For three years in a row, more than 40 % of participating states have reported decreased public library funding." *The 2012 State of America's Libraries*, AMERICAN LIBRARY ASSOCIATION, http://www.ala.org/news/mediapresscenter/americaslibraries/soal2012/public-libraries (last visited October 1, 2015).

[372] Commenters indicated that such concerns may be addressed by current licensing restrictions that limit such lending to one patron at a time. *See, e.g.* Klossner (Berkeley) at 102-03 ("I think libraries are okay with buying a single copy and loaning one, but there's a little bit of education on the patron side of why we only own one digital copy at a time."); StBeneStJohn Nov. Comments at 1. *See also* Adler (Cambridge) at 163-66 (outlining licensing arrangements). To the extent that library lending involves library patrons "willing and able to wait their turn for the limited loans and use of library materials," *see* text at note 279, the inefficiencies built into lending processes may avoid crossing the line of competing with the commercial market.

[373] See discussion in text at note 290.

It also appears that since the Green Paper was released, publishers' licensing policies have become at least somewhat more responsive to the concerns expressed by libraries. Since the last roundtable, the American Library Association has made available a table entitled "Big Five Publishers and Library Lending" which provides details of the licensing practices of the major book publishers with respect to library lending of eBooks.[374] That table indicates that the major publishers will now license their entire catalogs to libraries for e-lending. Some publishers offer perpetual licenses permitting an unlimited number of loans (sometimes limited to one user at a time), while others have limits of one or two years, or 26 or 52 loans, after which renewal would be required.

Other library concerns relate to the price and other terms under which the books are offered.[375] Although publishers assert that the terms and conditions of their licenses are designed to replicate what libraries have traditionally done with hard copies of books that they lend,[376] at least with respect to academic libraries, licensing restrictions may be more onerous in some cases than existing practices.[377]

Based on the record before it, the Task Force concludes that licensing agreements between eBook publishers and libraries are new and evolving, and we worry that early government intervention into the eBook market could skew the development of innovative and mutually beneficial arrangements. More time should be given to see whether market forces, and initiatives such as the Statement of Common Understanding noted by some library organizations, will produce desired outcomes. If over time it becomes apparent that libraries have been unable to appropriately serve their patrons due to overly restrictive terms imposed by publishers, further action may be advisable. This could involve convening library and publisher stakeholders to work out statements of best practices, or amending the Copyright Act to address the library concerns raised here.[378]

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[374] Robert C. Maier, *Big Five Publishers and Library Lending*, AMERICAN LIBRARY ASSOCIATION, http://www.americanlibrariesmagazine.org/wp-content/uploads/2015/04/BigFiveEbookTerms042215.pdf (last updated Apr. 22, 2015).

[375] An August 2014 article in *American Libraries* suggests that while "all of the Big Five publishers now offer their full ebook catalogs to public libraries[,] . . . the bad news continues to be price, loan limits, and consortium access." Rob Maier, *Macmillan's Full Catalog of Ebooks Now Available to Public Libraries*, AMERICAN LIBRARY ASSOCIATION, (Aug. 4, 2014), http://americanlibrariesmagazine.org/blogs/e-content/macmillans-full-catalog-of-ebooks-now-available-to-public-libraries/.

[376] *See* discussion at note 291.

[377] *See* discussion at notes 287-288.

[378] *See Hearing: The Register's Perspective on Copyright Review Before The Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 114th Cong., 1st Sess. 14-15 (April 29, 2015) (statement of Maria A. Pallante, United States Register of Copyrights and Director of the U.S. Copyright Office), *available* at http://copyright.gov/laws/testimonies/042915-testimony-pallante.pdf (stating that the Office is "ready to update the exception that provides a safe harbor for libraries and archives" and that Section 108 "must be completely overhauled.").

b. Preservation and Privacy

As to the assertions by some commenters that the first sale doctrine serves additional purposes such as preservation and privacy,[379] the Task Force agrees that these are important goals. But while they may be furthered in some circumstances by application of the first sale doctrine, we do not believe that they are central to the doctrine's core purpose: to permit the alienation of tangible personal property.[380] Nor has the record in the proceeding shown that extending first sale to digital transmissions is the best way to secure their protection.

As technologies continue to evolve and new distribution mechanisms supplant the old, the preservation of digital content raises challenges. To some degree, technology may provide new solutions, but libraries and archives play a critical role in preserving digital content for posterity and transferring it to new formats when the original ones become obsolete.[381] The Task Force recognizes the possibility that some licensing restrictions impede libraries' ability to fulfill that mission. As noted in the Green Paper, library preservation activities are addressed in Section 108 of the Copyright Act, and the Copyright Office and the Library of Congress have been actively engaged in considering its revision.[382] The Task Force recommends that issues relating to libraries' ability to preserve eBooks and other works in digital formats should be considered in that context, but recognizes the need to continue to monitor legal and marketplace developments to ensure that library lending and preservation concerns are addressed.

Outside the context of libraries and archives, the first sale doctrine may also have the effect of enhancing preservation, and it will continue to play this role in the physical world. The real challenges for digital preservation go well beyond first sale and the ability to transfer copies. Some of the problems identified in this proceeding relate to the state of technology: copies residing on devices that become obsolete and distribution depending on technologies that cease to function.[383] Other problems are a consequence of the larger digital ecosystem, and the fact that entities who at one time hold the technological key to granting access to services or works may go out of business or disappear from the marketplace, taking that technology with them.[384]

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[379] *See above* at Parts B.3.c.ii (Preservation), p. 48 & iii (Privacy), p. 49.

[380] *See* Green Paper at 35 (first sale doctrine "originated to ensure a consumer's control over her tangible physical property"); the Copyright Office Report at 86 ("The tangible nature of the copy is not a mere relic of a bygone technology. It is a defining element of the first sale doctrine and critical to its rationale. This is because the first sale doctrine is an outgrowth of the distinction between ownership of intangible intellectual property (the copyright) and ownership of tangible personal property (the copy)."). While other uses by the owner of a copy, such as modifying, repairing and displaying it, *see* PK Nov. Comments at 16, may be privileges that ordinarily accompany ownership of chattels, there is nothing in the first sale doctrine itself or in the text of section 109(a) that addresses them.

[381] The Task Force notes that the application of fair use to library activities and the digitization of library collections has recently been the subject of attention in the courts. *See, e.g.*, *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. Oct. 16, 2015); *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

[382] Green Paper at 24. *See above* note 378.

[383] *See* note 298 and accompanying text

[384] This problem may be ameliorated to at least some extent if orphan works legislation is adopted. *See* U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION: A REPORT OF THE REGISTER OF COPYRIGHTS (2015), *available at* http://copyright.gov/orphan/reports/orphan-works2015.pdf (last visited Oct. 16, 2015); U.S. COPYRIGHT

Whether the recipient of a digitally transmitted copy owns or merely possesses that copy seems unlikely, however, to determine whether that copy will be preserved. And to the extent that the existence of multiple copies in multiple locations in itself makes it more likely that the work will be preserved,[385] this could be said of any proliferation of copies.The preservation of personal collections may be better answered by other doctrines that are outside the scope of first sale, but this issue merits monitoring as the market evolves.

As to privacy, the Task Force is actively engaged in reviewing the nexus between privacy policy and innovation in the Internet economy.[386] We recognize that online commerce presents new risks relating to personal privacy, such as the possibility that licensing of eBooks could permit the identification of individual readers, including in the library context. Almost all states in the country have library-specific privacy laws,[387] and we expect that those laws will weigh into the on-going conversations between publishers and the library community on the relationship of licensor vendor data and licensing terms.[388] Outside of the library context, this issue is not specific to application of the first sale doctrine, but involves the broader question of how privacy is maintained in the context of online transactions generally.[389] Based on the record before it, the Task Force does not at this time have specific recommendations in the absence of broader progress on privacy in the online context.

c. Sales of Consumer Devices and Products

As noted above,[390] some commenters raised issues relating to the sale of consumer products, such as automobiles, refrigerators, and thermostats, many of which now operate with the assistance of embedded software. Their concern was that manufacturers might assert that the software in the consumer product was licensed rather than sold, casting doubt on the consumer's ability to resell or repair the product. A similar concern was raised about the ability of the owner of a computer or other device onto which digital copies of copyrighted works had been downloaded to transfer those copies as part and parcel of a resale of the device. Although neither of these issues relate to our inquiry on digital transmissions of copies, we make a few observations.

OFFICE, REPORT ON ORPHAN WORKS, A REPORT OF THE REGISTER OF COPYRIGHTS 27, 28-29 (2006), *available at* http://copyright.gov/orphan/orphan-report-full.pdf.

[385] PK Nov. Comments at 14.

[386] *See Privacy*, NTIA, http://www.ntia.doc.gov/category/privacy (last visited Oct 16, 2015).

[387] *State Privacy Laws Regarding Library Records*, AMERICAN LIBRARY ASSOCIATION, http://www.ala.org/advocacy/privacyconfidentiality/privacy/stateprivacy (last visited October 1, 2015).

[388] The Task Force will continue to monitor this issue in conjunction with the Institute of Museum and Library Services.

[389] As one professor observed, if there is any sacrifice in privacy by a recipient of a digital download, it is not the result of nonapplication of the first sale doctrine but rather the nature of the delivery technology. Villasenor (Alexandria) at 104-05.

[390] *See above* Part B.3.c.iv (Issues Relating to Sales of Consumer Devices), p 23.

The first sale doctrine permits the owner of a lawfully made copy to resell or give away that copy. That privilege extends to lawful copies that are embedded in a device owned by a consumer, whether the copy was already installed on the device at the time the consumer acquired it or was lawfully downloaded by the consumer after the consumer acquired the device, so long as the copy is transferred as part and parcel of a transfer of the device itself.[391] As noted in the Copyright Office Report, when a work has been lawfully downloaded onto a hard drive, "the first sale doctrine applies fully with respect to the tangible object (e.g., the user's hard drive) in which the work is embodied."[392]

However, as noted above, copyright owners sometimes make digital copies available pursuant to licenses that characterize the transaction as something other than a sale.[393] The Task Force did not hear evidence that licenses purporting to restrict a consumer's ability to resell have been used with respect to embedded software that operates a functional product, other than a computer or related equipment.[394] Thus, the record before us does not establish that the kinds of consumer products identified above are currently sold subject to such licenses. We do believe, however, that the alienability of everyday functional products is an important issue for consumers. If the market develops so that such devices are commonly sold with restrictions on subsequent purchasers' use of necessary software, further attention would be warranted.

In the case of devices containing downloads of copies of works, when the downloading is performed under a license, there may be policy reasons not to allow resale. As noted above,[395] it is common for licenses for music, books, and movies to permit the licensee to make multiple copies on multiple devices for her own personal use, or to share copies with others. Such licenses may also forbid the licensee to transfer the downloaded copy, even as part of a transfer of the consumer product onto which the copy was downloaded. Such a restriction is not unreasonable in a case where the licensee has, pursuant to the license, made or shared additional copies of the downloaded work. The licensee has gained the benefit of his bargain, exercising the privilege to make additional copies, in exchange for the inability to transfer copies of the downloaded work when he sells the consumer product. And unlike a sale of a physical copy, the sale of the consumer product onto which a copy was downloaded would not deprive the licensee of all of his copies of the downloaded work.

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[391] Software and music files that were downloaded illegally cannot be resold because they were not lawfully made. *See* H.R. REP. 94-1476 at 79 (1976) ("To come within the scope of section 109(a), a copy or phonorecord must have been 'lawfully made under this title,' though not necessarily with the copyright owner's authorization. For example, any resale of an illegally 'pirated' phonorecord would be an infringement, but the disposition of a phonorecord legally made under the compulsory licensing provisions of section 115 would not."), *available at* http://www.copyright.gov/history/law/clrev_94-1476.pdf.

[392] The Copyright Office Report at xviii, 78, 87, 100 ("a lawfully made tangible copy of a digitally downloaded work, such as a work downloaded to a floppy disk, Zip™ disk, or CD-RW, is clearly subject to section 109.").

[393] As noted in the Green Paper, to the extent that such licensing practices permit licensors to avoid application of the first sale doctrine, the result might be to render the doctrine meaningless for works that are only offered by means of such licenses. Green Paper at 36.

[394] *See* text at note 309.

[395] *See* notes 232-236.

The Task Force takes note of the observation that regardless of the legal consequences, it is not realistic to expect that someone who gives away an old device along with copies of works loaded onto it will seek permission[396] from all of the copyright owners (but as a practical matter someone who gives away such a device can avoid any potential liability by simply deleting the copies it contains). Of course, the likelihood that any copyright owner would assert a claim of infringement based upon such a low-value gift, or even be aware of it (as distinguished from commercial sales of devices along with loaded content), is low.

Given all of these considerations, the Task Force concludes that, at this time, the case has not been made in the record to change the law to address the sale of products or devices. Moreover, some of the concerns expressed may be better addressed through sections of the Copyright Act other than first sale.[397]

5. The Risks of Extending the First Sale Doctrine to Digital Transmissions

a. Potential Damage to Primary Markets

Numerous commenters described the potential harm to markets for creative works if copies could be transmitted digitally from one purchaser to other potential purchasers.[398] Many stressed the continued validity of the Copyright Office's conclusions that extending the first sale doctrine to digital transmissions would have harmful effects on primary markets due to the quality of digital copies and the efficient means of instantaneous, worldwide online dissemination.[399] As the Copyright Office noted:

> Physical copies of works degrade with time and use, making used copies less desirable than new ones. Digital information does not degrade, and can be reproduced perfectly on a recipient's computer. The "used" copy is just as desirable as (in fact, is indistinguishable from) a new copy of the same work. Time, space, effort and cost no longer act as barriers to the movement of copies, since digital copies can be transmitted nearly instantaneously anywhere in the world with minimal effort and negligible cost. The need to transport physical

[396] *See* note 311.

[397] The repair issue in particular could be addressed in the context of sections 117 or 1201. Section 117 provides for certain limitations on exclusive rights relating to computer programs, including for purposes of machine maintenance and repair. Section 1201, the prohibition on circumventing technological measures that protect copyrighted works, is subject to a number of exceptions and limitations, including exceptions adopted every three years in a rulemaking proceeding conducted by the Copyright Office. 17 U.S.C. § 1201(a) (1) (B)-(D). The sixth triennial rulemaking recently concluded, and the final rule includes an exemption for computer programs that control motorized land vehicles for purposes of diagnosis, repair and modification of the vehicle. *See* Exemptions to Prohibition Against Circumvention, 37 C.F.R. § 201.40(b)(6) (2015), *available at* http://www.ecfr.gov/cgi-bin/text-idx?SID=d422a7163d1dd24d7c9c17f87254a03d&mc=true&node=se37.1.201_140&rgn=div8; Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Proposed Rulemaking, 79 Fed. Reg. 73856, 73868-69 (Dec. 12, 2014), *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-12-12/pdf/2014-29237.pdf.

[398] *See* p. 51 *above*, Part B.4.a (Potential Effect on Primary Markets).

[399] *See id.*

> copies of works, which acts as a natural brake on the effect of resales on the copyright owner's market, no longer exists in the realm of digital transmissions.[400]

In the Green Paper, we asked whether there have been any changes in technological capabilities that would alter any of the conclusions reached by the Copyright Office in 2001. The evidence presented to us indicates that the technology to effectively prevent the retention of copies after a transmission has not yet become a practical reality.[401] If this does come to pass, it may affect our analysis of the impact on primary markets. In any event, while such a technology might dampen some of the negative effect on the primary market by avoiding a multiplication of copies emanating from a single source, it would not address the issues raised by the Copyright Office Report in the passage quoted above.[402]

Based on the record, the Task Force concludes that the Copyright Office's 2001 observations are still valid. Applying Section 109 to digital transmissions could risk causing substantial harm to the primary market for creative works (and to the income of creators as well as copyright owners).

b. Loss of Flexibility

The Task Force is persuaded that an overly broad application of the first sale doctrine could also impede the continued development of the growing range of flexible new licensing models and variable pricing. Considerable evidence was presented that such models are becoming more and more prevalent and that they provide real value to consumers above and beyond traditional ownership models.

If the first sale doctrine were extended to apply to these new offerings to the extent they involve transfers of ownership (either on their face or as interpreted by the courts), or by expanding it to cover at least some license arrangements, it could lessen the willingness of copyright owners to continue to offer the current range of options of different uses on different terms. Rather, they would presumably need to price their offerings to take into account the purchaser's ability to resell and the resulting impact on their markets.

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[400] The Copyright Office Report at 82-83 (citation omitted). Those conclusions were quoted with approval by the U.S. District Court for the Southern District of New York in the only reported case to address the issue. *Capitol Records, LLC v. ReDigi, Inc*, 934 F. Supp.2d 640, 656 (S.D.N.Y. 2013).

[401] *See* Part B.5, ("Forward and Delete" Technology), p. 52 *above*. However, such a technology and new business models may yet emerge. We note that several major companies have already filed patents intended to enable a digital resale marketplace. *See* David Streitfeld, *Imagining a Swap Meet for eBooks and Music*, N.Y. Times, Mar. 7, 2013, *available at* http://www nytimes.com/2013/03/08/technology/revolution-in-the-resale-of-digital-books-and-music html?_r=2. Amazon has secured at least two patents for a system that would enable resale of digital goods. The latest patent from June 2015 is for "a content management system [that] couples DRM protection of content items with a digital content store to allow content items to be transferred or resold from one user to another." U.S. Patent No. 9,064,276 (filed May 24, 2011), *available at* http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=%2Fnetahtml%2FPTO%2Fsrchnum.htm&r=1&f=G&l=50&s1=9064276.PN.&OS=PN/9064276&RS=PN/9064276.

[402] The Copyright Office Report at 98-100.

6. The Balance of Benefits and Risks

The ultimate question is whether there is sufficient evidence of a real-world problem to justify the risks involved in expanding the application of the first sale doctrine to digital transmissions at this time.

In the current online marketplace, consumers appear to have retained some benefits that parallel those provided by the first sale doctrine. These include some ability to share with friends and family and to try before buying, as well as opportunities to enjoy works at prices lower than purchasing new physical copies. In the digital marketplace, consumers are also able to enjoy greater flexibility and choice, including with respect to pricing. This point was widely acknowledged by commenters across the board, despite understandable concerns expressed by some about whether these benefits are permanent and the degree of control retained by copyright owners. And of course this is not an either/or choice—physical markets, subject to first sale, continue to exist as well for most if not all types of works.

Other benefits have undeniably been lost, primarily relating to the inability to resell copies or establish a secondary market.[403] It is difficult, however, to evaluate the extent of that loss, given the lack of evidence of consumer desires and any comparison of pricing in the secondary physical market to low-priced online offerings. In evaluating the total mix, the Task Force cannot conclude that there has been a substantial net economic loss for consumers at this point in time.

At the same time, we have been presented with persuasive arguments that there would be a significant risk of harm to the market for creative works if the first sale doctrine were extended to digital transmissions. There is the potential for substitution in the market from perfect copies, with one-to-one substitution of customers; and the potential multiplication of copies is not today clearly avoidable through the use of technology. We do not believe that the compromises put forward by commenters would adequately address these problems. Most included as a necessary component the automatic deletion of the transmitter's copy, which does not at this point seem feasible and which does not address the harm from "used" digitally transmitted copies competing in the marketplace with new copies. Others proposed expanding the doctrine to lawful possessors as well as owners of copies, which would not address the concerns about proliferation of copies and which would expand the first sale doctrine well beyond its roots in the alienability of personal property.[404] And distinguishing between categories of works based on consumer expectations seems a difficult task,especially given the dearth of evidence on this point.

Based on the record before us, The Task Force concludes that amending the law is not advisable at this time. We have seen insufficient evidence to show that there has been a change in

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[403] As explained *above* at Part B.3.b (Loss of Resale and Lending Markets), p. 46, other negatives identified by commenters either may be being resolved in the marketplace or do not have a clear causal relationship to the first sale doctrine.

[404] *See, e.g.* CIS-EFF Nov. Comments at 17-18; ORI Nov. Comments at 5. To the extent that this proposal is based on the increasing use of licensing, when a court construes a purported license to in fact constitute a sale, the first sale doctrine will apply. Moreover, the proposed solution would go far beyond addressing any issues relating to licensing. If the first sale doctrine were to apply to all "possessors" of a copy, as asserted by these stakeholders, then someone who had borrowed a copy would be entitled to sell that copy.

circumstances since the Report in 2001—if anything, the change has been for the better in terms of the consumer experience. However, given that this conclusion is based in part on existing market conditions, we also believe that developments should continue to be monitored to ensure that the marketplace continues to evolve in ways that benefit consumers. If that is not the case, there will be opportunities to address changed circumstances in the future.

7. Improve Consumer Information and Awareness

The Task Force does believe that there is a need to provide consumers with more clarity about the nature of the transactions they enter into when they download copies of works. As one consumer advocate said, "While copyright holders are under no legal obligation to sell copies of their works, they should be required to be clear if they are not selling copies at all, providing consumers with the information necessary to make their purchasing decisions wisely."[405]

It does not appear that consumers have a clear understanding whether they own or license the products and services they purchase online due in part to the length and opacity of most EULAs, the labelling of the "buy" button, and the lack of clear and conspicuous information regarding ownership status on websites.[406] The Task Force believes that consumers would benefit from more information on the nature of the transactions they enter into, including whether they are paying for access to content or for ownership of a copy, in order to instill greater confidence and enhance participation in the online marketplace.[407] No solution will likely ever entice consumers to read the fine print of EULAs, but online services can find other ways to inform consumers of the salient features of those licenses.

There was general agreement that few consumers read the EULAs that govern their relationship with the online service, and many asserted that EULAs are difficult for consumers to understand. This situation is hardly unique to content delivery services; consumers encounter lengthy EULAs in a wide variety of activities.[408] One practice that was the subject of considerable discussion does appear to be specific to the online delivery of creative works, however: the use of the "buy" button (or buttons with similar designations such as "purchase" or "own") in cases where no purchase is taking place. Although the record before us is devoid of any actual evidence as to what consumers understand when they click on the "buy" button, common sense indicates that some significant group believes that ownership of a copy is being transferred to them.[409]

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[405] PK Nov. Comments at 24-25.

[406] Meghan Neal, *Do You Ever Own your eBooks*, MOTHERBOARD (Aug. 19, 2013), http://motherboard.vice.com/blog/do-you-ever-own-your-e-books. *But see* CA Jan. Comments at 15 (discussing Amazon's eBook service as a benefit of licensing).

