

Comment to the United States Copyright Office

I'd like to thank the Copyright Office for the opportunity to comment on the effectiveness of the United States' current compulsory licensing system. I am an independent legal researcher and lawyer with an interest in music licensing reform, and I have studied the effects of the current regime for both composers and cover artists. I have written a note on the functioning of Section 115(a)(2) of the Copyright Act, entitled "'Look What They've Done To My Song, Ma' – 'Baby Got Back,' Moral Rights, And a Proposal For the Reform of 17 U.S.C. § 115(A)(2)." The American University Intellectual Property Law Brief recently published the note, and I have attached it in as an appendix to this letter. The following briefly summarizes the note's arguments.

The note concludes that Section 115(a)(2) needs to be reformed in order to close a legal loophole that unfairly oppresses artists, contrary to the intent of Congress. Section 115(a)(2)'s requirement that a cover 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," creates legal uncertainty, does not comport with 21st century attitudes towards covers, creates unnecessary burdens on arrangers seeking to repurpose orphan works, and frequently deprives artists who create arrangements of the fruits of their original expression. A real-world controversy from early 2013 is particularly illustrative of the problems caused by Section 115(a)(2)'s language.

In October 2005, an artist named Jonathan Coulton released a humorous "cover" arrangement of "Baby Got Back,"¹ a hip-hop classic by rapper Sir Mix-A-Lot.² Coulton's arrangement retained Sir Mix-A-Lot's lyrics, but also added new melodic and rhythmic material set against a smooth, folk-style acoustic guitar-led accompaniment. Coulton's "joke" arrangement became an

¹ Baby Got Back, JOCOPEdia, http://www.jonathancoulton.com/wiki/Baby_Got_Back (last modified Jan. 27, 2013).

² SIR MIX-A-LOT, BABY GOT BACK (Def American Records 1992).

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overnight viral hit due to the absurd juxtaposition of Sir Mix-A-Lot's lyrics and Coulton's crooning.³ In January 2013, Fox's hit TV show "Glee" featured a cast performance of "Baby Got Back," using a musical arrangement indistinguishable from Coulton's version.⁴ When Coulton contacted Fox's lawyers looking for an explanation, they responded by saying that Fox was within its legal rights to reproduce Coulton's musical arrangement at will, and that Coulton should simply be "happy for the exposure."⁵ In the wake of this incident and the PR blowup that followed, it was soon discovered that Coulton was but one of a troublingly large number of independent arrangers whose work was featured in an episode of Glee without acknowledgement, consent or compensation.⁶ Even the staunchest supporters of an "open access" system of copyright believe that one should not be allowed to copy another's creative work verbatim for commercial gain, against the owner's consent, and without any attribution.⁷ Therefore, it seems odd that the Copyright Act would permit this type of appropriation.

The legislative history of Section 115(a)(2) provides that the provision "is intended to recognize the practical need for a limited privilege to make arrangements of music being used under a compulsory license, but without allowing the music to be perverted, distorted, or travestied." This

³ See Cory Doctorow, *Nerd Folksinger Covers Baby Got Back*, BOINGBOING (Oct. 15, 2005, 10:43 AM), <http://boingboing.net/2005/10/15/nerd-folksinger-cove.html>; Jonathan Coulton, *Wowie Zowie*, JONATHAN COULTON (Oct. 18, 2005), <http://www.jonathancoulton.com/2005/10/18/wowie-zowie>.

⁴ Danger Guerrero, *'Glee' Ripped Off Jonathan Coulton And Said He Should Be "Happy For The Exposure,"* WARMING GLOW (Jan. 25, 2013), <http://www.uproxx.com/tv/2013/01/glee-ripped-off-jonathan-coulton-and-said-he-should-be-happy-for-the-exposure/>.

⁵ *Id.*

⁶ Michelle Jaworski, *Serial Song Theft on "Glee"? "Baby Got Back" Wasn't the First*, THE DAILY DOT (Jan. 25, 2013), <http://www.dailydot.com/entertainment/glee-ripping-off-jonathan-coulton-dj-earworm/> (suggesting that other arrangements potentially stolen include an a capella version of Usher's "Yeah" created by University of Oregon group "Divisi," a piano ballad version of Cyndi Lauper's "Girls Just Wanna Have Fun" arranged by Greg Laswell, and a mash-up arrangement of "Fly" and "I Believe I Can Fly" by artist DJ Earworm).

⁷ See Peter Suber, *Open Access Overview*, EARLHAM (Dec. 16, 2013), <http://legacy.earlham.edu/~peters/fos/overview.htm> ("Most authors [who embrace open access] choose to retain the right to block the distribution of mangled or misattributed copies. Some choose to block commercial re-use of the work. Essentially, these conditions block plagiarism, misrepresentation, and sometimes commercial re-use, and authorize all the uses required by legitimate scholarship, including those required by the technologies that facilitate online scholarly research.").