[407] Online consumer protection and education is in the legal spotlight. For example, the U.S. Court of Appeals for the Ninth Circuit recently held that if an online merchant has an arbitration agreement or other important terms and conditions on its website, those legal notices need to be in a place where the user is expected to find them. *See Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1178-79 (9th Cir. 2014).

[408] *See* Part B.7 (Consumer Expectations and Contract Terms), p. 55 *above*.

[409] That is, at least, a reasonable inference in cases where a copy of a work is transmitted to the consumer. In contrast, when a consumer is paying for access through a streaming service, even when presented with a "buy"

In any event, there is no reason why an online service that provides copies of works to consumers must use the word "buy" to describe the act of payment and downloading of a copy. There are alternatives that should be just as workable. It should be possible for online services to find an alternative for transactions that are not sales—i.e., that do not involve transfers of ownership.

With that in mind, the Task Force recommends the creation of a multistakeholder process to establish best practices in communications to consumers in connection with online transactions involving creative works. There are two related tasks that such a process could undertake in order to clarify what consumers may do with copies obtained by means of digital transmissions. The first, and simplest, task would be to arrive at a list of alternatives to the "buy" button. The focus here would be on labels that communicate in a word or two what it is that the consumer is paying for without affirmatively suggesting that he is obtaining ownership of a copy. A list of terms that should not be used, presumably with "buy," "own," and "purchase" at the top of the list, would also be a useful pursuit. Second, the multistakeholder group could establish best practices on how to inform consumers clearly and succinctly about the terms of EULAs regarding whether they "own" the copies provided and what they may do with them. One approach might be to produce a standardized form of notice, placed in or accessed from a conspicuous location on an e-commerce website or app, advising consumers in plain language about the terms in a license that cover the disposition of digitally transmitted copies.

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button, he probably realizes that all that he is buying is access, and not a property interest or even possession (much like paying for HBO or cable).

V. Assessing Statutory Damage Awards

A. Introduction

In the Green Paper, the Task Force explained that the Copyright Act allows plaintiffs to seek statutory damages for copyright infringement as an alternative to actual damages, and that they have become increasingly important in cases of online infringement, where the scope of the infringing use may not be ascertainable.[410]

The Task Force observed that concerns had been raised about the application of statutory damages against individual file-sharers who make infringing content available online, and against online services, which can be secondarily liable for infringement of large numbers of works.[411] With respect to individuals, we observed that the size of the awards in two infringement cases involving file-sharers had led to calls for changes in the levels of statutory damages.[412] With respect to online service providers, we described a debate between those who argue that the prospect of large statutory damages awards chill investment and innovation and those who assert that this prospect is necessary to deter infringing services that have the potential to cause great financial harm.[413]

The Task Force accordingly sought comments and convened public discussions regarding the application of statutory damages in the contexts of (1) individual file-sharers and (2) secondary liability for large-scale online infringement. Below we review the public commentary and set forth three recommendations for amendments to the Copyright Act.

B. Stakeholder Views

1. Individual File-Sharers

a. The Level of Statutory Damages

The Task Force heard differing viewpoints about whether the full range of statutory damages permitted under current law should be applied to individual file-sharers. Many commenters addressed the perceived fairness of enforcement activities vis-à-vis individual defendants generally, including whether the possibility of large statutory damages awards impedes individuals' ability to defend themselves or gives rise to abusive tactics. The Task Force also received proposals that addressed other concerns about litigation against individual file-sharers.

Much of the discussion focused on the only two such cases with reported trial verdicts, both of

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[410] Green Paper at 51.

[411] *Id.* at 48-50.

[412] *Id.*

[413] *Id.* at 52.

which resulted in high statutory damages awards that received considerable publicity.[414]

Those favoring an adjustment of the permissible range of statutory damages pointed to the large jury awards in these cases as examples of the "unpredictability and irrationality" of the statutory damages regime.[415] According to those commenters, individual file-sharers who infringe a handful of works for private, non-commercial purposes should not be required to pay damages that are disproportionate to the market value of the works.[416] Nor, in their view, does it make sense to impose large damages awards on individuals who cannot pay anywhere near the amounts awarded.[417] Some argued that the awards in these cases "exceed[ed] any rational measure of deterrence," noting potential due process concerns.[418]

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[414] The jury award in *Tenenbaum* was for $675,000 ($22,500 for each of 30 infringed works). *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85 (D. Mass. 2010), *aff'd in part, vacated in part, rev'd in part*, 660 F.3d 487 (1st Cir. 2011), *remanded to* 2012 U.S. Dist. LEXIS 119243 (D. Mass.Aug. 23, 2012), *aff'd by* 719 F.3d 67 (1st Cir. 2013). The three trials in *Thomas* resulted in awards of $222,000, $1.92 million and $1.5 million ($9,250, $80,000 and $62,500 per work), respectively. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008); *Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1049 (D. Minn. 2010); *Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1050 (D. Minn. 2010). It appears that only a few file-sharing cases against individuals have been litigated to the point where statutory damages have been awarded, and in most cases those awards have been made as part of default judgments against defendants who did not appear. *See* below note 559 (statutory damages awards against peer-to-peer file-sharers in cases culminating in default judgments typically range between $750 and $6,500 per work). Those cases that settled appear to have involved much lower amounts. *See* Menell Jan. Comments at 26 (noting that the "overwhelming majority of defendants" sued by the RIAA settled for between $3,000 and $5,000). *See also* note 443 and accompanying text below (asserting settlement amounts range from $2,000 to $10,000).

[415] CIS/EFF Nov. Comments at 20.

[416] *See, e.g.* PK Nov. Comments at 30; CDT Nov. Comments at 7 ("awards of hundreds or thousands of times the value of the infringed works raise serious questions"); Menell Jan. Comments at 67.

[417] *See* CEA Nov. Comments at 4 ("some of the most publicized judgments are far in excess of what defendants are able to pay, which again raises questions about the marginal deterrence value of these massive sanctions") & n.15; Coleman (Cambridge) at 103-104 ("courts should consider or instruct juries to consider the ability to pay, because what's punitive for me and what's punitive for some very wealthy person or some very poor person are three different things."); CDT Nov. Comments at 7-8 ("[B]eyond a certain point, higher and higher damage awards likely have vanishingly small marginal impact on deterrence . . . [f]or individuals, damages on the measures of hundreds of thousands of dollars are likely well past the point at which additional damages cease to achieve additional deterrence."); CIS/EFF Jan. Comments at 2 (citing *The Scope of Copyright Protection: Hearing Before the S. Comm. On Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 12-13 (2014) (statement of David Nimmer, Professor from Practice, UCLA School of Law, Of Counsel, Irell & Manella, LLP, Los Angeles)). Public Knowledge also noted the significant economic impact statutory damage awards may have on individual infringers. *See* Griffin/PK (Cambridge) at 94.

[418] CIS/EFF Nov. Comments at 20. *See also* CIS/EFF Jan. Comments at 1 ("[l]acking any explicit connection to actual harm, or other guidelines for consistent application, damage awards are often excessive beyond any reasonable measure of either compensation or deterrence"); CCIA Nov. Comments at 4 (questioning the "additional marginal deterrence . . .achieved by multiplying judgments tenfold"); Public Knowledge Nov. Comments at 30 & n.63 and accompanying text (citing scholarly commentary and cases raising potential due process concerns); CCIA Nov. Comments at n.12 (listing cases in which federal judges questioned awards); Menell Jan. Comments at 29.

Those arguing against any changes reasoned that the statutory damages system is flexible enough to accommodate appropriate remedies for noncommercial individual actors.[419] One commenter stated that the status of the individual, or the activity in which he is engaged, should be a factor for the court to consider in determining where within the range of statutory damages the award should fall: if the activity is noncommercial, the award should fall lower in the range; if it is for-profit and commercial, the award should fall higher in the range.[420] In defending the potentially high awards in file-sharing cases, commenters pointed out that one individual can do a lot of harm even if the infringing activity was not commercial, especially in the case of pre-release works.[421] They noted that the defendants in the two cited cases were not merely downloading copyrighted works but also were found liable for uploading and mass distribution.[422] Moreover, some added that the defendants were found to have lied about their activities and continued to engage in illegal file-sharing even after receiving notice of their infringing behavior, and that both the juries and appellate courts in those cases determined that the statutory damages awarded were appropriate and justified.[423] It was pointed out that in recent cases involving default judgments against file-sharers, courts have rendered judgments "on the lower end of the allowable infringement scale."[424]

Several stakeholders argued that the amounts awarded as statutory damages ought to have some correlation to actual damages.[425] Yet others stressed that statutory damages are available in part because of the difficulty of proving the amount of harm. Independent filmmakers pointed out that damages for copyright infringement are difficult to calculate due to lack of adequate data from infringers, who do not typically keep records of their illegal reproductions or sales.[426] Another commenter stated that "[t]his is particularly true when you're looking at online infringements where a single case of uploading makes works available to the entire Internet population without authorization."[427] One noted the Eighth Circuit's statement that "Congress was well aware of the threat of noncommercial copyright infringement when it established the

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[419] CA Jan. Comments at 21; Borkowski (LA) at 23-24; Tepp (Berkeley) at 160-61; Sheffner/MPAA (Nashville) at 15-16.

[420] Sheffner/MPAA (Nashville) at 15-16.

[421] *See* Aistars/CA (Alexandria) at 33-34, Tepp (Alexandria) at 72-73, Sheffner/MPAA (Nashville) at 29-30; Stilwell (LA) at 57-58 ("If an individual is leaking a copyrighted work before its street date, it causes substantial harm, and the courts should have the present level of discretion to address the really bad actor individuals[.]").

[422] CA Jan. Comments at 22 (stating that the award reflected "[Tenenbaum's] own admission . . . that he had distributed thousands of recordings beyond the thirty at issue and . . . that [he] was not simply downloading but also uploading and making the songs accessible to the entire internet").

[423] ASCAP *et al*. Jan. Comments at 7; RIAA Nov. Comments at 9.

[424] Aistars/CA (Alexandria) at 63.

[425] CIS/EFF Nov. Comments at 25 (proposing a correlation between actual damages and statutory damages, or requiring that plaintiffs show why actual damages cannot be proven); Menell Jan. Comments at 78. Additional proposals are listed in Part 3 (Statutory Damages) II.B.3, *below*.

[426] IFTA Nov. Comments at 4.

[427] Aistars/CA (Alexandria) at 32-33. *See also* Tepp (Alexandria) at 28.

lower end of the range."[428] Several observed that statutory damages need not bear any relationship to actual damages and that deterrence of future infringement by other potential infringers as well as the defendant is an important purpose of statutory damages awards.[429] On the other hand, one commenter wrote that "no commenter provides any evidence that damages are difficult or impossible to prove in every copyright suit, or even most," and argued that modern civil discovery tools can help calculate actual harm.[430]

b. Inconsistencies in Application

A number of commenters asserted that because there is no specific set of factors or guidelines to be used in calculating statutory damages awards, troubling inconsistencies in their levels can arise.[431] One commenter pointed out that damages are "untethered from anything."[432] While few examples involving file sharing were offered, the four different verdicts in the two cases discussed above represent a wide array of awards based upon similar or identical facts.[433]

Copyright owner groups as well as consumer advocates and other stakeholders suggested that it would be helpful to provide courts with guidance on factors to consider when setting statutory damages awards.[434] Several noted that although some model jury instructions already exist,[435] they are not being used in a consistent manner or in every circuit.[436]

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[428] CA Jan. Comments at 21 (quoting *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 908-09 (8th Cir. 2012)).

[429] Sheffner/MPAA (Berkeley) at 137; Marks/RIAA (Nashville) at 17; Aistars (Alexandria) at 32-34; CA Jan. Comments at 19-20, 22-23; RIAA Nov. Comments at 9-11; SIAA Jan. Comments at 17, 19-20; AAP Nov. Comments at 9-10; MPAA Nov. Comments at 7.

[430] CIS/EFF Jan. Comments at 2 (emphasis in original). *See also id*. at 3 ("We believe reliable research will show that proof of damages (to the degree ordinarily required by courts) will be readily available in most copyright cases, and that such proof is not categorically more difficult in copyright cases. If so, statutory damages should be explicitly tied to actual harm, or a reasonable multiple in cases of willful infringement, perhaps with an exception for cases where proof of damages is truly and demonstrably impossible to obtain.").

[431] CCIA Nov. Comments at 6 (noting that "[c]ourts could benefit from more guidance for calculating damage awards than merely stating, as 17 U.S.C. §504(c)(1) does, 'as the court considers just.'"). *See also* Samuelson and Wheatland, *Statutory Damages, a Remedy in Need of Reform* , 51 WM. & MARY L. REV. 439, 501-09 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1375604 (proposing "a set of principles for awarding statutory damages in copyright cases"); CIS/EFF Jan. Comments at 1-4 (stating that absent statutory guidelines and consistent caselaw, "copyright litigation becomes a high-stakes casino game").

[432] Sohn/CDT (Alexandria) at 25 ("[statutory] damages . . . aren't tied to the amount of harm caused. They aren't tied in any way to the amount of unjust profits or any realistic assessment of what an appropriate deterrent would be.").

[433] *See above* note 414 and accompanying text. *See also* Pamela Samuelson, Phil Hill &Tara Wheatland, *Statutory Damages: A Rarity in Copyright Laws Internationally, But For How Long?* 60 J. COPYRIGHT SOC'Y 529, 553 & n.101 (Summer 2013) (citing cases to illustrate the point that even identical fact patterns can result in different award amounts) (referenced by CEA Nov. Comments at 3 n.12; DiMA Nov. Comments at 8 n.18).

[434] *See, e.g.*, RIAA Nov. Comments at 11; DiMA Nov. Comments at 9 ("[P]olicymakers should consider at a minimum enacting mandatory guidelines that would outline the proper factors that courts should consider when imposing statutory damage awards."); CIS/EFF Nov. Comments at 27 ("Congress should enact a set of guidelines for judges and juries in setting statutory damage amounts. Such guidelines would make damages awards more

c. Litigation Abuse

Several commenters claimed that the potential high levels of statutory damages are linked to troubling enforcement tactics, often at the expense of individual defendants.[437] In their view, the statutory damages regime has helped foster a "nationwide plague of lawsuit abuse over the past three years" by entities that they label "copyright trolls."[438] They pointed to reports that attorneys representing copyright holders have filed hundreds of lawsuits against tens of thousands of anonymous Internet users,[439] representing a substantial percentage of copyright suits filed in the federal courts in recent years.[440] According to the commenters, these cases are rarely if ever litigated; instead, attorneys file "boilerplate complaints based on a modicum of evidence, calculated to maximize settlement profits by minimizing costs and effort"[441] and use the courts' subpoena power to identify Internet users, often in multiparty John Doe actions.[442] Then, commenters allege, they engage in a campaign of threats of high potential damages and harassment to coerce their targets into paying settlements of $2,000 to $10,000.[443] This is a

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predictable, and predictability would make the law a better guide for public behavior, allowing users of copyrighted works to better assess risk and act accordingly."); Samuelson (Berkeley) at 157.

[435] *See below* note 521.

[436] Perzanowski (Nashville) at 35-36 ("Sometimes [juries] are given guidance, sometimes there are factors that are helpful. That's not always the case, right? And so if we think these factors are useful, maybe one thing that we should do is talk about building those factors not into jury instructions, but building them into the statute."); Sheffner/MPAA (Berkeley) at 154-55 (observing that juries in some circuits are "given a number of factors" and that the jury system "is sometimes unpredictable").

[437] *See, e.g.* Menell Jan. Comments at 64 ("Many of those who continue to wield the statutory damage cudgel are widely viewed as opportunists looking for undeserved windfalls."); CDT Nov. Comments at 8; Bridges Nov. Comments at 1-12.

[438] CIS/EFF Nov. Comments at 21.

[439] Stoltz/EFF (LA) at 43 (noting that "multi-defendant John Doe lawsuits" accounted for "one-third of all copyright suits filed in the United States in 2013") (citing Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 IOWA L. REV. 1105, 1108-09 (2015)); Internet Association Nov. Comments at 4 (citing James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV.79, 91 (2012) ("Nearly 100,000 Does were named in copyright lawsuits over a period of thirteen months, starting from January 1, 2010")); ICC Nov. Comments at 4.

[440] *See* Menell Jan. Comments at 32-33 (noting lawsuits against thousands of porn file-sharers). *See also* Sag, note 439 *above*, at 117 ("[Multi-defendant John Doe" copyright lawsuits] were almost non-existent ten years ago. As of 2013, they were the majority of filings in 19 of the 92 federal district courts.").

[441] CIS/EFF Nov. Comments at 21 (quoting *Ingenuity 13 LLC v John Doe,* No 2:12-cv-8333ODW, 2013 U.S. Dist. LEXIS 64564 (C.D. Cal. May 6, 2013) (issuing sanctions against principals of Prenda Law)). *See also* Menell Jan. Comments at 33 (quoting court's description of lawsuits that are "essentially an extortion scheme" in *Malibu Media, LLC v. John Does 1 through 10*, 2012 WL 5382304 *3 (C.D. Cal. 2012)).

[442] In John Doe actions, defendants are identified initially as "John Doe" because their actual identity is unknown. *See John Doe Definition,* DICTIONARY.COM, http://dictionary.reference.com/browse/john-doe (last visited Oct. 28, 2015). For example, Prenda filed suit against over 1,000 John Does in a single case seeking to obtain identifying information about the defendants. *See* Bridges Nov. Comments at 11.

[443] CIS/EFF Nov. Comments at 21. *See* Bridges Comments at 4-10 (many accused infringers capitulate to demand letters to avoid the risks and costs associated with litigation); CDT Comments at 8 (asserting that the current statutory damages regime "can lead to a 'shakedown' dynamic"); NMR Nov. Comments at 24 ("This has created a

particular concern with respect to suits about copyrights covering adult content, where the Task Force has noted a large number of settlements that may have been motivated in part by the defendants' desire to avoid having their names associated with such content.[444] Such "predatory" enforcement may contribute to a negative public image of copyright.[445]

This behavior was characterized as the product of a "litigation business model where a plaintiff uses copyright law 'not to protect its property from unlicensed use, but rather to generate profit from use even in the absence of articulable harm to' the plaintiff."[446] One commenter stated that "[h]olders of low-value copyrights in unsuccessful movies or low-cost pornography, and even invalid assignments of rights in newspaper articles, use the threat of statutory damages to turn litigation threats into a profit center."[447] Another predicted that if statutory damages were calibrated to much lower levels, then this behavior would disappear.[448]

While some copyright owners acknowledged that there have been instances of "overly aggressive litigators" pursuing actions against individual file-sharers to extract quick settlements, they rejected the idea that such tactics are "the result of copyright law in general or the current statutory damages regime in particular."[449] They asserted that in contrast to the "patent trolls"[450] that have been the subject of recent scrutiny in Congress, it appears unlikely that "copyright

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climate in which large-scale plaintiffs frequently exploit small-scale defendants' lack of sophistication and resources to extract inappropriate settlements from them.").

[444] *See* Green Paper at 47 & n.243. *See also* Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 IOWA L. REV. 1105, 1108-09 (2015) (referenced by Stoltz/EFF (LA) at 43) (describing a large increase in lawsuits by that industry and noting that "of the 3817 copyright law suits filed in 2013, over 43% were against John Does and more than three-quarters of those related to pornography").

[445] AIPLA Jan. Comments at 7-8; Bridges Nov. Comments at 11-12; CDT Jan. Comments at 6-8; Menell Jan. Comments at 32-33 (discussing Righthaven and porn file-sharing suits as support for position that the public perception of copyright law has declined significantly in the post-Napster era and that this decline impacts the law's efficacy and vitality); Samuelson (Berkeley) at 167-68 (remarking that the "disrespect issue is even more serious than the troll issue").

[446] IAC Nov. Comments at 4 (quoting James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*," 19 UCLA ENT. L. REV.79, 89 (2012)); Coleman (Cambridge) at 114. The economic viability of these suits is said to depend upon suing as many defendants as possible in a single action to keep costs low, leveraging the threat of high statutory damages awards in order to maximize the defendants' willingness to settle. *See* Bridges Nov. Comments at 11; Sag, *above* note 439, at 1109-10, 1116, 1129 & 22.

[447] CIS/EFF Nov. Comments at 22 (footnotes omitted); *see also* Menell Jan. Comments at 32.

[448] Bridges Nov. Comments at 14.

[449] CA Jan. Comments at 22.

[450] The term "patent troll" has been used to refer to "a person or company that . . . focuses on aggressively or opportunistically enforcing [] patent[s] against alleged infringers" after having "acquire[d] such patents with no intent to use, further develop, produce, or market the patented inventions." Black's Law Dictionary 1219 (10th ed. 2014). Several bills have recently been introduced to combat litigation abuse by such entities. Protecting American Talent and Entrepreneurship Act (PATENT) Act, S.1137, 114th Cong. (2015); Targeting Rogue and Opaque Letters Act (TROL), H.R. 2045, 114th Cong. (2015); Demand Letter Transparency Act, H.R. 1896, 114th Cong. (2015); The Innovation Act, H.R. 9, 114th Cong. (2015).

trolls" will become a pervasive problem.[451] They stated that "the major content industries have abandoned aggressive direct enforcement against file-sharers and have emphasized ways of channeling consumers into a growing range of authorized channels."[452]

A number of commenters pointed out that courts have already stopped the litigation efforts of the two most well-known enforcement entities, Righthaven and Prenda Law, and have sanctioned the parties and counsel involved.[453] One copyright owner association asserted that, as a result of such corrective actions by the courts, "these schemes have crumbled under their own weight" and that the failure of such abusive litigation schemes "will likely deter future efforts at similar conduct."[454] In its view, the solution to the "copyright troll" problem that some commenters seek—capping potential awards of statutory damages—is not only unnecessary, but would "undermine the ability of copyright owners with legitimate claims to enforce their rights."[455] Some urged that even a narrowly focused cap on statutory damages to combat trolling behavior would be inappropriate, since in the digitally networked environment an individual infringer is capable of causing just as much harm as a corporation.[456]

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[451] AAP Jan. Comments at 15-16. *See also* Tepp (LA) at 60-61.

[452] Menell Jan. Comments at 67. *See also* Bridges Nov. Comments at 3 (noting that the RIAA "announced that it had abandoned the practice of seeking statutory damages for music downloads").

[453] Menell Jan. Comments at 33 & n.129; CA Jan. Comments at 22; AAP Jan. Comments at 15-16 (citing *Ingenuity 13 LLC v. John Doe*, Case No. 12-cv-8333-ODW, 2013 WL 1898633, at 1-2*, *5 (C.D. Cal., May 6, 2013)); *see also* Bridges Nov. Comments at 5-9 (discussing *Righthaven* and *Prenda* litigation). Numerous courts have ordered Righthaven to pay attorneys fees to prevailing defendants *See, e.g.*, *Righthaven LLC v. Wolf*, 813 F. Supp. 2d 1265 (D. Colo. 2011); *Righthaven LLC v. DiBiase*, No. 2:10-cv-01343-RLH -PAL, 2011 U.S. Dist. LEXIS 124127 (D. Nev. Oct. 26, 2011); *Righthaven LLC v. Hoehn*, No. 2:11-cv-00050-PMP-RJJ, Doc. 43, Order Granting Defendant's Motion for Attorney's Fees (D. Nev. Aug. 15, 2011); *Righthaven LLC v. Democratic Underground, LLC*, No. 2:10-cv-01356-RLH-GWF, 2012 U.S. Dist. LEXIS 82301 (D. Nev. June 14, 2012); *Righthaven LLC v. Leon*, No. 2:10-cv-01672-GMN-LRL, 2011 U.S. Dist. LEXIS 72043 (D. Nev. July 5, 2011). *See also Righthaven LLC v. Democratic Underground, LLC*, No. 2:10-cv-01356-RLH-GWF, Transcript of Order to Show Cause Hearing & Minutes of Proceedings from Show Cause Hearing, Docs. 137-38 (D. Nev. July 14-15, 2011) (sanctioning Righthaven in the amount of $5,000, pursuant to Fed. R. Civ. P. 11 and the court's inherent authority, for intentional misrepresentations to the court).

[454] MPAA Jan. Comments at 13.

[455] *Id*. *See also* CA Jan. Comments at 22 ("Copyright owners as a whole should not be punished for the short-lived, ill-advised litigation tactics employed by a small number of individuals, since judicial safeguards against those sort of actions are already readily available and used by courts when appropriate."); Borkowski/RIAA (Cambridge) at 116 ("there are ways not to throw the baby out with the bath water, because there are legitimate uses of statutory damages."); Tepp/U.S. Chamber (Berkeley) at 160-61; Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 IOWA L. REV. 1105, 1114-15 (2015) (arguing that "[n]ot all BitTorrent lawsuits qualify as copyright trolling" and pointing to the RIAA's campaign of lawsuits against individual file-sharers from 2003-2008 as an example of litigation that was not intended to create a revenue stream but rather was intended to deter) (referenced by Stolz (LA) at 43).

[456] MPAA Jan. Comments at 13.

d. Solutions Proposed by Stakeholders

Based on the concerns described above, a number of commenters urged that individual infringers should be treated differently, subject to a lower range of statutory damages.[457] One expressed a preference for legislation that would "recalibrate" statutory damages in cases against individuals, such as by reducing the maximum permissible awards.[458] Several stakeholders suggested the creation of guidelines in order to avoid disproportionate or unpredictable results.[459]

Another proposal was to provide special treatment for "non-commercial" infringements. For example, commenters sought reductions in the minimum and maximum statutory damages awards in cases involving personal, noncommercial uses of copyrighted works, including but not limited to file-sharing.[460] With respect to the maximum award, some commenters pointed to Canadian law, which places a $5,000 maximum on non-commercial uses.[461] One proposed that the total amount of statutory damages awarded in a single case should be capped at $150,000.[462] That commenter also recommended separating the compensatory function of statutory damages from the deterrence function by having separate provisions for each, arguing that if those functions were separated, "courts would not be tempted to confuse the two and award beyond-punitive damages against everyday individual infringers."[463]

Another commenter proposed that plaintiffs be required to make an election of statutory damages prior to trial or the filing of a summary judgment motion,[464] as a means to avoid their "gaming the system" by threatening draconian statutory damages throughout litigation in order to extract higher settlements. In addition, it suggested aligning the statutory damages "willfulness" standard with that set forth by the Federal Circuit for willful patent infringement, requiring the

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[457] For example, Public Knowledge stated that potentially high litigation costs, attorneys' fees, and actual damages awards are powerful deterrents in and of themselves so that there is no need for statutory damages awards to be so high for individual infringers. Griffin/PK (Cambridge) at 100.

[458] CDT Nov. Comments at 10-11.

[459] *Id. See* discussion *above*, notes 434 & 436.

[460] CIS/EFF Jan. Comments at 36 & n.79. *See* Herlihy (Cambridge) at 91 (suggesting a statutory damage award of $750 per work.); Bridges Nov. Comments at 14 (proposing awards below the $750 statutory minimum for file-sharing cases).

[461] *See* Bridges Nov. Comments at 13-14; CIS/EFF Nov. Comments at 26. In contrast to the "per work" amount set forth in the United States, the Canadian cap applies to "all works" in a proceeding. Section 38.1 of [Canada] Copyright Act, RSC 1985 (authorizing statutory damages between $500 and $20,000 for commercial infringement and between $200 and $5,000 for infringements for non-commercial purposes, "with respect to all infringements involved in the proceedings for all works or other subject matters"), *available at* http://laws-lois.justice.gc.ca/eng/acts/C-42/page-41 html (last accessed on Nov. 17, 2015).

[462] Bridges Nov. Comments at 13. Bridges further suggested that the $150,000 cap apply to the total awards against all defendants in a single case, and in addition, that it apply to "all cases the copyright holder files against the same defendants in a single 36-month period." *Id.*

[463] *Id.* at 14 (citing Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 509 (2009)).

[464] CCIA Nov. Comments at 7. Under existing law, a plaintiff may elect statutory damages at any time before final judgment is entered. 15 U.S.C. § 504(c)(1).

plaintiff to "show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement."[465]

Some tied the possibility of a separate forum for small claims to the issue of statutory damages, suggesting that such a forum would provide a more effective venue for individuals to resolve copyright disputes.[466] This approach was welcomed by a number of rights holders, who supported the idea of a small claims forum where cases could be brought against individual infringers in a cost-effective way.[467] Implicit in these proposals is that, as the Copyright Office recommended in its 2013 report on small claims, there would be a cap on the amount of statutory damages that could be awarded.[468] An association of Internet and e-commerce companies was also positive about this idea, remarking that the "result would be an enforcement option for rights owners that both is far much less expensive to bring and that yields damages awards that are proportionate to the offense and enjoy broad legitimacy."[469] One commenter predicted that the establishment of a small claims forum would itself increase deterrence if infringers knew that hundreds of copyright owners were now able effectively to assert their rights.[470]

Another suggested approach to the issue of individual infringers was to focus on copyright education. Several copyright owner groups stated that educating users about legal options for accessing content is the primary approach to direct individuals away from infringement, coupled with graduated response systems that involve sending alerts "to direct individuals away from infringement."[471]

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[465] CCIA Nov. Comments at 7 (citing *In re Seagate Technologies*, LLC, 497 F.3d 1360, 1371 (Fed. Cir. 2007)). *See also* IAC Nov. Comments at 5 (questioning whether "willfulness" "should mirror the *Seagate* definition in patent law.").

[466] *See, e.g.*, Menell Jan. Comments at 67 & 75 (arguing that a "parking ticket" approach to copyright infringement through a small claims tribunal for non-commercial, small-scale infringements would "impose just enough cost upon file-sharers to encourage participation in what is hope will be a growing competitive marketplace for content"); Pietz (LA) at 36; NMR Nov. Comments at 24-29.

[467] ICC Nov. Comments at 4 (arguing that high statutory damages in individual federal court infringement actions "are poorly tailored to address problems of individual infringement"); SGA Nov. Comments at 1-4; Carnes/SGA (Nashville) 25-26, 63. *See also* MPAA Jan. Comments at 7 (supporting Copyright Office inquiry into feasibility of creating a copyright small claims court).

[468] The Copyright Office recommended that a copyright tribunal be established within the Copyright Office to serve as a voluntary alternative for litigation of low-value infringement claims, with a $15,000 per work cap on statutory damages and a $30,000 cap on all damages (actual or statutory) in a single action. U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS 4 (September 2013) [hereinafter "COPYRIGHT OFFICE SMALL CLAIMS REPORT"], *available at* http://copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf.

[469] ICC Nov. Comments at 4. *See also* Menell Jan. Comments at 75; NMR Nov. Comments at 24-25; SGA Nov. Comments at 1-4.

[470] Carnes/SGA (Nashville) at 25-26.

[471] *See* CA Jan. Comments at 21. *See also* Marks/RIAA (Nashville) at 24; A2IM Nov. Comments at 4. Another commenter suggested that a graduated response program "should significantly reduce the extent to which copyright owners need to sue" individuals in order to reduce illegal file sharing. Sydnor Nov. Comments at 5.

2. Secondary Liability for Large Scale Online Services

a. Chilling Effects

With respect to online service providers, the question posed by the Task Force was how statutory damages should be calculated in cases involving secondary liability where hundreds of thousands of works may have been infringed.[472] In addition to concerns expressed about statutory damages generally, the comments most relevant to this question focused on whether potentially huge statutory damages awards have a "chilling effect" on innovation and investment.

Critics of the current statutory damages regime pointed to a number of lawsuits against technology companies, generally involving services offering methods of digital distribution that enable large-scale copyright infringement by third parties.[473] In determining the responsibility of these companies for the illegal activities of the users, the courts have applied various theories of direct and secondary liability.[474] Although many of these cases ultimately settled, the levels of potential liability have fueled headlines and commentary.[475]

Technology companies and public interest advocates asserted that the magnitude of statutory damages awards available in such cases have had a chilling effect on innovation and

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[472] Green Paper at 52.

[473] Cases cited include: *Arista Records LLC v. Lime Group LLC*, 784 F. Supp. 2d 313 (S.D.N.Y. 2011) (identified in Internet Society Jan. Comments at 4-5; Menell Jan. Comments at 77-78) (*Limewire*); *Disney Enterprises, Inc. v. Hotfile Corp*., No. 11-20427-CIV, 2013 U.S. Dist. LEXIS 172339 (S.D. Fla. Aug. 28, 2013), *aff'g in part*, 798 F. Supp. 2d 1303 (S.D. Fla. 2011 (noted by CEA Nov. Comments at 2); *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3D 1020 (9th Cir. 2013), *cert. dismissed sub nom., Fung v. Columbia Pictures Indus*. 134 S. Ct. 624 (2013) (*Isohunt*) (identified in CEA Nov. Comments at 4; WGAW Jan. Comments at 2); *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003) (referenced in Menell Jan. Comments at 21); *UMG Recordings, Inc. v. MP3.com, Inc.*, No. 00 Civ. 472 (JSR), 2000 WL 1262568 at *1, *6 (S.D.N.Y. Sept. 6, 2000) (identified, *inter alia*, in Carrier Jan. Comments at 11-14; CIS/EFF Nov. Comments at 23-24); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 US 913 (2005) (*Kazaa and Grokster*) (identified by Menell at 21); *A&M Records, Inc. v. Napster, Inc*., 239 F.3d 1004 (2001) (identified by Menell at 21; CEA at 2); *Paramount Pictures Corp. v. ReplayTV, Inc*., 298 F. Supp. 2d 921 (C.D. Cal. 2001) (discussed in CEA Nov. Comments at 2, n.2; referenced by CIS/EFF Nov. Comments at 23). *See also* Menell Jan. Comments at 20-21, 28, 77-78 (discussing ReplayTV, Kazaa, Grokster, Morpheus, Scour, Napster, MP3.com, MP3Board.com, and Limewire); Green Paper at 49.

[474] *See* Green Paper at 47-48. Attempts have also been made to extend secondary liability to cover investors, corporate officers and directors in such services. *See* Carrier Jan. Comments at 5-6 & 14-15; CCIA Nov. Comments at 5; CEA Nov. Comments at 2.

[475] *See, e.g.*, Jim Hu, *Ruling Against MP3.com Could Cost $118 million*, CNET, Jan. 2, 2002, *available at* http://www.cnet.com/news/ruling-against-mp3-com-could-cost-118-million/ (reporting award of $25,000 per violation against MP3.com, "possibly exposing the company to damages of $118 million") (cited in Carrier Comments at 11 note 35); Dawn Kawamoto, *Lawsuits Dampen VCs' File-sharing Enthusiasm*, CNET NEWS, Sept. 4, 2000, *available at* http://news.cnet.com/2100-1023-245275 html ("The threat of vicarious liability has scared off many venture firms from the file-sharing arena") (cited in Carrier Comments at 15). *See also* Menell at 18-24 (describing the post-Napster litigation); Greg Sandoval, *Lime Wire settles with RIAA for $105 million*, CNET, May 12, 2011, *available at* http://news.cnet.com/8301-31001_3-20062418-261 html (noting that Lime Wire's chairman and CEO Mark Gorton was found personally liable for copyright infringement and could have been required to pay up to $1.4 billion and reported that the plaintiffs "pressed for a $75 trillion verdict [that] the Court labeled [] 'absurd'") (cited, for another purpose, in RIAA Nov. Comments at 10 & n.32).

investment.[476] One commenter cited an amicus curiae brief to the Supreme Court by a group of venture capitalists arguing that statutory damages have "crushing implications for vendors of multi-purpose technologies, where damages from unforeseen users can quickly mount in the millions or even billions of dollars[,]" and that in this respect secondary liability for copyright infringement is "qualitatively different from most other sorts of business risks that investors can insure against or build into their business calculations."[477] Another commenter pointed to a survey of investors in digital content intermediaries that it said confirmed "that uncertainty around liability risks deter[ring] investment in this field."[478]

Commenters also pointed to innovative companies that they say were bankrupted by litigation even though they were ultimately found to be non-infringing.[479] According to one commenter, potential statutory damages will deter some new business plans that rely on fair use from moving forward.[480] At the same time, several noted that "[e]vidence for the innovation-chilling effect

[476] Carrier Jan. Comments at 15, 17-18; CCIA Nov. Comments at 4; CDT Nov. Comments at 8-9 (listing cases and potential awards); CIS/EFF Nov. Comments at 23 (listing new technologies, such as ReplayTV and MP3.com, allegedly driven out of business by copyright lawsuits); IAC Nov. Comments at 2-4; CEA Nov. Comments at 2-3. *See also* AIPLA Jan. Comments at 7 ("The potential for extremely high statutory damages may discourage innovation by mass digitization and online services that use large numbers of copyrighted works.").

[477] CDT Comments at 10 (quoting the Brief of the National Venture Capital Association as Amicus Curiae in Support of Respondents to the Supreme Court in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005)). *See also* CCIA Nov. Comments at 7 (noting that for online services "[t]he $750 floor means that . . . potential damages quickly reach uninsurable levels that deter investment"). Another commenter asserted that venture capitalists are cautious because personal liability has been common in copyright cases, and "[a]s a result, small firms with disruptive new ideas often will not be able to bring the ideas to the market. In fact, such a chilling effect at least partially explains why funding for these firms has fallen in recent years." Carrier Jan. Comments at 15.

[478] CCIA Nov. Comments at 5 (citing Matthew Le Merle *et al*., Booz & Company, *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study* (2011), *available at* http://www.strategyand.pwc.com/media/uploads/Strategyand-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf). CCIA also asserted that that a Second Circuit decision creating "legal certainty" inspired up to an estimated $1.3 billion in investment in U.S. cloud computing firms. *See id.* at 5 (citing Josh Lerner, Analysis Group, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* (2011), *available at* http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/lerner_fall2011_copyright_policy_vc_investments.pdf (last visited Oct. 2, 2015).

[479] IAC Nov. Comments at nn.8-9 (citing Eliot Van Buskirk, *Veoh Files for Bankruptcy After Fending Off Infringement Charges*, Wired, Feb. 12, 2010, *available at* http://www.wired.com/2010/02/veoh-files-for-bankruptcy-after-fending-off-infringement-charges/ (reporting that Veoh, after prevailing in a copyright infringement suit filed by Universal Music Group, entered bankruptcy due to "distraction of the legal battles, and the challenges of the broader macro-economic climate") and Ali Sternburg, *15 Technologies That Content Industries Sued After Diamond Rio*, Disruptive Competition Project, October 8, 2013, *available at* http://www.project-disco.org/intellectual-property/100813-15-technologies-that-content-industries-sued-after-diamond-rio/, (an article cataloguing 15 different new technologies that were sued over the previous 15 years and identifying ReplayTV, Mp3.com, MP3Tunes, iCraveTV, ClearPlay, Veoh, Vimeo, YouTube, Cablevision, Zediva, Redigi, Dish Hopper, Aereo, TVEyes); CIS/EFF Nov. Comments at 23 (referring to ReplayTV and MP3.com as having been "driven out of business by copyright lawsuits.").

[480] *See* Bridges Jan. Comments at 10-11.

will . . . usually not be readily apparent. In most cases, the public doesn't see and will likely never know about the innovations that don't happen and the features that aren't offered."[481]

Critics raised questions as to whether the rationale for calculating statutory damages on a per-work basis is appropriate, given that the service providers are unable to directly control the number of works infringed by their users, and in light of the sheer number of works that may be involved.[482] Several commenters expressed the view that the statutory damages amounts awarded for large-scale infringement are inappropriate because they are "punitive" in nature, claiming that there is "no evidence that . . . large statutory damages are necessary or beneficial."[483] One referred to such damages as a "corporate death penalty" that was never intended by Congress.[484] They challenged the view that statutory damages of this magnitude are necessary to deter infringement,[485] and asserted that in these circumstances too they should be calibrated to actual harm.[486]

In contrast, rights holder groups disputed the claimed "chilling effect" on innovation, asserting a lack of support by empirical evidence.[487] Several pointed to the many existing services as evidence that the availability of statutory damages does not compromise the development of legitimate digital content services.[488] One academic who was generally critical of high statutory damages awards acknowledged that although "it seems reasonable to surmise that digital technology innovators would invest their resources and energies elsewhere" in light of such "potentially crushing liability," in fact there has been "no shortage of tantalizing new digital

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[481] CDT Nov. Comments at 9 (noting also that "[t]he threat of massive statutory damages [that] forced [a defendant] to seek a declaratory judgment before rolling out the product, slowing the pace of innovation substantially"). *See* AIPLA Jan. Comments at 7 ("It is difficult, if not impossible, to quantify empirically how much innovation is discouraged by the current statutory damages system. Nevertheless, the potential legal exposure may create incentives that undermine investment in technologies, even where services have a good faith belief that their actions are lawful.").

[482] CDT Comments at 10 ("The argument that statutory damages need recalibration in cases of secondary liability is particularly strong because a secondary infringer doesn't control the number of works ultimately infringed. . . . Internet platforms operate at massive scale, meaning that users' infringements can quickly multiply and escalate a platform's possible damages to incredible heights."). *See also* PK Nov. Comments at 32-33.

[483] CDT Nov. Comments at 10. *See also* PK Nov. Comments at 31, CIS/EFF Nov. Comments at 20; CCIA Nov. Comments at 4 ("When cases are brought against an intermediary for third party conduct, particularly where the intermediary was endeavoring to comply with the DMCA, a punitive mechanism is generally inappropriate.").

[484] Carrier Jan. Comments at 16. Carrier also noted that high awards also make it difficult for a small company to post bond to appeal an adverse judgment. *Id.* at 12.

[485] CDT Nov. Comments at 9 ("for most legitimate businesses, the risks of having the business declared unlawful and shut down and then having to pay actual damages and profits would be significant enough to deter business models based on blatant or rampant infringement."); CCIA Nov. Comments at 4.

[486] Menell Jan. Comments at 78; Stoltz/EFF (LA) at 45 (" . . . [it] is really especially true in the secondary liability context that we have to start with the actual harm"). *See also* IAC Nov. Comments at 5 (requesting the Task Force to consider whether damages should be calculated to approximate actual damages).

[487] IPO Jan. Comments at 4.

[488] RIAA Nov. Comments at 10 (listing legitimate new services that developed notwithstanding *LimeWire* case that settled for $105 million.); ASCAP *et al*. Jan. Comments at 7; Digital Liberty Jan. Comments at 3.

technologies—from the iPod to image search engines, YouTube, Facebook, Google's Book Search, BitTorrent, iPhone, iPad, Kindle, and Twitter—that could be (and have been) portrayed as facilitating copyright infringement."[489]

b. Deterrence and Incentives

Copyright owners stressed that one of the main advantages of the current statutory damages regime is its deterrent effect against highly damaging behavior. They argued that high levels of statutory damages are necessary in order to thwart massive infringing activity, and therefore courts must have the power to award them. They also asserted that the costs and efforts associated with trying to shut down illegal file-sharing "enterprises" that reach audiences of millions justify large damages.[490] As to the arguments against the punitive aspect of such damages, the MPAA remarked that "[t]he concept behind secondary liability is that the intermediary has profited from or knowingly contributed to the infringement at issue. If such intermediaries are 'being penalized,' it is because of their own connection to the infringing activity, not as helpless or disinterested victims of third-party behavior."[491]

In the copyright owners' view, statutory damages are important to incentivize online services to implement access and use controls to avoid massive infringement, especially where new technologies make it easy to distribute copyrighted content without authorization.[492] Several also expressed the view that rather than hindering the development of legitimate services or platforms, statutory damages have promoted the creation and development of new distribution services, providing them protection from competition by infringing services and from other forms of piracy.[493]

c. Solutions Proposed by Stakeholders

Those concerned about excessive awards against online services proposed solutions similar to some proposed with respect to individual infringers. Among the solutions offered, either to apply in all cases, or only with respect to online services, were:

- Adopting mandatory factors to be considered in assessing statutory damages.[494]
- Ensuring that statutory damages more closely track actual harm, damages, or profits.[495]

[489] Menell Jan. Comments at 78 (concluding that "[t]he relatively modest capital requirements associated with innovation in digital distribution technologies, research and social norms, risk and liability-insulating institutions, and the importance of technological advance in fields unaffected by copyright liability dampen the chilling effects of disproportionate copyright liability").

[490] ITIF Nov. Comments at 3.

[491] MPAA Jan. Comments at 12.

[492] A2IM Nov. Comments at 4; AAP Nov. Comments at 10.