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Congressional intent mirrors the doctrine of “moral rights,” a somewhat controversial idea that the law should give rights to artists to preserve their work’s artistic integrity.⁸ The United States has thus far only embraced a limited version of moral rights through legislation such as the Visual Artists Rights Act of 1990 (VARA),⁹ which provides a limited right for artists “to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation.” However, the language of Section 115(a)(2) is inferior to VARA in a few key ways.

Most importantly, Section 115(a)(2) creates an overly burdensome “opt in”-style regime, whereas VARA’s regime is “opt out.” Under section 115(a)(2), the power to provide consent for an arrangement to receive derivative work protection is held by whoever holds the copyright to the original song. In other words, the law presumes the copyright holder has withheld consent for any arrangements, at least until he or she expressly states otherwise. This creates a major burden on an arranger to locate and negotiate with the original copyright holder, often many years after the original song is first released. Even assuming the original copyright owner can be located, Section 115(a)(2) allows him or her to withhold consent for any reason. This regime is very different than that under VARA, which by default allows the distortion of works unless the original artist acts affirmatively to obtain an injunction preventing the distortion.

Apart from being overly burdensome and inefficient, Section 115(a)(2)’s default “no covers allowed” setting simply does not comport with modern songwriters’ general attitudes towards

⁸ Compare Cassandra Spangler, Comment, *The Integrity Right of an MP3: How the Introduction of Moral Rights into U.S. Law Can Help Combat Illegal Peer-to-Peer Music File Sharing*, 39 SETON HALL L. REV. 1299, 1300 (2009) (advocating moral-rights protection for musical artists in the United States), with Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 265 (2009) (arguing that moral rights impede artistic progress). See also Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 38-39 (1985) (quoting H.R. REP. NO. 94-1476, at 109); Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 97 (1996).

⁹ 17 U.S.C. § 106A (1990).

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derivative arrangements. Most songwriters understand that if their music is to the test of time, others will necessarily adapt and re-imagine their work; countless artists in a wide variety of genres have thus embraced and encouraged the production of transformative covers.¹⁰ While there are certainly some musicians who object to all unauthorized covers as a matter of principle,¹¹ this small minority ought not to be assumed to be the default position in the twenty-first century.

In order to better effectuate Congress's stated intent "to recognize the practical need for a limited privilege to make arrangements of music being used under a compulsory license, but without allowing the music to be perverted, distorted, or travestied," Section 115(a)(2) should be re-written as follows:

A compulsory license includes the privilege of 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~~

¹⁰ See John Dolen, *Interview with Dylan: 09/29/95*, FORT LAUDERDALE SUN SENTINEL (Sept. 29, 1995), available at <http://www.interferenza.net/bcs/interw/florida.htm> (replying to a question about Jimi Hendrix's cover of his song "All Along the Watchtower," Bob Dylan replied: "[Jimi] had such talent He found things that other people wouldn't think of finding in there. He probably improved upon it by the spaces he was using. I took license with the song from his version, actually, and continue to do it to this day"); RZA Digs Justin Bieber "Runaway Love" Remix, MUSICIANS ENTOURAGE (Sept. 14, 2010), <http://musiciansent.com/2010/09/rza-digs-justin-bieber-%E2%80%9Crunaway-love%E2%80%9D-remix/> (rapper RZA approving of a remixed arrangement of Wu-Tang song "Wu-Tang Clan Ain't Nuthing ta F' Wit," combined with the vocals of Justin Bieber song "Runaway Love"); Chris Vinnicombe, *Trent Reznor talks Johnny Cash*, MUSICRADAR (Aug. 5, 2008), <http://www.musicradar.com/us/news/guitars/trent-reznor-talks-johnny-cash-168199> (describing the reaction of Nine Inch Nails frontman Reznor upon hearing Johnny Cash's arrangement of the Nine Inch Nails song "Hurt": "It really, really made sense and I thought what a powerful piece of art"); Douglas Wolk, *Beck's New 'Song Reader' Album, and Destroy It Yourself Music*, MTVHIVE (Dec. 12, 2012), <http://www.mtvhive.com/2012/12/12/beck-song-reader/> (artist Beck encouraging internet users to create their own arrangements of his new album: "[p]ersonalizing and even ignoring the arrangements is encouraged. Don't feel beholden to what's notated. Use any instrument you want to. Change the chords; rephrase the melodies . . . Play it for friends, or only for yourself."); Robert Wright, *Introduction to Alchemy: A Study of Tom Waits through Cover Songs*, EMPTY MIRROR, <http://www.emptymirrorbooks.com/features/tom-waits-cover-songs.html> (last visited Jan. 19, 2014) ("Most songwriters view their songs as "children" or "babies," implying a paternal bond of care and affection, while the cover artist's relationship to the song is that of spouse or lover, a union of intimacy and desire, seeking completion and fulfillment from someone else's creation.").