[493] IFTA Nov. Comments at 4 ("Rather than hinder the development of legitimate services or platforms to deliver content, statutory damages provide an essential mechanism of protection for legitimate portals that license independent films and television programming."); Tepp (Alexandria) at 28-29.

[494] DiMA Nov. Comments at 9; CIS/EFF Nov. Comments at 27.

- Requiring the plaintiff to demonstrate why actual damages or profits are particularly difficult to prove.[496]

- Reducing the minimum per work award,[497] or limiting the total amount of statutory damages that may be awarded in a single case against all defendants or within a set time period.[498]

- Reducing or denying statutory damages when the defendant reasonably believed that its use of the copyrighted work was non-infringing, or had a strong if ultimately losing fair use claim.[499]

- Giving courts discretion whether to apply the "per-work multiplier."[500]

- Exempting secondary infringers entirely from statutory damages.[501]

3. The Innocent Infringement Defense

Although the Task Force did not specifically request comments relating to the innocent infringement provision of Section 504 of the Copyright Act,[502] which allows the reduction or remittitur of statutory damages in certain circumstances, a few commenters proposed its reform, including but not limited to cases involving individual file-sharing and online services.

Several asserted that, in practice, the reduced minimum amounts have rarely been awarded.[503] One study found "only two cases in the four-decade history of the current Copyright Act in which the defendant successfully invoked the discretionary 'innocent infringer' reduction in

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[495] CDT Nov. Comments at 11; Menell Jan. Comments at 78; CIS/EFF Nov. Comments at 25 ("in ordinary cases without evidence of particularly egregious conduct, courts could limit statutory damages to small multiples (two or three times) over actual damages or profits").

[496] CIS/EFF Nov. Comments at 26.

[497] CCIA Nov. Comments at 6-7.

[498] Bridges Nov. Comments at 13.

[499] CIS/EFF Nov. Comments at 25; CDT Nov. Comments at 11. *See* discussion below of proposals to amend section 504's innocent infringement provision.

[500] PK Nov. Comments at 35. By "per-work multiplier," the Task Force understands Public Knowledge to be referring to the requirement that a minimum of $750 *per work* be awarded in statutory damages.

[501] Carrier Nov. Comments at 19.

[502] Section 504 includes a procedure for reducing or remitting (*i.e.* refraining from imposing) statutory damages in cases of "innocent infringement." The minimum statutory damages award per work may be reduced from $750 to $200 when the "infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright." 17 U.S.C. §504(c) (2). Statutory damages will be completely remitted for employees of nonprofit educational institutions, libraries or archives who infringe the reproduction right, when they believed with reasonable grounds that the activity was a fair use. *Id.*

[503] Samuelson (Berkeley) at 148; CIS/EFF Jan. Comments at 3.

minimum damages."[504] The minimum damages provision was described as "almost useless"[505] because under Sections 401(d)[506] and 402(d),[507] the reduction is not available where a copyright notice appears on the infringed work.[508] Thus, "even if the infringer had a reasonable good faith belief that his or her action might fall within an exception or the terms of a license, a court cannot reduce the statutory damages if a notice was affixed to the work."[509]

The second prong of the "innocent infringer" provision, under which courts are required to remit statutory damages in limited circumstances, was also the subject of proposals for change. A library association commenter asserted that this provision "is of little benefit to libraries in the Internet age" because it applies only to the reproduction right and so does not cover many online uses that implicate other rights.[510] Motion picture companies objected to this proposal, noting that "internal library reproductions have far less of an impact on the market value of works than online (or offline) distributions and public performances."[511]

Library representatives took the position that the remittitur provision is too narrow in other respects as well. First, they noted that it applies only to cases in which the defendant had a good faith belief that the use was permitted under section 107, and not by any other exception to the Copyright Act.[512] They proposed that Congress modify the statute by permitting reduction or complete remittitur of statutory damages, regardless of whether copies of the infringed work bore a copyright notice, whenever the court finds that the defendant believed and had reasonable grounds for believing that his or her use did not infringe. They also proposed extending the benefit of remittitur beyond the current coverage of public broadcasters and employees of nonprofit educational institutions, libraries and archives to cover acts by "nonprofit institutions,

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[504] CIS/EFF Jan. Comments at 3 (citing Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 474-75 & n.175 (2009) (surveying copyright damages cases and finding two cases applying the "innocent infringer" minimum: *Warner Bros., Inc. v. Dae Rim Trading, Inc.*, 677 F. Supp. 740, 769-70 (S.D.N.Y. 1988), *aff'd in part by Warner Bros., Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1122 (2d Cir. 1989); *D.C. Comics, Inc. v. Mini Gift Shop,* 912 F.2d 29, 35-36 (2d Cir. 1990)).

[505] LCA Nov. Comments at 2.

[506] *See* 17 U.S.C. §401(d): " Evidentiary Weight of Notice.— If a notice of copyright in the form and position specified by this section appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as provided in the last sentence of section 504 (c) (2)."

[507] *See* 17 U.S.C. §402(d) (same as § 401(d) with respect to sound recordings).

[508] CCIA Nov. Comments at 6 (noting that this limitation "makes little sense in the online world").

[509] LCA Nov. Comments at 2. *See, e.g., BMG Music v. Gonzalez,* 430 F.3d 888, 892 (7th Cir. 2005), *cert. denied Gonzalez v. BMG Music,* 547 U.S. 1130 (2006).

[510] LCA Nov. Comments at 2-3.

[511] MPAA Jan. Comments at 11.

[512] LCA Nov. Comments at 2.

individual file sharers, and secondary infringers alike" whenever any of them reasonably believe their acts are noninfringing.[513]

Motion picture companies opposed this proposed expansion too, observing that it is difficult to imagine how file-sharers could reasonably believe their use was noninfringing and that secondary infringers include those who build their business models on infringement.[514] A recording industry representative argued that $200 is not a lot to pay for an infringement even if it was innocent.[515]

C. Conclusions and Recommendations

1. Overview

In reviewing the positions and proposals set forth by stakeholders, the Task Force is mindful that statutory damages are intended to "provide reparation for injury" as well as to "discourage wrongful conduct."[516] We agree that there is a need for effective enforcement tools, including meaningful statutory damages, to curb the online piracy that can undermine the value of rights and hobble the development of legitimate markets. At the same time, however, it is important to avoid excessive and inconsistent awards that risk encouraging disrespect for copyright law or chilling investment in innovation. And the abusive enforcement campaigns reported by commenters should not be tolerated.

Accordingly, the Task Force recommends three amendments to the Copyright Act to address some of the concerns presented and to better balance the needs of copyright owners, users, and intermediaries.[517] First, we recommend incorporating into the statute a list of factors for courts and juries to consider when determining the amount of a statutory damages award. Second, we recommend changes to the copyright notice provisions that would expand eligibility for the lower "innocent infringement" statutory damages awards.[518] We also propose that, in cases involving non-willful secondary liability for online services offering a large number of works, courts be given discretion to assess statutory damages other than on a strict per-work basis. Together, these changes should maintain the goals of compensation and deterrence that the statutory damages regime supports while providing courts with improved tools to appropriately calibrate the awards.[519]

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[513] *Id.* at 3. *See also* CIS/EFF Nov. Comments at 25-26.

[514] MPAA Jan. Comments at 11.

[515] Borkowski/RIAA (LA) at 23.

[516] *Sony BMG Music Entertainment v. Tenenbaum*, 719 F.3d 67, 71 (1st Cir. 2013) (quoting *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952)).

[517] None of these measures would affect the authority of federal courts to award other relief permitted under statute or to consider the facts of a particular case in applying the law.

[518] We make no specific recommendations on the other proposed changes to the innocent infringement provision of Section 504, as there was insufficient opportunity to develop a full record. *See* below p. 97.

[519] In addition, as discussed below, the Task Force recommends further consideration of the small claims tribunal concept presented by the Copyright Office. *See* Section V, Part C.2.d (Establish a Streamlined Procedure for

2. Recommendations

a. Specify Factors in the Copyright Act to Consider in Assessing Statutory Damages

The Task Force recommends that Congress enact a new paragraph in Section 504 of the Copyright Act specifying factors that must be considered when determining statutory damage award amounts. The aim is to ensure a greater degree of predictability in copyright infringement cases across the country and address some other concerns raised in this proceeding.[520] In considering what factors should be included, we have drawn upon existing model jury instructions[521] as well as federal case law.[522] The Task Force considered proposing federal model jury instructions, but concluded that a statutory set of factors would be preferable since they will be binding on all courts.[523] We believe that litigants and courts would be well-served by

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Adjudicating Small Claims), p. 99, *below* & notes 466-470, p. 78 *above* (setting forth stakeholder support of small claims tribunal in the online file-sharing context).

[520] Other federal laws include factors for courts to consider in assessing statutory damages. *See* Truth in Lending Act of 1968 ("TILA"), 15 U.S.C. § 1640(a) (providing a floor and ceiling for damages against creditors and enumerating a nonexclusive list of factors to be considered); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a) (listing factors similar to those in TILA). *Cf.* U.S. SENTENCING GUIDELINES MANUAL§ 2B5.3 cmt. notes 2 & 5 (2014) (list of factors in Federal Sentencing Guidelines for copyright infringement cases), *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf.

[521] Instructions on statutory damages for copyright infringement are included in the model jury instructions of three federal judicial circuits: the Seventh, Ninth, and Eleventh Circuits. The Seventh Circuit's model jury instructions list the following factors: the revenues that plaintiff lost because of the infringement; the difficulty of proving plaintiff's actual damages; the circumstances of the infringement; whether defendant intentionally infringed plaintiff's copyright; and deterrence of future infringement. Federal Civil Jury Instructions of the Seventh Circuit § 12.8.4 (2015) [hereinafter 7th Circuit Model Jury Instructions], *available at* https://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_cir_civil_instructions.pdf. The Eleventh Circuit's model instructions list the same factors. Eleventh Circuit Civil Pattern Jury Instructions § 9.32 (2013) [hereinafter 11th Circuit Model Jury Instructions], *available at* http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCivilPatternJuryInstruction.pdf. The Ninth Circuit's model jury instructions are very general and do not include a list of factors, stating only that the purpose of statutory damages "is to penalize the infringer and deter future violations of the copyright laws." *See* Ninth Circuit Manual of Model Jury Instructions § 17.25 cmt. (Civil) (2007 & Supp. 2014) [hereinafter 9th Circuit Model Jury Instructions], *available at* http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Civil_Jury_Instructions_2014_6.pdf.

[522] Numerous judicial decisions discuss factors to be used in determining the amount of statutory damages. "Among the most common list of factors recited are the relationship between the statutory damages sought and any actual damages or profits, whether the infringement was willful or innocent, the need for deterrence, defendant's past infringement record, defendant's cooperation after the matter was brought to its attention, and the scope of the infringement. No one factor is more important than any other." 6 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 22:174 (2015) (footnotes omitted). *See also* 5 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §14.04 [B][1][a](footnote omitted). The Task Force's proposed factors 1, 2, 3, 6 and 8, discussed below, address those considerations.

[523] The Circuit Court of Appeals' model jury instructions do not have the force of law. *See* Resolution of the Eleventh Circuit Judicial Counsel dated May 29, 2013, located at the 11th Circuit Model Jury Instructions 2 (noting that its resolution authorizing the distribution of the pattern jury instructions "shall not be construed as an adjudicative approval of the content of such instructions which must await case-by-case review"); 7th Circuit Model Jury Instructions 1 (2015) (noting that the instructions were only pattern instructions and that "[n]o trial judge was

requiring consideration of a uniform set of factors designed to result in an appropriate award based upon the facts of each case.

The nine factors listed below are those that will most often be applicable in a statutory damages determination.[524] We believe that they should be non-exclusive, so that courts are not foreclosed from considering other factors that may be relevant in a particular case.[525]

The Task Force proposes a new clause in subsection Section 504(c)[526] as follows:

> FACTORS TO CONSIDER -- In making any award under this subsection, a court shall consider the following nonexclusive factors in determining the appropriate amount of the award:
>
> (1) The plaintiff's revenues lost and the difficulty of proving damages.
>
> (2) The defendant's expenses saved, profits reaped, and other benefits from the infringement.[527]
>
> (3) The need to deter future infringements.
>
> (4) The defendant's financial situation.
>
> (5) The value or nature of the work infringed.
>
> (6) The circumstances, duration, and scope of the infringement, including whether it was commercial in nature.

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required to use them"), 9th Circuit Model Jury Instructions 2 (2007) (noting that the instructions "are models" and are not "intended to discourage judges from using their own forms and techniques for instructing juries"). *See above* note 521.

[524] These proposed factors reflect factors contained in model jury instructions published by in the American Bar Association, with minor changes in the order in which the factors are listed and in their wording. AMERICAN BAR ASSOCIATION, MODEL JURY INSTRUCTIONS COPYRIGHT, TRADEMARK AND TRADE DRESS LITIGATION § 1.7.8 Todd S. Holbrook & Alan N. Harris eds. 2008) [hereinafter ABA MODEL JURY INSTRUCTIONS]. They also include additional factors taken from the Seventh and Eleventh Circuits' model jury instructions. *See above* note 521.

[525] The Task Force recognizes that there may be additional circumstances that the court will consider in particular cases. *See, e.g. UMG Recordings, Inc. v. MP3.com, Inc.,* No. 00 Civ. 472, 2000 WL 1262568 at *5 (S.D.N.Y. Sept. 6, 2000) (noting that defendant's conduct "has on the whole been responsible and this is a mitigating factor in defendant's favor"); *Dream Games of Ariz., Inc. v. PC Onsite,* 561 F.3d 983, 992-93 (9th Cir. 2009) ("decision maker may consider plaintiff's conduct during litigation.").

[526] If this recommendation is enacted into law, the current clauses will need to be renumbered.

[527] Two of the factors in the ABA model instructions have been combined into this single factor: ABA factors 2 ("The expenses saved or profits reaped by defendant in connection with the infringement") and 3 ("Other benefits that infringement may have provided to defendant") ("The defendant's expenses saved, profits reaped, and other benefits that infringement may have provided to defendant"), because they both address what the defendant gained as a result of the infringement. *See* ABA MODEL JURY INSTRUCTIONS §§ 1.7.8(2) & 1.7.8(3).

(7) In cases involving infringement of multiple works, whether the total sum of damages, taking into account the number of works infringed and number of awards made, is commensurate with the overall harm caused by the infringement.

(8) The defendant's state of mind, including whether the defendant was a willful or innocent infringer.

(9) In the case of willful infringement, whether it is appropriate to punish the defendant and if so, the amount of damages that would result in an appropriate punishment.

When calculating the total award, all of these factors should be weighed holistically, in the context of the entire case, to ensure that the overall award is appropriate.[528] Below we explain various factors' relevance to the issues raised in the comments and roundtables.

i. Relating Awards to Actual Harm and Benefits

The first two proposed factors address concerns expressed by both defenders and critics of the current statutory damages provision. Critics have urged that the level of any statutory damages awarded should be pegged to the amount actual harm.[529] Copyright owners view statutory damages as at least in part a means to be compensated for the harm they have suffered and to obtain restitution for the profits or other benefits received by the defendant as a result of the infringement.[530] At the same time, they stressed that statutory damages are available precisely because it is often difficult to prove whether or how much a plaintiff was harmed by the infringement, and deterrence generally requires levels above actual harm.[531]

The Task Force agrees that statutory damages should bear some relationship to the amount of actual harm suffered by the plaintiff and any financial benefits accruing to the defendant, in circumstances where these amounts are calculable.[532] However, given the frequent difficulty of proving actual damages, a plaintiff that fails to provide evidence of harm should not be precluded from a statutory damages award. Moreover, the correlation need not be exact and other factors may affect the ultimate award. As the Court of Appeals for the Second Circuit recently observed, "Although revenue lost is one factor to consider, we have not held that there must be a direct correlation between statutory damages and actual damages. To suggest otherwise is to ignore the

[528] *See Dream Games of Arizona, Inc. v. PC Onsite,* 561 F.3d 983, 992 (9th Cir. 2009) (in determining statutory damages award, jury is "guided by what is just in the particular case") (internal quotes and citations omitted).

[529] *See* discussion *above* at note 425.

[530] *See* discussion *above* at note 421.

[531] *See* discussion *above* at notes 426-427. *See also Sony BMG Music Entm't v. Tenenbaum,* 660 F.3d 487, 502 (1st Cir. 2011); *Douglas v. Cunningham,* 294 U.S. 207, 209 (U.S. 1935) (interpreting the 1909 Act); *Brady v. Daly,* 175 U.S. 148, 154 (1899).

[532] *See Bait Productions v. Angelica Murray,* No. 8:13-cv-0169-T-33AEP, 2013 US Dist. Lexis 120170, *15-16, 2013 WL 4506408, *6 (M.D. Fla. Aug. 23,2013) ("statutory damages are not intended to provide a plaintiff with a windfall recovery; they should bear some relationship to the actual damages suffered") (internal quotes omitted) (quoting *Clever Covers Inc. v. Sw Fla. Storm Def. LLC,* 554 F Supp. 2d 1303, 1313 (M.D. Fla. 2008)).

various other factors a court may consider and the purposes of statutory damages in the willful infringement context."[533]

ii. Relating Awards to Value of Works

The Task Force also agrees with courts and commenters that the value or nature of the infringed work (the fifth proposed factor), should be an important element in statutory damage determinations.[534] An award that takes into account the likely heightened magnitude of harm to the market for a pre-release work may enable the copyright owner to receive a more appropriate level of compensation than an award of actual damages. On the other hand, when the infringed work is of minimal commercial value, a lower award may be appropriate. This can help address concerns about "holders of low-value copyrights … using the threat of statutory damages to turn litigation threats into a profit center."[535]

iii. Assessing Deterrence and Punishment

As noted in the Green Paper, deterrence is a fundamental goal of the Copyright Act's statutory damages system[536] and is cited in most model jury instructions and court opinions.[537] Effective

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[533] *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 127 (2d Cir. 2014). *See also Webloyalty.com, Inc. v. Consumer Innovations, LLC*, 388 F. Supp. 2d 435, 442-43 (D. Del. 2005); *Fitzgerald Pub. Co. Inc. v. Baylor Pub. Co., Inc.*, 670 F.Supp. 1133, 1140 (E.D.N.Y. 1987). In *RSO Records, Inc. v. Peri*, 596 F.Supp. 849, 862 (S.D.N.Y. 1984), the court observed:

> Undoubtedly assessed statutory damages should bear some relation to actual damages suffered. Because statutory damages are often used in cases where actual damages cannot be precisely calculated, however, they cannot be expected to correspond exactly. Further, courts have also recognized that Congress's provision for a greater award in cases of willful infringement indicates that statutory damages may in such cases exceed the amount of documented damages. By taking on a partially punitive character, such awards serve the Copyright Act's twofold purpose of compensation and deterrence.

[534] *See* ABA MODEL JURY INSTRUCTIONS § 1.7.8(4) (Factor 4); *see also* 9th Circuit Model Jury Instructions § 17.25 cmt. (2007 & 2014 Supp.). *See also F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232 (1952) (statutory damages vest trial courts with broad discretion to determine "what is just in the particular case, considering the nature of the copyright . . .") (quoting *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106-107 (1919; *Dream Games of Arizona, Inc. v. PC Onsite*, 561 F.3d 983, 992 (9th Cir. 2009) (jury has wide discretion in determining statutory damages award, "guided by what is just in the particular case, considering the nature of the copyright…"[internal quotes and citations omitted]); *Fitzgerald Publ'g Co., Inc. v. Baylor Publ'g Co., Inc.*, 807 F.2d 1110, 1117 (2d Cir. 1986) (listing the "the value of the copyright " as one factor to be considered when determining the award amount); *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 403 (S.D.N.Y. 2002) ("Factors considered relevant to determining an appropriate statutory damages award include …the value of the copyright").

[535] *See* text *above* accompanying note 447, p. 75.

[536] *See* Green Paper at 51. *See also Sony BMG Music Entm't v. Tenenbaum*, 719 F.3d 67, 71 (1st Cir. 2013).

[537] *See* ABA MODEL JURY INSTRUCTIONS § 1.7.8(6) (Factor 6); 7th Circuit Model Jury Instructions §12.8.4(2015); 11th Circuit Model Jury Instructions § 9.32 (2013); 9th Circuit Model Jury Instructions § 17.25 cmt. (2007 & Supp. 2014); *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 643 (8th Cir. 1996); *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 403 (S.D.N.Y. 2002) (statutory damages further "the Copyright Act's dual objectives of compensating copyright owners for past infringement and deterring future infringement").

deterrence will normally require an amount greater than the expenses saved by the infringer or the harm caused to the rights holder.[538] As noted by the Register of Copyrights, if the amount of damages awarded is not greater than an infringer would have had to pay to comply with the law, many users would conclude that it is to their advantage to simply infringe and wait to see whether they are sued, since the ultimate price of using a work will be the same.[539] Deterrence in this context focuses not only on deterring a particular defendant from infringing again, but also on discouraging other potential infringers—a point repeatedly made by copyright owners.[540]

Although it is impossible to predict with certainty what unlawful activities will be deterred due to the potential size of damages awards, statutory damages in order to be effective should be assessed at a level sufficient to deter further infringement both by the defendant and by others.[541]

(a) The Defendant's State of Mind

The amount necessary to deter will vary from case to case due in part to the defendant's state of mind. The more willful the infringement, the higher the award that may be needed to deter such future acts, as one who consciously engages in an infringing act is more likely to become a repeat infringer unless deterred.[542] Deterrence may also be relevant where the infringement is not

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[538] "[F]oremost, the court must award an amount that will put the defendant on notice that it costs more to violate the copyright law than to obey it." *Dream Dealers Music v. Parker,* 924 F. Supp. 1146, 1153 (S.D. Ala. 1996). To further the goal of deterrence, "statutory damages awards frequently greatly exceed the actual damages shown." *Stevens v. Aeonian Press, Inc.*, No. 00 Civ. 6330 (JSM), 2002 U.S. Dist LEXIS 20189, *7(S.D.N.Y. Oct. 23, 2002). *See also F.W. Woolworth Co. v. Contemporary Arts, Inc.,* 344 U.S. 228, 233 (1952) ("Moreover, a rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers. It would fall short of an effective sanction for enforcement of the copyright policy."); *Chi-Boy Music v. Charlie Club, Inc*., 930 F.2d 1224, 1229 (7th Cir. 1991) (considering the deterrent purpose of statutory damages and awarding "approximately three times the amount due under past license agreements"); *Fitzgerald Publishing Co., Inc. v. Baylor Publishing Co., Inc.,* 807 F.2d 1110, 1117 (2d Cir. 1986).

[539] COPYRIGHT OFFICE SMALL CLAIMS REPORT 21, *above* note 468.

[540] *See above* note 429 and accompanying text.

[541] *See Illinois Bell Tel. Co. v. Haines & Co.,* 905 F.2d 1081, 1089 (7th Cir. Ill. 1990) ("A damage award greater than profits is also proper to put *potential infringers* on notice that "it costs less to obey the copyright laws than to violate them.") (quoting *Int'l Korwin Corp. v. Kowalczyk,* 855 F.2d 375, 383 (7th Cir. 1988)) (emphasis added) (internal quotation omitted); *Broadcast Music v. R Bar,* 919 F. Supp. 656, 660 (S.D.N.Y. 1996). *See also* BRUCE P. KELLER & JEFFREY P. KUNARD, COPYRIGHT LAW: A PRACTITIONER'S GUIDE §12.4 (Prac. L. Inst. ed., 2012) ("the deterrent effect on the defendant and third parties").

[542] To some extent, this factor is already built into the statutory text, insofar as the potential range of statutory damages depends upon whether the infringement was willful ($750-$150,000), innocent ($200-$30,000) or "knowing" ($750-$30,000). 17 U.S.C. § 504(c) (2015). However, the defendant's consciousness of whether he or she was infringing also comes into play as courts consider how high, within the statutory range, the award should be. The fact that an infringement is willful does not require an award higher than the maximum award for a non-willful infringement; in many cases involving willful infringement, the court has awarded $30,000 or less in statutory damages. 6 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 22:180 (2015); *Peer Int'l Corp. v. Luna Records, Inc.,*887 F. Supp. 560, 569 (S.D.N.Y.1995); *Richard Feiner and Co., Inc. v. Passport Int'l Productions, Inc.*, No. 97 Civ. 9144(RO),1998 WL 437157, *2 n.8 (S.D.N.Y. July 31, 1998) ("a finding of willful infringement does not mandate enhanced damages").

willful but nevertheless careless.[543] On the other hand, deterrence will be less critical in cases of innocent infringement, since one who was not aware and had no reason to believe that she was infringing will not need to be deterred from future infringements.

In the file-sharing context, the defendant often knowingly disseminates large numbers of copies,[544] so this factor is not likely to lower an award. On the other hand, in the case of remixes, a defendant may have reasonably and in good faith reached the erroneous conclusion that her remix is a fair use.[545] In such circumstances, it would be appropriate to consider an award in the low end of the range. Similarly, this factor may help address concerns about the chilling effect of high levels of damages against innovative online services. For online services that reasonably believed that they were engaging in noninfringing conduct, this factor would reduce the likelihood of a very high award.

(b) The Defendant's Financial Situation

The Task Force recognizes the concern that some awards of statutory damages can be far beyond the capacity of the defendant to pay—whether an individual or a start-up business. Requiring juries and judges to consider the defendant's financial situation (the fourth factor) when assessing the level of the award will help address that concern.[546]

This factor is closely tied to both the deterrence and the punishment aspects of statutory damages. The amount necessary to deter a multi-billion dollar company from infringing for commercial profit will be far greater than the amount necessary to deter a private individual with limited income from engaging in noncommercial file-sharing. Similarly, a judgment of a few thousand dollars may serve as meaningful punishment for an low-income individual, but not a major corporation.[547]

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[543] *See Los Angeles News Serv. v. Reuters TV Int'l*, 942 F. Supp. 1275, 1283 (C.D. Cal. 1996) (statutory damages "particularly necessary to deter what may be at most careless infringement by major news-disseminating organizations whose business it is to supply audiovisual news material worldwide for a fee"), *aff'd in part, rev'd in part*, 149 F.3d 987 (9th Cir. 1998).

[544] Not surprisingly, plaintiffs in file-sharing cases generally allege willful infringement. *See* Christopher Cotropia & James Gibson, *Copyright's Topography: An Empirical Study of Copyright Litigation*, 92 TEX. L. REV. 1981, 2004 (2014), *available at* http://www.texaslrev.com/wp-content/uploads/CotropiaGibson92-7.pdf (finding that in all 512 file-sharing cases surveyed, plaintiffs sought injunctions and statutory damages based on willful infringement).

[545] *See above* Remix discussion, Section III, Part B.2.a (Fair Use), pp. 10-11 & Part C.2 (Provide Greater Clarity for Fair Use: Guidelines and Best Practices), pp. 27-29.

[546] *See* discussion *above* at p. 71 and note 417.

[547] It is a standard practice in non-copyright cases to consider the defendant's financial situation whenever punitive damages are awarded. 22 Am. Jur. 2d Damages § 623 (2015) ("While it is usually only one of several considerations relative to the determination of the amount of punitive damages, the wealth or financial condition of the defendant should be taken into account in determining the proper amount of punitive damages since the degree of punishment or deterrence is to some extent proportionate to the means of the wrongdoer. In other words, the amount of an award of punitive damages must relate to and not be disproportionate to the defendant's ability to pay. Courts do not require, or invite, the financial ruination or bankruptcy of a defendant liable for punitive damages.") (Footnotes omitted).

(c) The Nature of the Infringement

The appropriate level of the award will also depend upon the circumstances, nature and scope of the infringement (the sixth factor).[548] The analysis under this factor would justify a higher award for an enterprise that spent months or years engaged in widespread infringing activity than for an individual fan who creates an infringing mashup of excerpts from television series episodes. The distinction between non-commercial and commercial purposes also should be addressed under this factor, with infringements conducted for commercial gain typically justifying a higher award than those conducted for non-commercial, personal purposes.[549]

(d) Punishing Willful Infringement

The ninth factor addresses whether it is appropriate to punish the defendant and would apply only in cases involving willful infringement.[550] In such cases, statutory damages have been held to also serve a punitive function,[551] differing from the deterrence element by focusing on the defendant's past behavior. The Task Force believes it is appropriate for the court to consider those punitive purposes, including in cases involving individual file-sharers or mass online services, where warranted, bearing in mind the degree of the defendant's willfulness[552] and the

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[548]*See* ABA MODEL JURY INSTRUCTIONS § 1.7.8(5) (Factor 5); 7th Circuit Model Jury Instructions § 12.8.4 (2015); *See F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232 (1952) ("the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid") (quoting *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106-07 (1919)); 9th Circuit Model Jury Instructions § 17.25 (2007 & 2014 Supp.); *Dream Games of Arizona, Inc. v. PC Onsite,* 561 F.3d 983, 992 (9th Cir. 2009).

[549] A number of commenters proposed reducing the maximum statutory damages award specifically for noncommercial uses. *See* note 460 *above* and accompanying text. The Task Force does not believe that a bright line between commercial and noncommercial uses is justified in the statutory damages context, particularly given that a noncommercial use can cause just as much harm to the market for a copyrighted work.

[550] *See* ABA MODEL JURY INSTRUCTIONS §1.7.8(10) (Factor 10) ("In the case of willful infringement, the need to punish the defendant, if you find punishment appropriate under the facts"); 9th Circuit Model Jury Instructions § 17.25 (2007 & 2014 Supp.) (stating that the purpose of statutory award "is to penalize the infringer and deter future violations of the copyright laws.").

[551] *See Feltner v. Columbia Pictures,* 523 U.S. 340, 352 (1998) ("an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment"); *Sony BMG Music Entm't v. Tenenbaum,* 660 F.3d 487, 514 (1st Cir. 2011) ("statutory damages, unlike punitive damages, have both a compensatory and punitive element"); *Dream Games of Arizona, Inc. v. PC Onsite,* 561 F.3d 983, 992 (9th Cir. 2009); *Cass County Music Company v. C.H.L.R., Inc.*, 88 F.3d 635, 643 (8th Cir. 1996); *Fitzgerald Publ'g Co., Inc. v. Baylor Publ'g Co., Inc.,* 807 F.2d 1110, 1117 (2d Cir. 1986).

[552] *See above* pp. 71-72 and notes 417 and 421, and discussion of Factor 8 (The Defendant's State of Mind), p. 90. The fact that punitive considerations may be taken into account in awarding statutory damages does not, however, mean that they are subject to the jurisprudence governing awards of punitive damages. Courts of appeals that have addressed that issue have concluded that due to the way in which the statutory damages provisions of the copyright law are structured, the factors considered under punitive damages cases such as *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), are not applicable. *See Sony BMG Music Entm't v. Tenenbaum*, 719 F.3d 67, 70 (1st Cir. 2013) ("The concerns regarding fair notice to the parties of the range of possible punitive damages awards, which underpin Gore, are simply not present in a statutory damages case where the statute itself provides notice of the scope of the potential award. Moreover, Gore's second and third guideposts cannot logically apply to an award of statutory damages under the Copyright Act."); *Capitol Records, Inc. v. Thomas-Rasset,* 692 F.3d 899, 907-908 (8th

defendant's financial condition.[553] Of course, where the online service is found secondarily liable for enabling the conduct of third parties without any element of willfulness on its part, this factor would not apply.

iv. Adjusting for Multiple Works

The seventh factor—whether the total sum of damages, taking into account the number of works infringed and number of awards made, is commensurate with the overall harm caused by the infringement—can help address the concerns expressed by many commenters that awards involving numerous works can become excessive. This is intended to ensure that the overall award is proportionate to the harm and not simply a mechanical function of adding a number of individual awards for each infringed work.[554]

Just as a license to use multiple works may cost less than multiple license fees to use a single work, the compensatory aspect of a statutory damages award need not always increase equally for each additional infringed work. At least some of the amount needed to deter future infringements or to punish a willful infringer may be taken into account in the evaluation of the damages for the infringement of one work, and less may be required for any further deterrent effect in awarding statutory damages for other works in the same lawsuit. On the other hand, a jury might properly conclude that each act of infringement warrants an additional and equal degree of deterrence and/or punishment.

In cases involving a large number of works, this factor permits the court to take a holistic approach, adjusting the award for each work to ensure that the overall award is appropriate in magnitude. Nevertheless, the statute still requires at least the minimum possible award for each work infringed, limiting the bounds of the court's discretion.[555] The Task Force's third recommendation below giving courts the additional option, in certain cases involving large

Cir. 2012) (concluding that the Gore guideposts for punitive damage awards "would be nonsensical if applied to statutory damages.").

[553] *See* the discussion of Factor 4 (The Defendant's Financial Situation), *above*, p.91.

[554] *See* ABA MODEL JURY INSTRUCTIONS §1.7.8(8) (Factor 8) ("The number of works infringed and number of awards made (that is, the overall result)"). *See also UMG Recordings v. MP3.com*, No. 00 Civ. 472, 2000 U.S. Dist. LEXIS 13293, *15 (S.D.N.Y. Sept. 6, 2000) ("I believe any attempt to reduce this determination to some kind of mathematical formula or equation is spurious. There are a great many factors to consider and the Court must weigh them as best it can, based on the evidence and on the Court's reasoned evaluation of all the relevant factors and their interplay."); *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 910 ("The absolute amount of the award, not just the amount per violation, is relevant to whether the award is 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.' The recording companies here opted to sue over twenty-four recordings. If they had sued over 1,000 recordings, then a finder of fact may well have considered the number of recordings and the proportionality of the total award as factors in determining where within the range to assess the statutory damages.") (citation omitted) (quoting *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919)).

[555] *See, e.g. Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 992 (9th Cir. 2009) ("'If statutory damages are elected, [t]he [jury] has wide discretion in determining the amount of statutory damages to be awarded, constrained only by the specified maxima and minima.'") (quoting *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1336 (9th Cir. 1990)).

numbers of works, to assess statutory damages other than on a strict per-work basis is intended to supplement the discretion permitted under this factor.

v. Promoting Consistency and Transparency

As pointed out by many commenters, the broad range of potential statutory damages—from $200 to $150,000—confers flexibility but also can engender uncertainty and inconsistency.[556] Although compensatory, deterrent, and punitive functions are all considered in granting awards, courts do not always make clear the extent to which each is relevant in any given case, and as a rule juries offer no explanations of the bases for their awards.[557] Nor are juries consistently given detailed instructions on how to determine the amount of the award. The Task Force believes that additional guidance would help to harmonize judgments and provide greater stability.

The Task Force also recommends that courts consider articulating on the record, or asking juries to return special verdicts that indicate, which part of each statutory damages award represents compensation to the copyright owner and which part is awarded for purposes of deterrence or punishment. This practice would add more transparency and clarity, assisting in any appellate review.

vi. Other Proposals

Reducing the Minimum/Maximum Levels. Based on the record before us, the Task Force does not recommend reducing the minimum or maximum levels for statutory damages. We believe the concerns raised in these proceedings can be addressed through our other recommendations, without affecting the entire range of cases as to which Congress has established the existing parameters.

With respect to file-sharing, statutory damages must take into account not merely the defendant's personal use, but his or her acts in uploading and distributing copies to potentially numerous recipients.[558] And while statutory damage awards of $150,000 per work are rare, there may be cases, including in the context addressed in these proceedings, where such awards are justified due to the need to deter and punish willful infringement.[559]

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[556] *See* discussion *above* notes 419, 431-433.

[557] Although one commenter suggested that separate awards should be issued for purposes of compensation and deterrence, as a practical matter this would be difficult given the need to weigh different factors together when making an award. *See* note 463 and accompanying text, *above.*

[558] *See Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 502 (1st Cir. 2011). *See also Arista Records LLC v. Usenet*, No. 07 Civ. 8822 (HB), 2010 U.S. Dist. LEXIS 96957, 16-17 (S.D.N.Y. Sept. 16, 2010) (rejecting a defendant's argument that damages per work should have been limited to the value of an individual download of a sound recording since "defendants had over 15,000 subscribers, each of whom might have otherwise purchased plaintiffs' songs").

[559] The typical range of statutory damages awards against peer-to-peer file-sharers has been between $750 and $6,500 per work. *AF Holdings LLC v. Bossard*, 976 F. Supp. 2d 927, 930-31 (W.D. Mich 2013) (summarizing damages awards "in cases involving intentional copyright infringement by use of BitTorrent or other file-sharing protocols"); *Riding Films, Inc. v. John Does 1-65*, Case No. 2:13-cv-44, 2015 U.S. Dist. LEXIS 2438, *5 (S.D. Ohio January 8, 2015). In at least a handful of file-sharing cases, however, courts have awarded default judgments for the

In addition, while most of this section addresses the potential negative impact of the maximum level of statutory damages, some commenters have also expressed concern about the minimum amount of statutory damages permitted under the Act.[560] Under the Task Force's proposal, for example, an innocent infringer would still be subject to the $200 per-work statutory minimum while a non-innocent infringer would be subject to at least a $750 per-work minimum. Even these low sums, however, could still have a crippling effect in the online context when multiplied by the number of works at issue in a given case.[561]

Amending "Willfulness" Definition. Although a few commenters suggested aligning the definition of "willfulness" to mirror the patent infringement standard, the Task Force is not prepared to make such a recommendation at this time as the change would not be limited to the contexts of file-sharing and online services, and the issue was not raised by the questions presented in this process so as to allow adequate input and development of the record.

Curbing Litigation Abuse. As discussed above, the Task Force heard concerns about so-called "copyright trolls" that use the threat of statutory damages to obtain settlement fees from alleged infringers.[562] Some have suggested that Congress consider recalibrating statutory damages specifically to discourage misuse of the system.[563] We do not recommend such changes at this time.

With respect to the proposal to require election of statutory damages prior to trial or the filing of a summary judgment motion,[564] for example, it is not clear how this would meaningfully impede a plaintiff's ability to "extract higher settlements." The typical complaint made against the so-called "copyright trolls" who are the targets of this proposal is that they use the threat of high statutory damages awards to pressure a potential defendant to settle prior to filing a lawsuit in order to avoid incurring any substantial litigation-related expenses.[565] Plaintiffs employing such a strategy, a necessary component of which is to avoid the costs of a trial on the merits or any substantial motion practice, would rarely if ever reach the point where they would have to make an election even if the statute were amended as proposed. Moreover, there will be few circumstances under which such a plaintiff would elect not to seek statutory damages, since it will be unlikely to be able to prove actual damages higher than a potential statutory damages award.

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maximum amount of $150,000 per work for willful infringement. *CP Prods. Inc. v. Glover*, No. 1:12-cv-00808-JMS-DML, 2013 U.S. Dist. LEXIS 184573 (S.D. Ind. Mar. 26, 2013) (granting default judgment and awarding $150,000 in statutory damages for infringement of one copyrighted work); *AF Holdings LLC v. Lessere*, Case No. 12-CV-22156-UU, Default Final Judgment, Doc. 25 (S.D. Fla. Oct. 9, 2012) (granting default judgment and awarding $150,000 in statutory damages for infringement of one work).

[560] *See above* notes 460, 497, 503-509 and accompanying text.

[561] *See above* note 555 and accompanying text.

[562] *See above* Part B.1.c. (Litigation Abuse), pp. 74-77.

[563] *See above* notes 460-465, pp. 77-78.

[564] *See* text accompanying note 464 *above.*

[565] *See* discussion *above*, Part B.1.c (Litigation Abuse), p. 74.

The Task Force recognizes that the abusive enforcement actions described by commenters may facilitate unfair settlements, and can serve as a profit-making business for unscrupulous plaintiffs seeking a quick reward. Such actions are harmful to the copyright system as well as the judicial system. At the same time, most rights holders who assert infringement claims, including some who file John Doe lawsuits against numerous defendants, are not engaging in vexatious litigation.[566] While the potentially high level of statutory damages may at times encourage abusive enforcement activities, it also permits awards that are appropriate for harmful acts of infringement.[567] The unfair tactics used by certain litigants should be curbed without cutting back a remedy that serves legitimate purposes of compensation and deterrence. The courts are well-positioned to evaluate such tactics and have sanctioned counsel and parties who pursue baseless, reckless, or vexatious claims.[568]

Courts can also deprive such litigants of the ability to use the tactics that make such litigation profitable. In fact, a decision by the U.S. Court of Appeals for the District of Columbia Circuit last year may cripple the ability to pursue "John Doe" suits against file-sharers as a business model.[569] Its holdings, if adopted in the other judicial circuits, promise to make it much more difficult to pursue a strategy of suing as many defendants as possible in a single action to keep costs low and to settle quickly.[570] If over time such measures prove insufficient to curb the problem of litigation abuse, it may be necessary to take further steps to consider possible alternative solutions. Ultimately, the interests of rights holders, consumers, and online platforms are harmed by abusive litigation, and preventing such strategies is an important goal.

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[566] *See above* note 455 and accompanying text.

[567] *See above* note 455.

[568] *See above* notes 453-454 and accompanying text.

[569] The court held that the mere fact that two or more defendants accessed the same file through BitTorrent provides an insufficient basis for joinder; joinder requires that the defendants were participating in the same BitTorrent "swarm" *at the same time,* something that should significantly reduce the number of defendants who can be joined in a single suit. The court also held that a plaintiff suing a large number of Doe defendants and seeking discovery of their identities must have a good faith belief that each of the defendants may be found in the district in which the suit was pending. *AF Holdings, LLC v. Doe*, 752 F.3d 990 (D.C. Cir. 2014).

[570] *See* note 446 and accompanying text, *above*. One critic of "copyright trolls" has made the following observation about the implications of the court's ruling:

> [S]ince D.C. may have been the only court that still allowed trolls to engage in mass filing against multiple John Doe defendants, the loss of that option should discourage, if not stem altogether, further troll activity. After all, the porn troll business model is built largely on the troll's ability to get into court with such mass filings without having to do any of the hard work of identifying specific defendants. Once in the courtroom door, the troll can merely raise the fear that defendants might be identified through the discovery process. That then allows the troll to threaten the "outing" of a defendant as an illegal downloader, often of a pornographic movie, which threat can then be leveraged into a quick settlement that the defendant agrees to only as a means of concealing his or her identity and good name.

Kevin Goldberg, *Porn Troll Patrol: D.C. Circuit Rules Against 'John Doe' Lawsuits*, COMMLAWBLOG (June 4, 2014), http://www.commlawblog.com/2014/06/articles/intellectual-property/porn-troll-patrol-d-c-circuit-rules-against-john-doe-lawsuits/ (last visited Oct. 28, 2015).

b. Remove Notice Bar to the Innocent Infringement Defense

Reduced damages awards for innocent infringement appear to be infrequent, in part because existing law bars invocation of this defense where a notice is present on copies of the work.[571] The Task Force believes that this obstacle to the potential for reduced statutory damages should be removed. We therefore recommend amending the notice provisions in the Copyright Act so that the innocent infringement defense remains available in cases where there is a copyright notice.[572]

Specifically, the Task Force proposes that Sections 401(d) and 402(d) be amended to provide that the appearance of notice is relevant but not a bar to the assertion of an innocent infringement defense. The existence of a copyright notice should remain a factor for the court to consider when determining whether to reduce the damages award, since it may bear on the defendant's state of mind. If a defendant asserts that he was not aware of and had no reason to believe that the work was protected by copyright, the existence of a copyright notice would tend to undermine that claim. But if a defendant mistakenly believed that he was engaging in a fair use, the notice would not undermine that defense.

This proposal preserves the copyright owner's incentive to provide notice because, depending on the basis for the innocent infringement defense, the notice may still be relevant and even dispositive.

As to the proposals for expanding the mandatory remittitur provision for innocent infringers, to include additional types of defendants or to cover additional rights or exceptions,[573] the Task Force is not prepared to make recommendations at this time as there has been insufficient opportunity for public comment on these issues. The existing provision requiring complete remittitur of statutory damages is narrowly crafted to apply only in cases where the harm to the copyright owner is likely to be negligible, since acts of reproduction by nonprofit entities relying on fair use normally would not cause significant damage. Expanding eligibility for that provision would require a careful consideration based on a full record. As to acts of infringement by employees of libraries and archives who reasonably believe in good faith that their conduct falls within the scope of exceptions other than fair use, the Task Force is not aware of cases in which, if the provision had covered such exceptions, a qualifying entity could have invoked the remittitur provision. It may be that section 108, the exception for libraries and archives, should be included within the scope of that provision, but there has not been an opportunity to fully explore that issue in this proceeding.

c. Provide Greater Discretion in Cases of Non-willful Secondary Liability for Large Scale Online Services

There is no question that the use of the "per-work multiplier" in the context of online services making entire libraries of works available to the public can result in statutory damages that are

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[571] *See* text *above* accompanying notes 503-509, pp. 83-84.