¹¹ *Prince Hates Random Stars Covering His Songs*, ACESHOWBIZ (April 14, 2011, 6:05 PM), <http://www.aceshowbiz.com/news/view/w0011693.html> (artist Prince criticizing the power compulsory licensing gives other artists to cover his songs).

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~~work under this title, except with the express consent of the copyright owner.~~ **However, the license may be revoked if the artist of the original work or his assignees can show that material prejudice to the artist or song's integrity or reputation will result from distribution of the new arrangement.**

This new language has a number of benefits. By removing the provision that eliminates “derivative work” protection for arrangements made without the original artist’s consent, the proposed law would grant – by default – a “thin” copyright protection for the arrangement’s original, creative features. This protection would limit the ability of third parties (such as Fox) to create identical copies of the new arrangement without permission. Although the proposed law would preserve the artist’s ability to object to an offensive arrangement, the proposed law would require that the plaintiff show “material” prejudice to the artist or song’s integrity or reputation. Requiring material prejudice would ensure that the artist’s interest in integrity is respected, while preventing the plaintiff from haphazardly punishing an arrangement merely because he or she disapproves of it.

It is often difficult to balance the rights of an author to maintain his or her artistic integrity with the rights of the public to rearrange and adapt the artist’s work. Music is not merely a commodity sold like a toaster; artists put a piece of themselves in their musical works, and therefore suffer legitimate harm when a cover artist perverts, distorts, or travesties their work. At the same time, protecting artistic integrity should not mean punishing innovative arrangers who advance art through new and creative arrangements. The proposed law effectively fixes the problems of the existing regime while striking an equitable balance of these interests. With the adoption of the proposed language, the copyright system will be better able to foster the creation of a diverse and vibrant library of music.

LOOK WHAT THEY'VE DONE TO MY SONG, MA¹:
JONATHAN COULTON, MORAL RIGHTS, AND A
PROPOSAL FOR THE REFORM OF 17 U.S.C. §
115(A)(2)

BY JOE NEWMAN²

1. MELANIE, WHAT HAVE THEY DONE TO MY SONG MA, *on* CANDLES IN THE RAIN (Buddah Records 1970); *See also* Miley Cyrus, *The Backyard Sessions – Look What They've Done To My Song*, YOUTUBE (Oct. 4, 2012), <http://www.youtube.com/watch?v=aSpkaBeZckY>; *The Line of Best Fit, Of Montreal – Look What They've Done To My Song Ma (Best Fit Sessions)*, YOUTUBE (May 22, 2012), <http://www.youtube.com/watch?v=lvCGMVBtTY>; RAY CHARLES, LOOK WHAT THEY'VE DONE TO MY SONG, MA (Tangerine Records 1972).

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ABSTRACT

In 1992, Anthony Ray, a.k.a. Sir Mix-A-Lot, released the song "Baby Got Back." The song, a "chart-topping multi-platinum Grammy-winning hip-hop celebration of female pulchritude," is widely considered a modern classic. In October 2005, an artist named Jonathan Coulton released a humorous "cover" arrangement of "Baby Got Back" that retained Sir Mix-A-Lot's lyrics, but also added new melodic and rhythmic material set against a smooth, folk-style acoustic guitar-led accompaniment. Coulton's "joke" arrangement became an overnight viral hit due to the absurd juxtaposition of Sir Mix-A-Lot's lyrics and Coulton's crooning.

In January 2013, Fox's hit TV show "Glee" featured a cast performance of "Baby Got Back," using a musical arrangement virtually indistinguishable from Coulton's version. When Coulton contacted Fox's lawyers looking for an explanation, they responded by saying that Fox was within its legal rights to reproduce Coulton's musical arrangement at will. In the wake of this incident, it was soon discovered that Coulton was but one of a troublingly large number of independent arrangers whose work was featured in an episode of Glee without acknowledgement, consent or compensation.

The story of Jonathan Coulton and Glee is both unusual and complicated, involving a relatively obscure provision within the Copyright Act's compulsory licensing scheme, 17 U.S.C. § 115(a)(2). Section 115(a)(2) as it stands now is an unnecessary and draconian provision that oppresses artists of all types. This paper will explain how section 115(a)(2) functions, and how it hurts both arrangers and the original artists of arranged works. Having established the numerous structural and policy problems with the current regime, this paper will propose a modest revision of the law, designed to better protect both recording artists and arrangers, and to advance the underlying goals of the Copyright Act.