[572] LCA Nov. Comments at 2; CCIA Nov. Comments at 6.

[573] *See above*, Part B.3 (The Innocent Infringement Defense), pp. 83-85.

extraordinarily large.[574] These levels of awards could potentially have a chilling effect on investment and innovation. Moreover, the "per work" calculation makes less sense in the context of secondary liability than in cases involving direct infringement. Where an online service provider enables thousands or even millions of users to infringe by offering many copyrighted works to the world at large, there is a more attenuated connection between the service provider's actions and the number of works that are infringed; typically, the service provider will have no control over or knowledge of the number of works that are infringed.

At the same time, the Task Force acknowledges that the potential for harm to individual creators and the creative industries caused by infringement using mass online services is considerable. And while some chilling effect may result from potentially massive damages, the scope of any such chilling effect is unclear. Although some investment may be deterred by uncertain legal environments and litigation over the issue of infringement may have bankrupted some companies, there is little concrete evidence of how much lawful innovation has actually been chilled. Even assuming a reduction in innovation and investment, it is not clear that this was solely the result of the potential magnitude of statutory damages awards—as opposed to potential liability itself, litigation costs or the threat of other remedies such as injunctive relief. And it may well be that the risk of statutory damages has had a positive effect in deterring innovators from engaging in conduct likely to be infringing, or encouraging investment in other innovation instead.

After careful consideration of all of these aspects, the Task Force concludes that an adjustment in the law is advisable. We recommend that section 504 be amended to provide that, in cases of nonwillful secondary liability by online services involving large numbers of infringed works, courts shall have the discretion to depart from the strict "per work" calculus and adjust the overall award to an amount that appropriately reflects the purposes set forth in the statutory factors we have proposed above.[575] This recommendation goes further than the leeway permitted under factor 7 described above, since without this additional change the courts are still bound to the minimum statutory per work amounts. When a court must multiply this minimum by a very large number of copyrighted works, it may not be possible to avoid an excessive outcome.[576]

Congress should consider whether to set a minimum number of infringed works beyond which an additional per-work award would not be mandatory, or whether that number should be determined in each case by the court.[577] Courts would not be required to abandon the strict "per work" method of calculation, but instead would have the discretion to do so if that calculus would lead to a disproportionate overall award. Nor should the enactment of such a provision be read to mean that this is the favored result in cases involving more than the threshold amount.

[574] *See* discussion *above* at note 482.

[575] *See above* Part C.2.a.iv (Adjusting for Multiple Works), pp. 93-94 (discussing factor 7).

[576] *See* discussion *above* at note 482.

[577] The per-work minimum would not be suspended with respect to all infringed works in the case, but only with respect to those works beyond the minimum number of works necessary to permit application of the alternative calculation method.It may be worthwhile to conduct a study to determine what the minimum number of works should be.

The Task Force is confident that the courts will be in the best position to determine whether, in each case, the alternative approach should be used.[578]

This flexibility should not, however, be available in cases involving willful infringement or intentional inducement of infringement.[579] These circumstances present the clearest need for deterrence and punishment. Concerns that high statutory damages awards may have a chilling effect on companies engaging in technological innovation are premised on the proposition that such companies should be encouraged to innovate and we should not unduly penalize those that inadvertently cross the line. However, such concerns do not apply with respect to those who infringe willfully, or actively induce infringement by those who use their services or products. In the words of the Supreme Court, "the inducement rule premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise."[580]

d. Establish a Streamlined Procedure for Adjudicating Small Claims

Finally, the Task Force supports the creation of a streamlined procedure for adjudicating small claims of copyright infringement and believes that further consideration should be given to the proposal of the Copyright Office to create a small claims tribunal.[581] The proposal would provide for a cap on awards of statutory and actual damages, limited discovery and counterclaims, assertion of all relevant defenses (including fair use), optional attorney representation, and awards of costs and fees against frivolous litigants.[582] Among other features of the system suggested by the Copyright Office, participation in small claims proceedings would be voluntary and would be administered by a centralized tribunal in a single location.[583] One recommendation of particular relevance to our review here is that the Copyright Office proposal would cap statutory damages awards on both a per work and per case basis.[584]

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[578] We recognize that in some cases, online services facing claims of secondary liability for non-willful large-scale infringement may fall within one of the safe harbors set forth in 17 U.S.C. § 512.

[579] *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

[580] *Id.* at 937.

[581] COPYRIGHT OFFICE SMALL CLAIMS REPORT, note 468 *above*. The Small Claims Report was issued after the Green Paper.

[582] *Id.* at 4, 109-12, 117, 119-20. The Small Claims Report also detailed the current copyright enforcement system, discussed constitutional and federal procedure issues, analyzed state small claims courts and other enforcement bodies, and outlined stakeholder proposals and its recommendations to support the establishment of a small claims tribunal. *Id.* at Sections III-IV and *passim*. In the Green Paper, the Task Force described the then-ongoing study and observed that an alternative to the federal courts could be useful for certain online infringement claims. *See* Green Paper at 58.

[583] *See* Small Claims Report at 97-99, 102-03. While the Task Force agrees that a small claims procedure with all of these features is desirable, we do not necessarily endorse each and every detail of the Copyright Office proposal, nor do we offer a particular legislative proposal at this time. However, we do note that any small claims system should include safeguards to prevent abuse.

[584] *Id.* at 109-112 (discussing stakeholder proposals for the range of damages and recommending a $15,000 per work cap and a cap of $30,000 for all damages in a single case involving a registered work, and half those amounts for

A small claims procedure for infringement claims of relatively low economic value would provide individual and smaller rights holders an alternative mechanism to enforce their rights if they lack the resources to litigate or employ another remedy under the current copyright system.[585] Given a damage cap, alleged infringers in the small claims process would not face the highest levels of statutory damages available under the current system. Other aspects of a small claims process could also help balance the interests of claimants and alleged infringers.

After considering the Copyright Office proposal in light of the comments the Task Force received,[586] we believe that a small claims process should be established to resolve infringement claims involving, inter alia, online file-sharing.[587] Many copyright owners would be willing to trade the potential for higher damages in exchange for lower costs and simpler, more expedited procedures, and defendants would also be attracted to a less costly forum where the exposure to damages is limited.[588] This could also help diminish the risk of disproportionate levels of statutory damages against individual infringers. Both parties would ultimately benefit from a small claims process that aims to streamline copyright litigation while reducing the potential costs for everyone involved.

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late-registered works); *see also* notes 50-51, 55-56 & 62 and accompanying text, *above* (presenting stakeholder views on capping statutory damages).

[585] We note that if a small claims tribunal can adjudicate file-sharing and other types of claims, it could become a useful venue for rights holders to engage in direct enforcement actions against alleged individual infringers.

[586] *See above*, pp. 77, Part B.1.d (Solutions Proposed by Stakeholders).

[587] A small claims tribunal is not likely, however, to have an appreciable impact on large scale secondary liability cases against online services given the magnitude of potential damages. Although our focus is on file-sharing, a small claims tribunal could also be useful in other infringement cases.

[588] *See* Small Claims Report at 24 ("Copyright owners whose works are infringed often are deterred from enforcing their rights due to the burden and expense of pursuing litigation in the federal system. Especially in the case of lower-value copyright claims, the potential for monetary recovery can be quickly overcome by the costs of discovery, motion practice, and other litigation expenses."); *see also* Green Paper at 58 (noting that a small claims procedure could provide an alternate remedy for rights holders lacking the resources to effectively use the DMCA takedown mechanism).

APPENDIX I

Public Comments Submitted on the Green Paper and Abbreviations

The Internet Policy Task Force extends its thanks to all of our colleagues throughout the Executive and Legislative branches who have provided valuable feedback and consultation during the development of this report.

We offer special thanks to all of the individuals and private sector organizations who submitted comments in response to our Notice of Inquiry. Those commenters are listed below with their abbreviation used throughout the White Paper.

ORGANIZATIONS

American Association of Independent Music	A2IM
American Free Trade Association	AFTA
American Intellectual Property Law Association	AIPLA
ASCAP (Joint submission with BMI CMPA NSAI NMPA RIAA SESAC)	ASCAP et al.
ASCAP	ASCAP
Association of American Publishers	AAP
BMI	BMI
BSA-The Software Alliance	BSA
Califa Group	Califa
Center for Democracy and Technology	CDT
Electronic Frontier Foundation (joint submission with Stanford University's Center for Internet and Society)	CIS/EFF
Computer and Communications Industry Association	CCIA
Consumer Electronics Association	CEA
Consumer Federation of America	CFA
Copyright Alliance	CA
Copyright Clearance Center	CCC
Creative Commons	CrComm
Deviant Art	DeviantArt
Digital Library	Digital Library
Digital Media Association	DiMA
Digital Right To Repair	DRTR
Directors Guild of America	DGA
eBay	eBay
Entertainment Software Association	ESA
Future of Music Coalition	FMC
Ghostly International	Ghostly
Global Intellectual Property Center	GIPC

Google	Google
Hardin Comments Librarians of Trinity University	Trinity
Independent Film and Television Alliance	IFTA
Information Technology and Innovation Foundation	ITIF
Institute for Policy Innovation	IPI
Intellectual Property Owners Association	IPO
Internet Association	IAC
Internet Commerce Coalition	ICC
Internet Infrastructure Coalition	IIC
Internet Society	Internet Society
Juneau Public Libraries	Juneau
Kernochan Center for Law, Media, and the Arts	Kernochan
Libraries of the College of Saint Benedict and Saint John	StBeneStJohn
Library Copyright Alliance	LCA
Motion Picture Association of America	MPAA
National Cable and Telecommunications Association	NCTA
National Music Publishers Association (joint submission with Nashville Songwriters Association International, SESAC, Inc. Church Music Publishers Association)	NMPA et al.
New Media Rights	NMR
Ohio Library Council	Ohio Library
Organization for Transformative Works	OTW
Owners Rights Initiative	ORI
Public Knowledge	PK
Rain City Video, Inc (joint submission with Screenplay)	Screenplay
Recording Industry Association of America	RIAA
Redigi	ReDigi
ScreenPlay, Inc. and Rain City Video, Inc.	ScreenPlay
Software and Information Industry Association	SIIA
Songwriters Guild of America	SGA
SoundExchange	SX
Stanford Center for Internet and Society and Electronic Frontier Foundation	CIS/EFF
The Harry Fox Agency Inc.	Harry Fox
University of Michigan Library	UofM
Wattpad	Wattpad
Writers Guild of America West	WGAW

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APPENDIX II

Participants in Public Meeting and Roundtable Discussions

The Internet Policy Task Force offers special thanks to all of the individuals and private sector organizations and our colleagues at the Copyright Office who participated in our Public Meeting on Copyright Policy, Creativity & Innovation in the Internet Economy, and those who participated in our Roundtables on Remixes, First Sale Doctrine, and Statutory Damages. Those participants are listed below with their affiliated organization, and the abbreviation used throughout this report.

Name	Organization	Organization Abbreviation	Location
Allan Adler	Association of American Publishers	AAP	Alexandria, Cambridge
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George Borkowski	Recording Industry Association of America	RIAA	Cambridge, Los Angeles
K. Christopher Branch	KC Branch Firm		Los Angeles
Catherine Bridge	Walt Disney Company	Disney	Los Angeles
Chris Brown	Brown & Rosen LLC		Cambridge
Scott Burroughs	Doniger/Burroughs APC		Los Angeles
Rick Carnes	Songwriters Guild of America, Inc.	SGA	Nashville
David Carson	International Federation of the Phonographic Industry	IFPI	Alexandria
Ronald Coleman	Geotz Fitzpatrick		Cambridge
Jay Cooper	Greenburg Traurig		Los Angeles
Kyle Courtney	Harvard University		Cambridge
Alex Curtis	Creator's Freedom Project		Nashville
Tiki Dare	Oracle		Berkeley
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Dennis Dreith	AFM & SAG-AFTRA Fund	AFM/SAG-AFTRA	Los Angeles
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Markham Erickson	Internet Association		Alexandria
Scott Evans	Adobe		Berkeley

Name	Organization	Organization Abbreviation	Location
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Anne Gililand	UNC Chapel Hill		Cambridge
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Jodie Griffin	Public Knowledge	PK	Cambridge
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Meg Kribble	American Association of Law Libraries	AALL	Cambridge
Keith Kupferschmid	The Software & Information Industry Association	SIIA	Cambridge
Dina LaPolt	LaPolt Law, P.C.		Los Angeles
Steven Marks	Recording Industry Association of America	RIAA	Nashville
Walter McDonough	Future of Music Coalition	FMC	Cambridge
Corynne McSherry	Electronic Frontier Foundation	EFF	Berkeley
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Deborah Moore	Film Producer		Los Angeles
Stephanie Moore	Engine Advocacy	Engine	Berkeley
Helene Muddiman	Hollywood Elite Composers	Hollywood Composers	Los Angeles
David Newhoff	Writer, Filmmaker, Blogger of “Illusion of More”		Cambridge

Name	Organization	Organization Abbreviation	Location
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Jay Rosenthal	National Music Publishers' Association	NMPA	Alexandria, Cambridge
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Pam Samuelson (Professor)	UC Berkeley School of Law		Berkeley
Eddie Schwartz	Music Creators North America	MCNA	Nashville
Josh Schiller	Boies, Schiller & Flexner LLP		Alexandria
Vicki Sheckler	Recording Industry Association of America	RIAA	Berkeley
Ben Sheffner	Motion Picture Association of America, Inc.	MPAA	Berkeley, Cambridge, Nashville
Ed Shems	Graphic Artists Guild	GAG	Cambridge
Emery Simon	BSA, The Software Alliance	BSA	Alexandria
Sherwin Siy	Public Knowledge	PK	Alexandria
David Sohn	Center for Democracy & Technology	CDT	Alexandria
Tim Stehli	HoriPro Entertainment Group, Inc.	HoriPro	Nashville
Rachel Stilwell	The Law Office of Rachel Stilwell		Lost Angeles
Mitch Stolz	Electronic Frontier Foundation	EFF	Berkeley, Los Angeles
John Strohm	Loeb & Loeb LLP		Nashville
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**Pro hac vice application to be filed*

Attorneys for Defendant SPOTIFY USA INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID LOWERY, individually and on behalf of himself and all others similarly situated, Plaintiffs, vs. SPOTIFY USA INC., a Delaware corporation, Defendant.	Case No. 2:15-cv-09929-BRO-RAO **DEFENDANT SPOTIFY USA INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION OR, IN THE ALTERNATIVE, TO TRANSFER VENUE TO THE SOUTHERN DISTRICT OF NEW YORK** Date: April 4, 2016 Time: 1:30 p.m. Judge: Hon. Beverly Reid O'Connell

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

I. INTRODUCTION

This case—a putative nationwide copyright class action brought by a resident of Georgia against Spotify USA Inc. ("Spotify"), a New York-headquartered company—does not belong in this Court for two reasons. First, the Court lacks personal jurisdiction over Spotify. As the Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014), makes clear, Spotify is not subject to general personal jurisdiction here because—as a Delaware corporation headquartered in New York—it is not "at home" in California. Nor is it subject to specific personal jurisdiction: Spotify has not itself created the minimum, suit-related contacts directed at California that the Due Process Clause requires to authorize specific jurisdiction. This lawsuit should therefore be dismissed under Federal Rule of Civil Procedure 12(b)(2).

Second, even if this Court did have personal jurisdiction over Spotify, the case should be transferred to the Southern District of New York under 28 U.S.C. § 1404. The reason is simple: Venue in California is not convenient for either of the parties or any of the potential witnesses, including potential key third-party witnesses. Spotify's headquarters and all of its employees relevant to this litigation are located in New York. Plaintiff Lowery is a Georgia resident who has not alleged any ties to California. In addition, one of the most important third-party witnesses to this action, namely, the Harry Fox Agency, is located in New York. Finally, no party documents relevant to this litigation are located in this District. Thus, "for the convenience of parties and witnesses," and "in the interest of justice" (28 U.S.C. § 1404), this case should be transferred to the Southern District of New York. In fact, if this Court were to transfer this action to New York, it could avoid the need to rule on the constitutional questions presented by the issue of personal jurisdiction, because a court may grant a transfer motion without deciding whether personal jurisdiction exists.

II. THIS COURT LACKS PERSONAL JURISDICTION OVER SPOTIFY IN THIS MATTER.

"In opposing a defendant's motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that jurisdiction is proper." *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1068 (9th Cir. 2015) (internal quotation marks omitted). As this Court is aware, there are two forms of personal jurisdiction: (a) "general jurisdiction," which applies where a defendant is so "at home" in the forum that a court may adjudicate any claims against the defendant arising from anywhere in the world; and (b) "specific jurisdiction," which allows a court to adjudicate claims that arise out of the defendant's suit-related contacts with the forum state. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

Neither form of personal jurisdiction over Spotify is proper in this case. As a Delaware corporation with its principal place of business in New York, Spotify is not subject to general jurisdiction in this State. And this litigation does not arise out of suit-related contacts that Spotify has directed towards California in particular, as is required for specific jurisdiction. Thus, the Due Process Clause does not authorize personal jurisdiction over Spotify here.[1]

A. Spotify Is Not Subject To General Jurisdiction In California.

The Supreme Court's 2014 decision in *Daimler* sharply limits the range of jurisdictions in which a corporate defendant may be considered "'essentially at home'" and therefore subject to general jurisdiction. *Lightfoot v. Cendant Mortg. Corp.*, 769 F.3d 681, 689 (9th Cir. 2014) (quoting *Daimler*, 134 S. Ct. at 755-58). As the Ninth Circuit recently explained, *Daimler* holds that "[t]he two places where a corporation is 'essentially at home' and therefore subject to general

[1] "Where, as here, no federal statute authorizes personal jurisdiction, the district court applies the law of the state in which the court sits. California's long-arm statute, Cal. Civ. Proc. Code § 410.10, is coextensive with federal due process requirements." *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011) (citations omitted).

jurisdiction are its ***place of incorporation*** and its ***principal place of business***." *Id.* (citing *Daimler*, 134 S. Ct. at 760) (emphasis added). A corporation can be considered at home elsewhere only in a truly "exceptional case," such as when its *de facto* principal place of business and its formal headquarters are temporarily in different locations. *Daimler*, 134 S. Ct. at 755–58 & n.8 (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952)).[2]

Those "exceptional" conditions do not apply here, and *Daimler* therefore conclusively demonstrates that Spotify is not subject to general jurisdiction in California. As Plaintiff concedes in his complaint, Spotify is incorporated in Delaware and its principal place of business is in New York. Compl. ¶ 8; *see also* Declaration of Sachin Doshi ¶ 8. That ends the inquiry under *Daimler*: Because Spotify is not "at home" in California, it is not subject to general jurisdiction here. Spotify is subject to general jurisdiction only in Delaware or New York.

B. Spotify Is Not Subject To Specific Jurisdiction In California In This Case.

Spotify is likewise not subject to specific personal jurisdiction in California in this case. In *Walden v. Fiore*, 134 S. Ct. 1115 (2014), the Supreme Court reaffirmed the traditional rule that, for specific jurisdiction to exist, "the defendant's suit-related conduct must create a substantial connection with the forum State." *Id.* at 1121. Under this rule, three requirements must be satisfied before a court may exercise specific jurisdiction consistent with due process.

First, the defendant must have established "contacts with the *forum State itself*, not . . . contacts with persons who reside there." *Id.* at 1122 (emphasis

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[2] *Perkins* is the only case in which the Supreme Court has found general personal jurisdiction over a non-resident defendant. There, a Philippine corporation was temporarily relocated to Ohio while the Japanese occupied the Philippines during World War II. 342 U.S. at 447. During that time, "Ohio was the corporation's principal, if temporary, place of business." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 n. 11 (1984) (describing facts of *Perkins*).

added). Thus, "a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." *Id.* at 1123. Further, contacts with individual forum *residents* are irrelevant except to the extent that they demonstrate that the defendant has targeted and directed its activities at the *forum state as such*. *See also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) (explaining that a defendant's "contract with an out-of-state [plaintiff]" does not "automatically establish sufficient minimum contacts in the [plaintiff's] home forum" and that courts must instead evaluate "whether the defendant purposefully established minimum contacts *within the forum*") (emphasis added).

Second, the contacts between the defendant and the forum state must be "contacts that the 'defendant *himself*' creates." *Walden*, 134 S. Ct. at 1122 (quoting *Burger King*, 471 U.S. at 475). This is so because the "[d]ue process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties." *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980)). Thus, "it is the *defendant's conduct* that must form the necessary connection with the forum State that is the basis for its jurisdiction over him." *Id.* (emphasis added) (citing *Burger King*, 471 U.S. at 478). Specific jurisdiction may not be based on the "'unilateral activity'" of persons other than the defendant. *See id.* at 1123 (quoting *Burger King*, 471 U.S. at 475).

Third, the contacts upon which specific jurisdiction is based must be "suit-related." *Walden*, 134 S. Ct. at 1121. Contacts that have nothing to do with the "underlying controversy" in the litigation are irrelevant to specific jurisdiction. *Id.* at 1121 n.6 (quotation marks omitted).

In this case, none of the three due process requirements underscored in *Walden* is met.

1. Under *Walden*, Spotify Has Not Directed Its Activities Towards California Simply By Making Its Internet-Based Services Available Around The World.

Lowery does not allege that Spotify has directed any of its activities *specifically toward California* as opposed to other jurisdictions. He does not, because he cannot. The Spotify activities at issue in this lawsuit—Spotify's licensing of musical compositions in the United States—are activities that are exclusively performed by Spotify employees in New York City or Spotify AB employees in Sweden,[3] and/or by Spotify's exclusive third party licensing agent for mechanical rights in the United States, namely, the Harry Fox Agency, which also performs all of its relevant activities in New York City. *See* Doshi Decl. ¶ 14. These activities have nothing to do with California.