INTRODUCTION

In 1992, Anthony Ray, a.k.a. Sir Mix-A-Lot, released the song “Baby Got Back.”³ The song, a “chart-topping multi-platinum Grammy-winning hip-hop celebration of female pulchritude,”⁴ is widely considered a modern classic, and has been named VH1’s top one-hit wonder of the ‘90s.⁵ Unsurprisingly considering its wide cultural impact, the song has been lampooned and rearranged on a number of occasions, including by Sir Mix-A-Lot himself.⁶ One artist’s humorous arrangement of “Baby Got Back” became the focal point of one of the more interesting music-related controversies of 2013—an incident that perfectly demonstrates the need to reform 17 U.S.C. § 115(a)(2), a broken provision within the Copyright Act’s current compulsory licensing regime.

In October 2005, an artist named Jonathan Coulton released a “cover” arrangement of “Baby Got Back” through his personal website.⁷ Although Coulton is not a traditional “mainstream” artist, his witty, tongue-in-cheek compositions and arrangements have earned him a strong and loyal following that has contributed well over a million dollars in online sales to his website.⁸ As provided in 17 U.S.C. § 115, a compulsory license allows an artist to make and distribute a cover arrangement of an existing song without negotiating directly with the copyright holder, so long as the arranger pays a set “mechanical royalty” (a certain percentage of each sale) to the copyright owner (typically the original song’s publisher).⁹ Coulton applied for and

3. SIR MIX-A-LOT, *BABY GOT BACK* (Def American Records 1992).

4. Zach Kay, *Sir Mix-a-Lot’s 20th Anniversary, “Baby Got Back,”* HIP HOP PRESS (Nov. 15, 2011), <http://www.hiphoppress.com/2011/11/sir-mix-a-lots-20th-anniversary-baby-got-back>.

5. *VH1’s 40 Greatest One-Hit Wonders of the ‘90s*, TOPONEHITWONDERS (May 8, 2011), <http://toponehitwonders.com/1990s/vh1s-40-greatest-one-hit-wonders-of-the-90s/>.

6. See, e.g., Advertisement: SpongeBob Squarepants Burger King (2009), available at <https://www.youtube.com/watch?v=7gMZ62PsvRM>; *Robot Chicken: Table Be Round* (Cartoon Network television broadcast Oct. 5, 2008), available at <http://video.adultswim.com/robot-chicken/table-be-round.html>.

7. Baby Got Back, JOCOPIEDIA, http://www.jonathancoulton.com/wiki/Baby_Got_Back (last modified Jan. 27, 2013).

8. See *Jonathan Coulton*, JOCOPIEDIA, http://www.jonathancoulton.com/wiki/Jonathan_Coulton#cite_note-1 (last modified Oct. 4, 2012).

9. See 17 U.S.C. § 115(c)(2); *Frequently Asked Questions*, HARRY FOX AGENCY, <http://www.harryfox.com/public/FAQ.jsp#9> (last visited Apr. 29, 2013). All of Coulton’s original songs are distributed under a Creative Commons BY-NC license,

received a compulsory license from the Harry Fox Agency prior to distributing his arrangement of “Baby Got Back.”¹⁰

Coulton’s arrangement of “Baby Got Back” retained Sir Mix-A-Lot’s lyrics, but also added new melodic and rhythmic material set against a smooth acoustic accompaniment.¹¹ The intentionally jarring juxtaposition of Sir Mix-A-Lot’s suggestive lyrics and Coulton’s “soulful folkie crooning about his ‘home boys’ and how he ‘likes big butts and cannot lie’” was praised as “absolutely hilarious.”¹² Coulton’s “joke” arrangement became something of a viral hit; the song was downloaded over 47,000 times during the weekend of its release, and was also played on terrestrial radio.¹³

In January 2013, Coulton discovered that Fox’s hit television show *Glee* was planning to feature his arrangement of “Baby Got Back” in an upcoming musical number.¹⁴ *Glee* is well known for casting talented young performers who sing glee club renditions of popular songs, frequently drawing humor from the juxtaposition of serious or edgy source music with the wide-eyed, Broadway-style performances of the glee club singers.¹⁵ Season four, episode eleven of *Glee*¹⁶ featured a cast performance of “Baby Got Back,”¹⁷ using an arrangement virtually indistinguishable from Coulton’s folk version.¹⁸

which allows those who download the song to freely share and remix the work so long as they provide proper attribution and do not use the work for commercial purposes. *The Mp3 Store*, JONATHAN COULTON, <http://www.jonathancoulton.com/store/downloads/> (last visited Feb. 15, 2014); see also *Attribution-NonCommercial 3.0 Unported*, CREATIVE COMMONS, <http://creativecommons.org/licenses/by-nc/3.0/> (last visited Feb. 15, 2014). However, as a licensed cover song, Coulton’s “Baby Got Back” does not use the Creative Commons License. See *The Mp3 Store*, supra note 9.

10. Jonathan Coulton, *Baby Got Back and Glee*, JONATHAN COULTON (Jan. 18, 2013), <http://www.jonathancoulton.com/2013/01/18/baby-got-back-and-glee/>.

11. See Cory Doctorow, *Nerd Folksinger Covers Baby Got Back*, BOINGBOING (Oct. 15, 2005, 10:43 AM), <http://boingboing.net/2005/10/15/nerd-folksinger-cove.html>.

12. *Id.*

13. Jonathan Coulton, *Wowie Zowie*, JONATHAN COULTON (Oct. 18, 2005), <http://www.jonathancoulton.com/2005/10/18/wowie-zowie/>.

14. Coulton, *Baby Got Back and Glee*, supra note 10.

15. *Glee - About*, FOX BROADCASTING, <http://www.fox.com/glee/about/> (last visited Feb. 15, 2014).

16. *Glee: Sadie Hawkins* (Fox television broadcast Jan. 24, 2013), available at <http://www.amazon.com/Sadie-Hawkins/dp/B00B5Q4YRS>.

17. Danger Guerrero, *'Glee' Ripped Off Jonathan Coulton And Said He Should Be 'Happy For The Exposure'*, WARMING GLOW (Jan. 25, 2013), <http://www.uproxx.com/tv/2013/01/glee-ripped-off-jonathan-coulton-and-said-he-should-be-happy-for-the-exposure/>.

18. See *id.* (containing side-by-side comparisons of the two songs). Not only did *Glee*’s version copy Coulton’s new melody, harmony, rhythm, and accompaniment, but

Fox never contacted Coulton before it aired the episode, and never gave him compensation or attribution in the show's credits, despite the fact that the two arrangements sound nearly identical.¹⁹ Fox also sold recordings of its arrangement of "Baby Got Back" on the iTunes digital store, again without crediting or compensating Coulton.²⁰ When Coulton contacted Fox's lawyers looking for an explanation or apology, they responded by saying that Fox was within its legal rights to reproduce Coulton's musical arrangement at will, and that Coulton should be happy for what the "exposure" that having his song featured on *Glee* would do for his career.²¹ Coulton sarcastically commented about Fox's response in his blog: ". . . they do not credit me, and have not even publicly acknowledged that it's my version—so you know, it's kind of SECRET exposure."²² In the wake of this incident, it was soon discovered that Coulton was but one of a troublingly large number of independent arrangers whose works have been adapted for episodes of *Glee* without the arrangers' acknowledgement, consent, or offer for compensation.²³ Coulton considered legal action, but lamented that

the version even contained the line "Johnny C.'s in trouble," which Coulton had changed from "Mix-A-Lot's in trouble" in the original hip-hop version. This change, which makes little sense in the context of the *Glee* episode, effectively rules out any defense that the similarity between the songs was the result of pure coincidence. See *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 926 (7th Cir. 2003) ("It is in order to avoid having to prove access that mapmakers will sometimes include a fictitious geographical feature in their maps; if that feature (what is called in the trade a 'copyright trap') is duplicated in someone else's map, the inference of copying is compelling.").

19. Guerrero, *supra* note 17 (quoting Laura Hudson, *Did Glee Rip Off a Jonathan Coulton Cover of 'Baby Got Back'?*, WIRED (Jan. 18, 2013 7:40 PM), <http://www.wired.com/underwire/2013/01/glee-coulton-baby-got-back/>).

20. See *id.* (quoting Coulton, *Baby Got Back and Glee*, *supra* note 10).

21. *Id.*

22. *Id.* (quoting Coulton, *Baby Got Back and Glee*, *supra* note 10). Fox never apologized to Coulton formally or informally, and the *Glee* version of "Baby Got Back" remains on the iTunes store with no official acknowledgement of Coulton's involvement. See *id.* Coulton's angry fans responded by posting extremely negative reviews of the *Glee* performance of "Baby Got Back" on iTunes. Patricia Hernandez, *Pissed-Off Jonathan Coulton Fans Review-Bomb Glee's 'Baby Got Back'*, KOTAKU (Jan. 31, 2013), <http://kotaku.com/5980619/pissed+off-jonathan-coulton-fans-review+bomb-glees-baby-got-back>. Meanwhile, in a creative use of extrajudicial self-help, Coulton rereleased his cover version on iTunes under the title "Baby Got Back (in the style of *Glee*)," and donated the sizeable proceeds to charity. See *id.*