Plaintiff tries to overcome this obstacle by pointing to Spotify's alleged activities with respect to its users, alleging that "residents of California" enter into user agreements and engage in online transactions with Spotify, such as playing musical works through the service. Compl. ¶ 8. He also alleges that the Spotify service interacts with "computers of residents in California" in its operations. *Id.*

But the fact that Spotify's online service is accessible in California and used by certain California *residents* does not indicate that Spotify has purposefully directed its activities *toward California in particular*. Indeed, a federal district court recently reached the same conclusion in a highly analogous case, *Gullen v. Facebook, Inc.*, 2016 WL 245910 (N.D. Ill. Jan. 21, 2016). There, a plaintiff sued Facebook in a putative class action, alleging that Facebook's "tag suggestion" feature violated Illinois law. *Id.* at *1. The plaintiff argued that Facebook was subject to specific jurisdiction in Illinois because it had supposedly "target[ed]" the feature at "millions of users who are residents of Illinois." *Id.* at *2. But the court

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[3] Spotify USA Inc. is a wholly-owned subsidiary of Spotify AB, a company organized under the laws of Sweden. Doshi Decl. ¶ 7. Spotify AB is not a party to this litigation.

disagreed, concluding that that assertion was simply "not true" because the feature was available to *all* Facebook users, not merely those in Illinois. *Id.*

The same analysis applies here: Spotify's service is not directed at California in particular simply because it "is accessible to [California] residents." *See id.* As with the Facebook feature at issue in *Gullen*, Spotify's content is available to users throughout the United States (and the world). Millions of people around the world use Spotify's service—Spotify has at least 75 million active users in 58 countries[4]—and the catalog of content available to users in California is the same as that available to users anywhere else in the country (*see* Doshi Decl. ¶ 13), demonstrating that Spotify does not target its service at California residents in particular. The fact that California residents use Spotify simply reflects that certain "purchasers happen[] to live in" California; it does not indicate that Spotify expressly aimed its activities at California. *Adobe Sys. Inc. v. Cardinal Camera & Video Ctr., Inc.*, 2015 WL 5834135, at *5 (N.D. Cal. Oct. 7, 2015); *see also*; *Bubble Genius LLC v. Smith*, 2015 WL 4399483, at *5 (C.D. Cal. July 17, 2015) (holding that website did not target California even though California residents made purchases on it, because its operator did not "deliberately create substantial contacts with California" or intend the site to be "particularly desirable in the California market").

Spotify's service is not geographically "tethered to [California] in any meaningful way." *Walden*, 134 S. Ct. at 1125. Spotify is a digital music streaming service that allows users to stream music (and other related media) over the Internet to a wide range of devices, including personal computers, tablets,

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[4] *See* Stillman Decl. Exs. A-B (Business Insider, Spotify Now Has 20 Million Paying Subscribers, available at http://www.businessinsider.com/spotify-now-has-20-million-paid-subscribers-75-million-users-charm-2015-6?r=UK&IR=T; The New York Times, Starbucks in Deal with Spotify to Stream Music, available at http://www.nytimes.com/2015/05/19/business/media/starbucks-in-deal-with-spotify-to-stream-music.html?_r=0).

smartphones, cars, TVs, speakers, gaming consoles, and more. Doshi Decl. ¶ 10. In order to play music using the Spotify service, users must first log on to the Spotify service through the Spotify software or website on their devices. Doshi Decl. ¶ 13. The Spotify service is completely portable: a Spotify user who created an account in California (for example) can stream music to her device in another state (or sometimes another country). Doshi Decl. ¶ 13. This portability further confirms that Spotify has not directed its actions specifically at California. *See Picot v. Weston*, 780 F.3d 1206, 1215 (9th Cir. 2015) (holding that specific jurisdiction was unavailable because the defendant's actions were not directed at California but instead would "follow [the plaintiff] wherever he might choose to live or travel").

Courts have made similar points with respect to email, another portable Internet service, explaining that email contacts "do[] not show a relation between the [defendant] and [the forum]." *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 803 (7th Cir. 2014). This is so because "[a]s a practical matter, email does not exist in any location at all; it bounces from one server to another . . . and it winds up wherever the recipient happens to be at that instant." *McGibney v. Retzlaff*, 2015 WL 3807671, at *5 (N.D. Cal. June 18, 2015) (quotation marks omitted). Because a user can access email from anywhere, the relationship between where she happens to do so at any particular time and a lawsuit is "entirely fortuitous," meaning that an email contact does not show any connection between the defendant and the place where the contact happened to occur. *Id.* (quotation marks omitted).

The same is true of the Spotify service. Users can and do access Spotify from nearly anywhere, and it is (as in *McGibney*) "entirely fortuitous" where a user happens to be when she streams a particular song. *Id.* Thus, any contacts between Spotify and users who *happen* to be in California do not support specific jurisdiction, because they involve no "deliberate actions by [Spotify] to target or direct itself toward the forum state." *Advanced Tactical*, 751 F.3d at 803.

At bottom, Plaintiff's theory of jurisdiction cannot be that Spotify has targeted its service *at California*—it clearly has not—but instead that Spotify is subject to specific jurisdiction *anywhere and everywhere* its service can be accessed. Yet that theory would lead to the absurd conclusion that any website or online service would be subject to suit in virtually every jurisdiction. As the Seventh Circuit has put it: "[I]f having an interactive website were enough [to warrant specific jurisdiction], there is no limiting principle—a plaintiff could sue everywhere. Such a result would violate the principles on which *Walden* and *Daimler* rest." *Id.* at 803; *see also, e.g., GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000) (rejecting the notion that "mere accessibility" of an internet service in the forum suffices for personal jurisdiction, because that "expansive theory of personal jurisdiction would shred the[] constitutional assurance[] [of due process] out of practical existence"). Thus, this Court should hold that Spotify's contacts with users do not support specific jurisdiction because they are not in any way directed at California in particular.

2. The Only Relevant Contacts Would Be Those Created *By Spotify*–Not Those Generated By California Users' Interactions With The Spotify Service.

Plaintiff's argument for specific jurisdiction based on Spotify's interactions with California-based users fails for a second reason: Spotify does not *itself* create those contacts. In essence, Spotify simply makes available an online service that transmits music when, and only when, a person chooses to become a user and then interacts with the service.

Under similar circumstances, courts have repeatedly held that a defendant that operates an Internet-based service—like Spotify—does not *itself* create a contact with the forum state simply because the service has users in that state. For example, the Seventh Circuit has explained that "the operation of an interactive website does not show that *the defendant* has formed a contact with the forum state. And, without *the defendant's creating* a sufficient connection (or 'minimum contacts') with the forum state itself, personal jurisdiction is not proper." *Advanced Tactical*, 751 F.3d at 803 (emphasis added)).

Similarly, a federal court in Chicago recently rejected "the notion that" Facebook's "operation of an interactive site is sufficient to confer specific jurisdiction on it in every state from which the site can be accessed." *Gullen*, 2016 WL 245910, at *2. Because the plaintiff in *Gullen* had failed to "allege that Facebook targets" the challenged conduct—its "Tag Suggestions" feature—"at Illinois residents" in particular, "the fact that [Facebook's] site is accessible to Illinois residents does not confer specific jurisdiction over Facebook." *Id.*

The same is true here: Spotify's operation of an Internet-based service accessible to California users (as well as users around the country and the globe) does not mean that Spotify itself has "'formed a contact with'" California (*id.* (quoting *Advanced Tactical*, 751 F.3d at 803)). Accordingly, there is no specific personal jurisdiction over Spotify in this case for this additional, independent reason.

3. The Only Contacts That Spotify Itself Has Created With The Forum Are Not Suit-Related.

Plaintiff's complaint points to only one form of contact that conceivably reflects Spotify's direction of contacts towards California in particular: Spotify's two California offices. But those offices are irrelevant to specific jurisdiction, because they are not related to this lawsuit. And as *Walden* holds directly, it is the "defendant's *suit-related* conduct" that "must create a substantial connection with the forum State." 134 S. Ct. at 1121 (emphasis added).

Spotify's two small offices in California do not fit the bill. They employ a total of approximately 50-60 employees. Doshi Decl. ¶¶ 21-22. This is far less than the 450-500 employees located in New York, which is the hub of the company's United States operations. Doshi Decl. ¶ 9. All but eight of these employees work in roles unrelated to the content part of Spotify's business. Doshi Decl. ¶ 22. The majority of California employees work in advertising sales and of the few California employees who perform work related to the content side of Spotify's business, not a single one is involved with music composition licensing—the subject matter of this litigation. *See* Doshi Decl. ¶¶ 22-23. Thus, Spotify's California offices do not constitute "suit-related" contacts and accordingly cannot support specific jurisdiction in this case.

Plaintiff may also seek to argue that Spotify has established contacts with California by litigating in California courts in other cases. But specific jurisdiction is analyzed on a "case-by-case basis." *Braun v. Crown Crafts Infant Prods., Inc.*, 2013 WL 1154498, at *2 (W.D. Wash. Mar. 20, 2013). Thus, the existence of prior litigation in California says nothing about whether specific jurisdiction is available in *this* case.

* * *

Because there is neither general jurisdiction nor specific jurisdiction over Spotify in California, this case must be dismissed for lack of personal jurisdiction.

III. IN THE ALTERNATIVE, THE CASE SHOULD BE TRANSFERRED TO THE SOUTHERN DISTRICT OF NEW YORK.

In the alternative, this Court should transfer this case to the U.S. District Court for the Southern District of New York under 28 U.S.C. §1404(a). As described more fully below, the Southern District of New York, where Spotify's United States operations are based and where all of its knowledgeable witnesses and documents are located, as well as where key third-party witnesses and documents are located, is a far more convenient and appropriate forum for this litigation than this District, where *no* known documents or witnesses may be found, from the parties or otherwise.

A. Virtually All The Factors Courts Consider In Deciding Whether Venue Is Inconvenient Point Toward Transferring This Case to the Southern District of New York.

A district court may transfer a civil action to any other district where it could have been brought "[f]or the convenience of the parties and witnesses, in the interests of justice." 28 U.S.C. § 1404(a). There is no question that Lowery could have brought this suit in the Southern District of New York, because Spotify's principal place of business is located in New York City and Spotify is therefore subject to personal jurisdiction in that district. *See* 29 U.S.C. §1391(b)(1)-(2). Thus, transfer is appropriate as long as "'consideration[s] of convenience and fairness'" favor transfer. *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000) (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)).

The Supreme Court has instructed that the "public" and "private" interest factors relevant to transfer include:

- the parties' "relative ease of access to sources of proof";
- the "availability of compulsory process for attendance of unwilling witnesses";
- "some weight to the plaintiffs' choice of forum";
- "local interest in having a localized controversy decided at home";
- "administrative difficulties flowing from court congestion"; and
- in diversity jurisdiction cases, "having the trial . . . in a forum that is at home with the law."

Atl. Marine Constr. Co. v. U.S. Dist. Court for Western Dist. of Tex., 134 S. Ct. 568, 581 n.6 (2013) (citations and internal quotation marks omitted).

Here, all of the most significant factors weigh squarely in favor of transfer and the remaining factors are largely neutral, while *none* of the factors favors Plaintiff.

1. The Southern District Of New York Is A Far More Convenient Forum For Both Parties.

The Southern District of New York is a far more convenient forum for *both* parties than this District. Spotify's headquarters are located in New York City and Plaintiff is a Georgia resident; neither party resides here.

Moreover, in a class action lawsuit, the defendant's presence in the transferee venue is a "weighty consideration" in deciding whether to grant a transfer. *In re Yahoo! Inc.*, 2008 WL 707405, at *3 (C.D. Cal. Mar. 10, 2008) (granting transfer to defendant's home district, where plaintiffs did not allege that they resided in the transferor district or that the transferor district was otherwise convenient to them for any particular reason). Spotify's United States operations are based in New York, the company's largest U.S. office, where Spotify employs approximately 450-500 employees. Doshi Decl. ¶ 9. The most senior employees of Spotify USA Inc., including its Chief Content Officer, Chief Revenue Officer, Chief Marketing Officer, and Global Head of Communications and Public Policy, work in the New York office. Doshi Decl. ¶ 9. Furthermore, this lawsuit makes allegations relating to Spotify's publishing licensing and royalty payment procedures. Compl. ¶¶ 1-3. All Spotify employees in the United States with knowledge of these policies and procedures work in New York and live either in New York or in the New York metropolitan area. Doshi Decl. ¶ 15. These employees include:

- ***Sachin Doshi***, VP of Content Strategy & Operations, who is knowledgeable about where documents and other evidence relevant to plaintiff's allegations may be found and where certain potential witnesses are located;
- ***Stefan Blom***, Chief Content Officer and Chief Strategy Officer, who is knowledgeable about Spotify's overall licensing practices and strategy, including with respect to obtaining mechanical licenses;

- ***Andrew Contompasis***, Technical Account Manager, who is knowledgeable about how content physically is delivered to Spotify from record labels and how it makes its way onto the service;
- ***James Duffett-Smith***, formerly an attorney for Spotify who was recently named Head of Publisher Relations, who is knowledgeable about Spotify's relationship with HFA, Spotify's relationships with music publishers, and Spotify's agreements relating to music publishing rights (including mechanical rights); and
- ***Niklas Lundberg***, formerly Head of Content Insight and recently named Head of Licensing for Labels and Recordings, who is knowledgeable about Spotify's relationship with HFA and Spotify's relationships with music publishers.

Doshi Decl. ¶¶ 1, 15. Former employee ***Kenneth Parks*** also resides in New York and is knowledgeable about Spotify's overall licensing practices and strategy, including with respect to obtaining mechanical licenses (prior to the time of his recent departure). Parks was Spotify's Chief Content Officer until September 2015 and from October 2015 to present has been engaged to provide consulting services to Spotify. Doshi Decl. ¶ 15.

By contrast, *no* Spotify employees with knowledge relevant to this action may be found in California. Doshi Decl. ¶¶ 15, 23.[5] Spotify documents relevant to Plaintiff's allegations are most likely to be in the possession of the New York employees named above, and would therefore be collected and reviewed at Spotify's New York offices. Doshi Decl. ¶ 16. Thus, it would be far more convenient for Spotify to defend against this lawsuit in New York. Doshi Decl. ¶

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[5] Although Spotify maintains two small offices in California, one in San Francisco and one in Los Angeles, neither of the company's California offices houses documents relevant to this litigation, and none of Spotify's California-based employees has any knowledge relevant to this litigation. Doshi Decl. ¶¶ 21,23.

24.

Litigating in New York would also be more convenient and cost-efficient for *Plaintiff*, who is a resident of Georgia. Compl. ¶ 7. Plaintiff would certainly have to appear for any trial in this action, and may well appear at other court proceedings. For such appearances, Georgia is of course much closer to New York than to California. In short, the convenience of both parties favors transfer to New York.

2. The Southern District of New York Is A More Convenient Forum For Witnesses.

"The convenience of the witnesses is usually the most important factor to consider in deciding whether to transfer an action." *Yahoo!*, 2008 WL 707405, at *3. This factor, too, weighs heavily in favor of transfer: virtually *no* relevant witnesses reside in California, while all of Spotify USA's witnesses and most of the non-party witnesses, with the exception of Spotify AB employees in Sweden, reside in New York (or the New York metropolitan area).

For example, all potential party witnesses in this litigation (other than plaintiff Lowery) live either in New York or in the New York metropolitan area. Doshi Decl. ¶ 15.[6] At least some of these employees are likely to be called as witnesses in this action.

Even more relevant is the fact that the *non-party* witnesses likely to be called are also predominantly located in New York. "The convenience of non-party witnesses is often the most important factor in determining whether a transfer under § 1404 is appropriate." *Hamilton v. Genesis Logistics, Inc.*, 2013 WL 3168373, at *6 (C.D. Cal. June 20, 2013); *see also, e.g., Galliani v. Citimortgage, Inc.*, 2013 WL 101411, at *4 (E.D. Cal. Jan. 7, 2013) ("It is axiomatic that

[6] As discussed above, there are employees of Spotify's parent company (Spotify AB) located in Sweden with relevant information, but Spotify AB is not a party to this lawsuit.

convenience of non-party witnesses is frequently the most important factor in the section 1404(a) calculus."); *Yahoo!*, 2008 WL 707405, at *3 ("[I]t is often the convenience of the non-party witnesses that figures most prominently in [the transfer] analysis.").

Here, that "most important" consideration points decisively in favor of transfer: the Harry Fox Agency ("HFA"), a rights management, licensing, and royalty services company headquartered in New York,[7] plays an important role in connection with activities at issue in the Complaint, as HFA is Spotify's exclusive third party licensing agent for mechanical rights in the United States. Doshi Decl. ¶ 17. Accordingly, the HFA employees who perform the relevant music licensing services on behalf of Spotify in New York are likely to have especially relevant testimony and documents. Doshi Decl. ¶ 18. Litigating this case in the Southern District of New York would be far more convenient for these key non-party witnesses who work (and presumably reside) in New York than proceeding here.

Furthermore, a small number of Spotify AB employees who work and reside in Sweden are also knowledgeable about Spotify's licensing of musical compositions in the United States and/or the Spotify/HFA relationship. Doshi Decl. ¶ 19. These employees include: Per Malm, Chapter Lead Manager, Content Engineering Chapter; Erik Olsson, Content Analyst; Simon Hartikainen, Senior Content Analysis Manager; and Johan Forshufvud, Strategic Partnership Manager. Doshi Decl. ¶ 19. To the extent that those witnesses might appear at trial, it would obviously be more geographically convenient for them if this litigation took place in New York rather than Los Angeles. And, at a minimum, their presence outside of either of the competing districts does not favor either district.

Finally, Cindy Charles, a former legal advisor and business consultant to

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[7] *See* Stillman Decl. Ex. C (S&P Report showing Harry Fox Agency's primary office location in New York, New York).

Spotify, is also knowledgeable about central issues to this litigation. Doshi Decl. ¶ 20. In particular, Charles was involved in developing Spotify's musical composition licensing program in the United States and advised Spotify during its negotiations with HFA related to HFA becoming Spotify's exclusive third party licensing agent for mechanical rights in the United States. Doshi Decl. ¶ 20. Although certain of her testimony and documents are likely to be protected by the attorney-client privilege, any non-privileged testimony and documents will be highly relevant to the issues in this case. Charles primarily resides in New York, but travels frequently to the San Francisco Bay area on business, where her husband also maintains a residence. Doshi Decl. ¶ 20. Although San Francisco is located in California, it is nearly 400 miles away from Los Angeles.

Indeed, the location of third party witnesses is more than a matter of mere convenience, as they may be outside this Court's subpoena power. Courts have often examined whether non-party witnesses are outside the court's subpoena power in considering whether to transfer a lawsuit. *U.S. v. One Oil Painting Entitled Femme en Blanc by Pablo Picasso*, 362 F. Supp. 2d 1175, 1185-86 (C.D. Cal. 2005); *Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152, 1165-66 (S.D. Cal. 2005) (ability to compel testimony weighed "strongly in favor of transfer" where current and former employees of a non-party with information material to the lawsuit resided beyond the reach of the transferor court's subpoena power but within the subpoena power of the transferee court); *Leyvas v. Bezy*, 2008 WL 2026276, at *4 (D. Ariz. May 9, 2008) ("inability of the Court to compel the attendance of certain witnesses would certainly favor transferring the case"). Accordingly, the fact that numerous potential third-party witnesses work (and presumably live) within the subpoena power of the Southern District of New York—while none, to Spotify's knowledge, reside within the subpoena power of this District—demonstrates that the "relative ease and access to sources of proof" clearly favors transfer to New

York. *Atl. Marine*, 134 S. Ct. at 581 n.6.

3. Plaintiff's Choice Of Forum Is Entitled To No Deference Here.

Ordinarily, a plaintiff's choice of venue is entitled to "some weight" (*Atl. Marine*, 134 S. Ct. at 581 n.6), but where (as here) "'the forum lacks a significant connection to the activities alleged in the complaint, the degree to which courts defer to the plaintiff's chosen venue is 'substantially reduced.'" *Broad. Data Retrieval Corp. v. Sirius Satellite Radio, Inc.*, 2006 WL 1582091, at *3 (C.D. Cal. June 6, 2006) (quoting *Williams v. Bowman*, 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001)). Here, as discussed above, the operative facts which underlie Plaintiff's claims—Spotify's licensing efforts and royalty payment procedures—occurred in New York. Accordingly, California lacks any "significant connection" to this case.

Moreover, plaintiff is a Georgia resident, not a California resident, and it is well established that a foreign plaintiff's choice of venue "deserves less deference than the forum choice of a domestic plaintiff." *Saleh*, 361 F. Supp. 2d at 1157 (quoting *Ravelo Monegro v. Rosa*, 211 F.3d 509, 514 (9th Cir. 2000)); *see also Fabus Corp. v. Asiana Express Corp.*, 2001 WL 253185, at *1 (N.D. Cal. Mar. 5, 2001) ("[t]he degree to which courts defer to the plaintiff's chosen venue is substantially reduced where the plaintiff's venue choice is not its residence"); *Painter's Dist. Council No. 30 Health & Welfare Fund v. Amgen, Inc.*, 2007 WL 4144892, at *3-4 (C.D. Cal. Nov. 13, 2007) (concluding that plaintiff's choice of forum was entitled to less deference "because California is not Plaintiff's domicile and Plaintiff has no contact with this district").

In addition, "the Ninth Circuit, 'like other courts, has noted that the weight to be given the plaintiff[']s choice of forum is discounted where the action is a class action.'" *Metz v. U.S. Life Ins. Co.*, 674 F. Supp. 2d 1141, 1146 (C.D. Cal.

2009) (quoting *Saleh*, 361 F. Supp. 2d at 1157); *see also Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987); *Painter's*, 2007 WL 4144892, at *3-4; *Hoefer v. U.S. Dep't of Commerce*, 2000 WL 890862, at *2 (N.D. Cal. June 28, 2000) ("[L]ittle deference . . . is given to a plaintiff's choice of forum in an action brought on behalf of a nationwide class."). In short, Plaintiff's choice of forum in this putative class action filed across the country from where he lives is entitled to little weight and less deference, and thus the factor does not weigh against transfer.

4. The Southern District of New York Has An Interest In And Ability To Adjudicate This Matter.

The Southern District of New York has a substantial connection to, and local interest in, this litigation. Because Spotify's U.S. operations are based in New York, that state has a "local interest" in Plaintiff's claims against one of its corporate citizens. By contrast, there is *no* relevant connection between Plaintiff's claims and this District. In addition, no identified witnesses reside in this District, and no documentary evidence is located here.