23. Michelle Jaworski, *Serial Song Theft on "Glee"? "Baby Got Back" Wasn't the First*, THE DAILY DOT (Jan. 25, 2013), <http://www.dailydot.com/entertainment/glee-ripping-off-jonathan-coulton-dj-earworm/> (suggesting that other arrangements potentially stolen include an a capella version of Usher's "Yeah" created by University of Oregon group "Divisi," a piano ballad version of Cyndi Lauper's "Girls Just Wanna Have Fun"

“it’s the darkest gray of the gray areas [of the law] . . . it doesn’t seem like something where a little guy could sue to get any satisfaction.”²⁴

Critics condemned Fox’s consistent pattern of appropriating the work of small independent musicians such as Coulton.²⁵ Even the staunchest supporters of an “open access” system of copyright believe that one should not be allowed to copy another’s creative work verbatim for commercial gain, against the owner’s consent, and without any attribution.²⁶ Therefore, it seems odd that the Copyright Act would permit this type of appropriation. The story of Jonathan Coulton and Glee is unusual and complicated, involving a relatively obscure provision within the Copyright Act’s compulsory licensing scheme.²⁷ A number of parties today are actively looking for ways to reform our current copyright system for the new digital economy.²⁸

arranged by Greg Laswell, and a mash-up arrangement of “Fly” and “I Believe I Can Fly” by artist DJ Earworm).

24. Laura Hudson, *Jonathan Coulton Explains How Glee Ripped Off His Cover Song — And Why He’s Not Alone*, WIRED (Jan. 25, 2013 3:21 PM), <http://www.wired.com/underwire/2013/01/jonathan-coulton-glee-song/>.

25. See, e.g., *id.*; Jaworski, *supra* note 23; Mike Masnick, *Broken Copyright: Jonathan Coulton Is Actually Infringing Copyright, But Glee Is Not*, TECHDIRT (Jan. 30, 2013 9:39 AM), <http://www.techdirt.com/articles/20130129/16045921819/broken-copyright-jonathan-coulton-is-actually-infringing-copyright-glee-is-not.shtml> (condemning the absurdity of a copyright system that leads to the result in the *Glee* controversy). But see Mike Madison, *Coulton, Glee, and Copyright*, MADISONIAN.NET (Jan. 28, 2013), <http://madisonian.net/2013/01/28/coulton-glee-and-copyright/> (arguing that Coulton’s history of “having relied on voluntary contributions from fans and others to support his career” and creating a “gift economy” for his music renders his ethical claims for attribution and compensation invalid). Even if Madison’s ethical arguments are correct, they apply only to Coulton and other artists that offer their arrangements for free, and not to other arrangers who attempt to profit from their arrangements.

26. See Peter Suber, *Open Access Overview*, EARLHAM (Dec. 16, 2013), <http://legacy.earlham.edu/~peters/fos/overview.htm> (“Most authors [who embrace open access] choose to retain the right to block the distribution of mangled or misattributed copies. Some choose to block commercial re-use of the work. Essentially, these conditions block plagiarism, misrepresentation, and sometimes commercial re-use, and authorize all the uses required by legitimate scholarship, including those required by the technologies that facilitate online scholarly research.”).

27. See 17 U.S.C. § 115(a)(2) (2012).

28. See, e.g., *The Register’s Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Prop. and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Maria A. Pallante, Register of Copyrights, U.S. Copyright Office), available at <http://www.copyright.gov/regstat/2013/regstat03202013.html> (suggesting that major reforms are needed to update U.S. copyright law in the twenty-first century); THE DEP’T OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (2013), available at <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf> (discussing a variety of contemporary copyright issues).

This article proposes a reform to the current compulsory licensing statute, specifically the reform of section 115(a)(2), which as it stands now, is an unnecessary and draconian provision that oppresses artists of all types.

This article will explain how section 115(a)(2) functions, and how it hurts both arrangers and the original artists of arranged works. Having established a number of problems with the current regime, this article will propose a modest revision of the law, designed to better protect recording artists and arrangers, and to advance the underlying goals of the Copyright Act.

ANALYSIS: 17 U.S.C. § 115(A)(2) AND THE MULTIPLE LEVELS OF DERIVATIVE-WORK PROTECTION

Understandably, given the complexity of the surrounding law, not all commentators writing about the Coulton/Glee incident have described the current law accurately. For instance, some commentators have explained that Fox's copying was permissible because "[y]ou don't retain copyright on things like the style in which you sing or the instrumentation or things that are unique to the recording."²⁹ This assertion is somewhat misleading because it does not consider the features of Coulton's arrangement that *are* eligible for protection.

Coulton created substantial original melodic material, set to the lyrics of Sir Mix-A-Lot's song which, as a rap, contained virtually no melody, and also created a completely original musical accompaniment with guitars, banjos, etc.³⁰ It is well established under 17 U.S.C. § 103(b) that an author may generally claim independent copyright protection in any material fixed in a derivative work that is "contributed by the author of such work, as distinguished from the preexisting material employed in the work."³¹ Furthermore, Congress

29. See Jaworski, *supra* note 23 (quoting Parker Higgins of the Electronic Frontier Foundation).

30. Compare SIR MIX-A-LOT, BABY GOT BACK (Def American Records 1992), with *Baby Got Back*, *supra* note 7.

31. 17 U.S.C. § 103(b) (2012); see also 17 U.S.C. § 103(a) ("[P]rotection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully."); *Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp.*, 210 F. Supp. 2d 147, 158 (E.D.N.Y. 2002), *aff'd sub nom. Well-Made Toy Mfg. Corp v. Goffa Int'l Corp.*, 354 F.3d 112 (2d Cir. 2003), *abrogated by* *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) ("[D]erivative works receive copyright protection separate from that of the preexisting works they modify . . ."); *Sapon v. DC*

specifically contemplated in 17 U.S.C. § 101 that a new “musical arrangement” of an existing work could receive protection as a “derivative” work.³² In the absence of any applicable law revoking protection, Coulton has a recognized copyright interest in the original, expressive features of his arrangement.³³ Coulton would then receive at least “thin” copyright protection in the original melodic and harmonic features of his arrangement, which would be protected at a minimum against “virtually identical” copying.³⁴ As previously mentioned, the Glee and Coulton arrangements of “Baby Got Back” are virtually identical.³⁵ Although it is generally rare in practice that a finding of “thin” copyright will lead to a finding of infringement,³⁶ the overwhelming similarities between the Coulton and Glee versions of “Baby Got Back” could well have supported such a finding had this case gone to a jury.³⁷

The *real* reason Coulton would lose in a summary judgment battle against Fox is not because his work is not the kind of work copyright law protects, but rather, due to a separate rule found in the compulsory licensing statute, 17 U.S.C. § 115(a)(2). Section 115(a)(2), applicable specifically to musical works, provides:

A compulsory license includes the privilege of making a

Comics, No. 00 CIV. 8992(WHP), 2002 WL 485730, at *8 (S.D.N.Y. Mar. 29, 2002) (“To determine whether a derivative work possesses the requisite originality, courts must compare the derivative work to the preexisting work and define which elements are new to the derivative work.”). While it is true that “a work involving changes (such as reproduction in another medium) requiring only ‘manufacturing’ or ‘physical’ skill, as opposed to ‘artistic’ skill, does not merit protection as a derivative work,” creating a new arrangement of an existing song usually involves artistic skill. *Well-Made Toy Mfg. Corp. v. Goffa Int’l Corp.*, 210 F. Supp. 2d 147, 158 (E.D.N.Y. 2002) (quoting *Durham Indus., Inc. v. Tomy Corp.* 630 F.2d 905, 910 (2d Cir. 1980)).

32. 17 U.S.C. § 101 (“A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, *musical arrangement* . . . or any other form in which a work may be recast, transformed, or adapted.”) (emphasis added).

33. *Cf.* 17 U.S.C. § 103; *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003) (explaining the concept of “thin” copyright protection).

34. *See, e.g.*, *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003) (holding that an artist’s derivative jellyfish sculptures are entitled to “thin copyright that protects against only virtually identical copying”).

35. *See, e.g.*, Aaron Pound, *Musical Monday - Baby Got Back by Jonathan Coulton (with Paul & Storm)*, DREAMING ABOUT OTHER WORLDS (Jan. 21, 2013), <http://dreamingaboutotherworlds.blogspot.com/2013/01/musical-monday-baby-got-back-by.html> (“[H]ere is the virtually identical Glee version.”).

36. *See Satava*, 323 F.3d at 812 (recognizing that the scope of “thin” protection will be narrow).

37. *See e.g.*, Pound, *supra* note 35 (one of many lay listeners finding the versions to sound “virtually identical”).

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.*³⁸

The second half of section 115(a)(2) is made up of two clauses, which reveal a number of extremely important implications for arrangers when unpacked. These implications can be grouped into two categories: liabilities and rights. The liabilities and rights of an arranger depend on both the character of his or her arrangement, and whether express consent has been obtained from the original work's copyright owner.