Furthermore, the Southern District of New York is just as familiar with applying federal copyright law as this Court. *See ESPN, Inc. v. Quiksilver, Inc.*, 581 F. Supp. 2d 542, 551 (S.D.N.Y. 2008) (both California and New York courts "are familiar with federal copyright law and have substantial experience applying it."). And no docket congestion considerations favor the Central District of California over the Southern District of New York; to put it mildly, "neither court is lacking for work." *ESPN*, 581 F.Supp.2d at 551.[8] Moreover, no unique "administrative difficulties" tethered to docket congestion are likely to arise in either court. *Atl. Marine*, 134 S. Ct. at 581 n.6. This factor is therefore neutral as

[8] *See* Stillman Decl. Ex. D., U.S. Courts, *Federal Court Management Statistics—June 2015*, http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-june-2015 (last updated June 30, 2015) (Central District of California saw 511 civil filings per judgeship in most recent 12-month period, whereas Southern District of New York saw 401).

to transfer.

B. The Court May Grant a Transfer Without Deciding the Question of Personal Jurisdiction.

The Supreme Court has explained that “a federal court has leeway ‘to choose among threshold grounds for denying audience to a case on the merits.’” *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 431 (2007) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999)). This “leeway” promotes judicial efficiency by allowing a court to take whatever it thinks is the “less burdensome course” in disposing of a case. *Id.* at 436.

“The law is clear that the Court need not resolve a motion to dismiss for lack of personal jurisdiction before deciding whether to transfer the case to another district under 28 U.S.C. § 1404.” *Halvorson v. Solaroad Technologies Group, LLC*, 2011 WL 1837748, *2 (W.D. Wash. May 12, 2011) (citing *Nelson v. Int’l Paint Co.*, 716 F.2d 640, 643 n.4 (9th Cir.1983)). Courts in this District have recognized their power to transfer a case without deciding questions of jurisdiction when there are “sound arguments for transfer” that make the issue of transfer especially easy to resolve. *Pub. Emps.’ Ret. Sys. of Miss. v. Stanley*, 605 F. Supp. 2d 1073, 1075 (C.D. Cal. 2009); *see also, e.g.*, *Turner v. Harrah’s New Orleans Hotel & Casino*, 2011 WL 1666925, at *3 (C.D. Cal. Apr. 7, 2011) (granting transfer without considering personal jurisdiction); *W. Digital Techs., Inc. v. Bd. of Regents of Univ. of Texas Sys.*, 2011 WL 97785, at *6 n.3 (N.D. Cal. Jan. 12, 2011) (granting transfer without reaching issues of personal jurisdiction or first-to-file); *Yung v. Institutional Trading Co.*, 2008 WL 1734743, at *1 (N.D. Cal. Apr. 14, 2008) (granting transfer without reaching issue of personal jurisdiction); *Abrams Shell v. Shell Oil Co.*, 165 F. Supp. 2d 1096, 1106 (C.D. Cal. 2001) (same); *Whiteman v. Grand Wailea Resort*, 1999 WL 163044, at *3 n.4 (N.D. Cal. Mar. 17, 1999) (same).

Accordingly, this Court can order a transfer without reaching the constitutional due process question of personal jurisdiction over Spotify. Such an approach would be an appropriate and expeditious way to resolve the challenges to allowing this case to proceed in California.

IV. CONCLUSION

For the foregoing reasons, the Court should dismiss this case for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2), or, in the alternative, transfer the case to the Southern District of New York pursuant to 28 U.S.C. § 1404.

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Statutory Limitations on Online Service Provider's Liability

By

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1. Limitations on Online Service Provider's Liability. 17 U.S.C. § 512.

a. Eligibility. 17 U.S.C. § 512(i).

(1) Limitations on online service provider's liability are available only if the OSP:

(a) has adopted and reasonably implemented, and informs subscribers of, a policy that provides for termination of repeat infringers, *see* 17 U.S.C. § 512(i)(1)(A); Ellison v. Robertson, 357 F.3d 1072, 1080 (9th Cir. 2004); Capitol Records, Inc v. MP3tunes, LLC, 821 F. Supp. 2d 627, 637 (S.D.N.Y. 2011) (purpose of requirement is to prevent service of Internet service providers from becoming havens or conduits for known repeat copyright infringers); and

i) It was Congress's intent that "those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access." Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1118 (D. Wash. 2004).

ii) A service provider implements a policy if it has a working notification system, a procedure for dealing with DMCA-compliant notifications, and if it does not actively prevent copyright owners from collecting information needed to issue such notifications. Perfect 10, Inc. v. CCBill, 488 F.3d 1102, 1109 (9th Cir. 2007). *See* In re Aimster Copyright Litig., 334 F.3d 643, 655 (7th Cir. 2003) (repeat infringer policy not implemented if service provider prevents copyright holders from providing DMCA-compliant notifications).

iii) A service provider need not affirmatively police its users for evidence of repeat infringement. 17 U.S.C. § 512(m)(1). *See* Perfect 10, Inc. v. CCBill, 488 F.3d 1102, 1111 (9th Cir. 2007).

iv) A service provider's response to notifications of infringement by non-parties is relevant in determining whether policy against repeat infringers is reasonable. *See* Perfect 10, Inc. v. CCBill, 488 F.3d 1102, 1113 (9th Cir. 2007).

v) The implementation of a repeat infringer policy requires that the penalty imposed by service providers must be the complete termination of a subscriber or account holder. BMG Rights Management (US) LLC v. Cox Communications, Inc., 2015 WL 7756130, *17 (E.D. Va. 2015).

(b) accommodates and does not interfere with standard technical measures. 17 U.S.C. § 512(i)(1)(B). See Perfect 10, Inc. v. CCBill, 488 F.3d 1102, 1115 (9th Cir. 2007) (issue of whether access to a website is a standard technical measure remanded to district court).

b. Availability of Safe Harbors.

(1) Transitory Digital Network Communications. 17 U.S.C. § 512(a).

(a) Definition of Online Service Provider (OSP). 17 U.S.C. § 512(k)(A).

i) "Service Provider" for this safe harbor is defined as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received."

See Perfect 10, Inc. v. CCBill, 488 F.3d 1102, 1115 (9th Cir. 2007) (to qualify for § 512(a) safe harbor, party must meet more restrictive definition of "service provider" than applicable to other § 512 safe harbors); Ellison v. Robertson, 357 F.3d 1072, 1081 (9th Cir. 2004).

(b) Where the service provider is acting as a mere conduit it cannot be held liable for monetary relief. *See* In re Charter Comm., Inc. Subpoena Enforcement Matter, 393 F.3d 771, 775 (8th Cir. 2005); Ellison v. Robertson, 357 F.3d 1072, 1081 (9th Cir. 2004) (AOL found to have functioned as a conduit service provider even though it stored Usenet messages for 14 days).

i) This safe harbor is not available where the service provider does not provide connections through its system or network, but merely facilitates digital network communications. *See* A & M Records, Inc. v. Napster, Inc., 2000 WL 573136, at *4 (N.D. Cal. 2000).

ii) There is no requirement that the communications must themselves be infringing. *See* Perfect 10, Inc. v. CCBill, 488 F.3d 1102, 1116 (9th Cir. 2007).

(c) Service provider can be enjoined from providing access to an identified subscriber or account holder who is using the provider's service to engage in infringing activity, as well as an online location outside the United States. 17 U.S.C. § 512(j).

(2) System Caching. 17 U.S.C. § 512(b).

(a) Definition of Online Service Provider (OSP). 17 U.S.C. § 512(k)(B).

i) "Service Provider" for this safe harbor is defined as "a provider of online services or network access, or the operator of facilities therefor" for provisions other than those dealing with transitory digital network communications.

(b) Where the service provider provides intermediate and temporary automatic storage of material made available online by a person other than the service provider, the service provider cannot be held liable for monetary relief.

(c) Service provider can be enjoined from providing access to an identified subscriber or account holder who is using the provider's service to engage in infringing activity, as well as an online location outside the United States. 17 U.S.C. § 512(j).

(3) Information Residing on Systems or Networks at Direction of Users. 17 U.S.C. § 512(c).

(a) Definition of Online Service Provider (OSP). 17 U.S.C. § 512(k)(B).

i) "Service Provider" for this safe harbor is defined as "a provider of online services or network access, or the operator of facilities therefor" for provisions other than those dealing with transitory digital network communications. *See* Hendrickson v. Amazon.com, Inc., 298 F. Supp. 2d 914, 915 (C.D. Cal. 2003).

ii) Cases have held that the section 512(c) safe harbor is not limited to operational features that provide or constitute storage. *See* Wolk v. Kodak Imaging Network, Inc., 2011 WL 940056, *3 (S.D.N.Y. 2011) (protections offered by section 512(c) extend to where service provider offers online tools permitting users to interact with user-submitted content); Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 38-39 (2d Cir. 2012) (replication, transmittal and display of videos on YouTube are within the safe harbor where the provision of such services, access and operation of facilities flow from the placement of the videos on YouTube's system by users); UMG Recordings, Inc. v. Veoh Networks, Inc., 620 F. Supp. 2d 1081, 1088-91 (C.D. Cal. 2008) (safe harbor applicable to the facilitation of access to user submitted material); IO Group, Inc. v. Veoh Networks, Inc., 586 F. Supp. 2d 1132, 1145-1148 (N.D. Cal. 2008) (safe harbor applicable to automated functions that facilitate access to user-submitted content).

(b) Where the service provider provides storage of material at the direction of a user that resides on a system or network controlled or operated by the service provider, the service provider cannot be held liable for monetary relief if:

i) it does not have actual knowledge of the infringement; is not aware of facts or circumstances from which infringing activity is apparent; or acts expeditiously to remove, or disable access to infringing material, upon obtaining such knowledge or awareness, 17 U.S.C. § 512(c)(1)(A);

a) Mere knowledge of the prevalence of infringing activity in general is insufficient. Knowledge of specific and identifiable infringements of particular infringing individual items is required. Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 30-32 (2d Cir. 2012) (actual knowledge is a subjective standard); UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022, 1037 (9th Cir. 2011); Corbis Corp. v. Amazon.com. Inc., 351 F. Supp. 2d 1090, 1108 (W.D. Wash. 2004).

1) The burden of policing websites for copyright infringement and identifying potentially infringing material is placed on copyright owners, not service providers. UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022, 1038 (9th Cir. 2011) (burden of determining whether materials are actually illegal is not placed on service provider); Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1113 (9th Cir. 2007); Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 34-35 (2d Cir. 2012) (willful blindness doctrine may be applied, in appropriate circumstances, to demonstrate knowledge or awareness of specific instances of infringement).

b) A service provider is deemed to have sufficient knowledge of infringement that can take it out of the safe harbor if it is aware of facts which raise a "red flag" that its users are infringing. *See* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 31 (2d Cir. 2012) ("[T]he red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement 'objectively' obvious to a reasonable person."); Costar Group Inc. v. Loopnet, Inc., 164 F. Supp. 2d 688, 702 (D. Md. 2001), *aff'd*, 373 F.3d 544 (4th Cir. 2004). *But see* Perfect 10, Inc. v. CCBill, 488 F.3d 1102, 1114 (9th Cir. 2007) (password-hacking websites and website URLs containing reference to stolen or illegal content are not *per se* red flags of infringement).

c) Notices provided by the copyright owner that do not comply with the notice requirements will not be considered when evaluating whether the service provider has actual or constructive knowledge. *See* Hendrickson v. Amazon.com, Inc., 298 F. Supp. 2d 914, 917-18 (C.D. Cal. 2003); Hendrickson v. eBay Inc., 165 F. Supp. 2d 1082, 1092-93 (C.D. Cal. 2001).

ii) it does not receive a financial benefit directly attributable to the infringing activity where the service provider has the right and ability to control such activity, 17 U.S.C. § 512(c)(1)(B); Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 36-38 (2d Cir. 2012) and

a) "Direct financial benefit" should be interpreted consistent with the common law standard for vicarious copyright liability. Perfect 10, Inc. v. CCBill, 488 F.3d 1102, 1117 (9th Cir. 2007). *See* Ellison v. Robertson, 357 F.3d 1072, 1079 (9th Cir. 2004) (relevant inquiry is whether infringing activity constitutes a draw for subscribers, not just an added benefit). *But see* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 36-38 (2d Cir. 2012) ("right and ability to control" infringing activity under § 512(c)(1)(B) requires something more than the common law vicarious liability standard of the ability to remove or block access to materials posted on a service provider's website).

b) The service provider must know of the infringing nature of a specific item before it has the right and ability to control the infringing activity. *See* UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022, 1041 (9th Cir. 2011). *But see* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 36 (2d Cir. 2012) ("Any service provider that has item-specific knowledge of infringing activity and thereby obtains financial benefit would already be excluded from the safe harbor under § 512(c)(1)(A) for having specific knowledge of infringing material and failing to effect expeditious removal.").

1) The service provider need not monitor or seek out facts indicating such infringing activity. Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 35 (2d Cir. 2012) ("DMCA safe harbor protection cannot be conditioned on affirmative monitoring by a service provider.").

c) The ability of a service provider to remove or block access to materials posted on its website or stored in its system does not mean that the service provider has the right and ability to control the infringing activity. *See* Hendrickson v. eBay Inc., 165 F. Supp. 2d 1082, 1093 (C.D. Cal. 2001) (infringing activity of the sale and distribution of pirated copies of motion picture by sellers via auction website are consummated offline and are not controlled by service provider); Costar Group Inc. v. Loopnet, Inc., 164 F. Supp. 2d 688, 704 (D. Md. 2001), *aff'd*, 373 F.3d 544 (4th Cir. 2004).

1) The right and ability to control the posting of infringing works may take the form of prescreening content, providing extensive advice to users regarding content and editing user content. *See* Wolk v. Kodak Imaging Network, Inc., 2011 WL 940056, *6 (S.D.N.Y. 2011); Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1110 (D. Wash. 2004).

d) Providing transaction processing for credit card purchases of infringing materials offered by independent third party seller does not constitute the right and ability to control the sale. *See* Hendrickson v. Amazon.com, Inc., 298 F. Supp. 2d 914, 918 (C.D. Cal. 2003).

iii) upon written notification of a claimed infringement responds expeditiously to remove, or disable access to the infringing material. 17 U.S.C. § 512(c)(1)(C).

a) The OSP must designate an agent to receive notifications of claimed infringements. 17 U.S.C. § 512(c)(2). *See* Wolk v. Kodak Imaging Network, Inc., 2011 WL 940056, *7 (S.D.N.Y. 2011).

b) Written notification of the claimed infringement must be provided to the designated agent. 17 U.S.C. § 512(c)(3). *See* ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F.3d 619 (4th Cir. 2001); Perfect 10, Inc. v. CCBill, 488 F.3d 1102, 1109 (9th Cir. 2007) (DMCA places burden of identifying potentially infringing material and adequately documenting infringement on copyright owner); Hendrickson v. Amazon.com, Inc., 298 F. Supp. 2d 914, 916 (C.D. Cal. 2003) ("The DMCA places the burden on the copyright owner to monitor the internet for potentially infringing sales."); Hendrickson v. eBay Inc., 165 F. Supp. 2d 1082, 1089 (C.D. Cal. 2001). To be "DMCA-compliant" the written notification must include "substantially" the following elements:

1) A physical or electronic signature of a person authorized to act on behalf of the owner of the exclusive right that is allegedly infringed.

2) Identification of the copyrighted work claimed to have been infringed.

3) Identification of the material that is claimed to be infringing and sufficient information to permit the service provider to locate the material. *See* Wolk v. Kodak Imaging Network, Inc., 2011 WL 940056, *4-5 (S.D.N.Y.

2011) (once DMCA-compliant notice of alleged infringement has been supplied, ISP is not required to use that information to police its site to uncover additional current infringements or to prevent future infringements); UMG Recordings, Inc. v. Veoh Networks, Inc., 665 F. Supp. 2d 1099, 1109-10 (C.D. Cal. 2009) (DMCA notices demanding removal of unspecified video recordings by certain artists did not provide information reasonably sufficient to permit service provider to locate the material); Hendrickson v. eBay Inc., 165 F. Supp. 2d 1082, 1090 (C.D. Cal. 2001) (in most situations the copyright owner required to identify specific item numbers of allegedly infringing items listed on auction website); Hendrickson v. Amazon.com, Inc., 298 F. Supp. 2d 914, 915 (C.D. Cal. 2003) (notice must make ISP aware of infringing activity that is occurring at the time it receives the notice).

4) Information sufficient to permit the service provider to contact the complaining party.

5) A statement that the complaining party has a good

faith belief that use of the material is not authorized by the copyright owner, its agent or the law. 17 U.S.C. § 512(c)(3)(A). *See* Hendrickson v. eBay Inc., 165 F. Supp. 2d 1082, 1089-90 (C.D. Cal. 2001) (failure to include statement renders notification of claimed infringement deficient). Copyright holders are required to consider whether the potentially infringing material constitutes a fair use prior to issuing a takedown notification. Lenz v. Universal Music Corp., 801 F.3d 1126, 1131-32, 1134-35 (9th Cir. 2015) (copyright holder need only form a subjective good faith belief that the allegedly infringing material does not constitute fair use).

6) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the copyright owner. *See* Perfect 10, Inc. v. CCBill, 488 F.3d 1102, 1112 (9th Cir. 2007) (copyright holder not permitted to cobble together adequate notice from separately defective notices); Hendrickson v. eBay Inc., 165 F. Supp. 2d 1082, 1089-90 (C.D. Cal. 2001) (failure to include statement renders

notification of claimed infringement deficient).

c) The service provider must respond expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of the claimed infringement. In re Charter Communications, Inc., Subpoena Enforcement Matter, 393 F.3d 771, 776 (8th Cir. 2005).

1) Only the specific material, the specific location of which is identified in the notification, need be removed or access denied. *See* UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022 (9th Cir. 2011).

d) The third prong of the safe harbor provision is not applicable when the offending item has already been removed from the ISP's system. *See* Hendrickson v. Amazon.com, Inc., 298 F. Supp. 2d 914, 918 (C.D. Cal. 2003).

(c) Service provider can be enjoined from providing access to an identified subscriber or account holder who is using the provider's service to engage in infringing activity, as well as an online location outside the United States. 17 U.S.C. § 512(j).

(d) The immunity from liability given to a service provider extends to employees of the service provider who are acting within the scope of their employment. *See* Hendrickson v. eBay Inc., 165 F. Supp. 2d 1082, 1095 (C.D. Cal. 2001).

(4) Information Location Tools. 17 U.S.C. § 512(d).

(a) Definition of Online Service Provider (OSP). 17 U.S.C. § 512(k)(B).

i) "Service Provider" for this safe harbor is defined as "a provider of online services or network access, or the operator of facilities therefor" for provisions other than those dealing with transitory digital network communications.

(b) Where the service provider provides references or links to an online location containing infringing material by using information location tools, the service provider cannot be held liable for monetary relief if:

i) it does not have actual knowledge of the infringement; is not aware of facts or circumstances from which infringing activity is apparent; or acts expeditiously to remove, or disable access to infringing material, upon obtaining such knowledge or awareness;

a) Safe harbor is not available where service provider had actual or constructive knowledge that third parties were using the service to engage in direct copyright infringement by downloading and uploading MP3 music files. *See* A & M Records, Inc. v. Napster, Inc., 2000 WL 1009483, at *5 (N.D. Cal. July 26, 2000).

ii) it does not receive a financial benefit directly attributable to the infringing activity; and

iii) upon notification of a claimed infringement responds expeditiously to remove, or disable access to the infringing material.

a) The OSP must designate an agent to

receive notifications of claimed infringements.

b) Written notification of the claimed infringement and the identification of the reference or link must be provided to the designated agent. 17 U.S.C. § 512(d)(3).

(c) Service provider can be enjoined from providing access to an identified subscriber or account holder who is using the provider's service to engage in infringing activity, as well as an online location outside the United States. 17 U.S.C. § 512(j). *See* Wolk v. Kodak Imaging Network, Inc., 2011 WL 940056, *7 (S.D.N.Y. 2011).

c. Takedown Notice and Put-Back Procedures. 17 U.S.C. § 512(g).

(1) When the OSP has removed or blocked material pursuant to the notice and take-down provisions, the OSP must:

(a) Take reasonable steps to promptly notify the subscriber that it has removed or disabled access to the allegedly infringing material;

(b) Upon receipt of a counter notification, promptly provide the copyright owner with a copy of the counter notification and inform the copyright owner that the OSP will replace the removed material or cease disabling access to it in 10 business days;

i) A counter notification is a written communication sent by the subscriber to the OSP's designated agent that identifies the material that was removed or disabled, states under penalty of perjury that the subscriber has a good faith belief that the removal or disabling was the result of mistake or misidentification, and consents to jurisdiction.

(c) Replace the removed material and cease disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice that the copyright owner has filed an action seeking a court order to restrain the subscriber from engaging in the alleged infringing activity. 17 U.S.C. § 512(g)(2)(C).

(2) Improper takedown notice.

(a) A knowing material misrepresentation that material or activity is infringing may result in liability for damages incurred by the alleged infringer, including costs and attorneys' fees, to be paid by the copyright owner or its authorized licensee. 17 U.S.C. § 512(f).

i) A copyright holder that does not consider fair use before sending a takedown notification is liable for damages. Lenz v. Universal Music Corp., 801 F.3d 1126, 1134 (9th Cir. 2015).

ii) Nominal damages may be recovered for an injury incurred as a result of a section 512(f) misrepresentation. Lenz v. Universal Music Corp., 801 F.3d 1126, 1137-38 (9th Cir. 2015).

d. Subpoena to Identify Infringer. 17 U.S.C. § 512(h).

(1) A copyright owner may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer.

(a) Such subpoenas can be issued only to an ISP engaged in storing on its servers material that is infringing or the subject of infringing activity, not to an ISP that acts only as a conduit by merely transmitting infringing material, but does not store such material on its servers. *See* RIAA v. Verizon Internet Services, Inc., 351 F.3d 1229, 1233 (D.C. Cir. 2003).

e. Section 512 is not the exclusive limitation on the liability of Online Service Providers. *See* 17 U.S.C. § 512 (l); Costar Group, Inc. v. Loopnet, Inc., 373 F.3d 544, 552-55 (4th Cir. 2004) (Congress intended the DMCA's safe harbor for IPSs to be a floor, not a ceiling, of protection, therefore it is irrelevant to determining what constitutes a prima facie case of copyright infringement).