The first of the two clauses prohibits arrangers from creating works that “change the basic melody or fundamental character of the [underlying] work.”³⁹ Under this clause, if an arrangement is generally faithful to the original author's vision—a “weak arrangement”—it qualifies for a compulsory license. The license shields the work from infringement liability so long as the arranger pays the obligatory royalties. On the other hand, if an arrangement changes the basic melody or fundamental character of the underlying work—a “strong arrangement”—the remix creator exceeds the privilege of making an arrangement and is thus ineligible for a compulsory license. Without this license, the creator of the strong arrangement will be left open to an infringement suit on behalf of the original copyright owner.⁴⁰

The second clause of section 115(a)(2) affects the arranger's rights in his or her newly created arrangement. Under the second clause of the statute, arrangements of a musical work “shall not be protected as a derivative work under this title” absent the explicit consent of the copyright owner.⁴¹ The second clause (outlining rights) is independent from the first clause (outlining liabilities) due to the use of the conjunction “and.” This suggests that all new musical arrangements are affected by the “rights” clause, regardless of whether or not the arrangement changes the fundamental character of the original work

38. 17 U.S.C. § 115(a)(2) (emphasis added).

39. *Id.*

40. See § 106 (“[T]he owner of copyright under this title has the *exclusive* rights . . . to prepare derivative works based upon the copyrighted work . . .”) (emphasis added).

41. § 115(a)(2).

under the “liabilities” clause.⁴² In other words, a work may be eligible for a compulsory license—shielding the arranger from liability—but ineligible for protection as a derivative work due to a lack of consent from the original song’s copyright owner.⁴³ It also means that any arrangement, weak or strong, may receive copyright protection for newly-added elements if the arranger obtains the express consent of the copyright owner.⁴⁴

Adding another wrinkle to this regime is the concept of “fair use,” which provides that a use of a work “for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright.”⁴⁵ An arrangement that qualifies as a fair use does not infringe the original work.⁴⁶ A finding of fair use also allows the arranger to bypass compulsory licensing and the prohibitions in section 115(a)(2) altogether; the arranger receives protection for any newly added material under the general provisions for derivative works in section 103(b).⁴⁷

42. Because section 115(a)(2) affects the *entire* musical arrangement, it makes musical derivative works unique as compared to all other derivative works protected by copyright law. In contexts other than music, “[i]f the derivative author can isolate some part of her work that does not make unauthorized use of the prior work, she can preserve copyright in that part . . .” BRAUNEIS & SCHECHTER, COPYRIGHT: A CONTEMPORARY APPROACH 92 (2012); *see* § 103(a). However, under section 115(a)(2), the arrangement *as a whole* is excluded from copyright protection absent the explicit consent of the author (or a finding of fair use).

Note that the arranger is still able to claim protection in any *sound recordings* that are created by a performance of his or her arrangement, assuming the rights in the underlying musical work(s) have been lawfully obtained. Coulton initially thought the *Glee* version of “Baby Got Back” contained audio taken directly from his recording of the arrangement, which Coulton correctly concluded would have generated a cause of action against Fox. *See* Hudson, *supra* note 24.

43. § 115(a)(2).

44. *See* §§ 103, 115(a)(2); *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003) (explaining that “thin” copyright protection protects against virtually identical copying). For most musical works, the protection offered by section 103 will be particularly “thin” due to the amount of the arrangement that is contributable to the underlying work (particularly its lyrics). *See* *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003).

45. § 107.

46. *Id.*

47. *See* § 103; *Keeling v. New Rock Theater Prods., LLC*, No. 10 CIV. 9345(TPG), 2013 WL 1899762 (S.D.N.Y. May 17, 2011) (holding that in the context of non-musical works, the creator of a fair use parody has a recognized copyright interest and may sue others for copying the parody); *see also* § 106(3) (granting the exclusive right to sell copies of a work); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 571-72 (focusing on “Oh, Pretty Woman” as a “commercial parody”).

Although section 103(a) provides that “protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which

Courts considering fair use utilize a four-part balancing test that considers, *inter alia*, the “purpose and character” of the new arrangement (in other words, how much it “transforms” the fundamental character of the original work).⁴⁸ In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court addressed the fair use factors with respect to 2 Live Crew’s song, “Pretty Woman,” a commercially-released hip-hop comedy version of Roy Orbison’s classic rock song “Oh, Pretty Woman.”⁴⁹ While not ruling on whether the song was a fair use, the Court nonetheless recognized that 2 Live Crew’s arrangement could constitute a transformative parody despite its commercial nature.⁵⁰ Notably, 2 Live Crew conceded at the outset of the case that it was not entitled to a compulsory license under section 115(a)(2) because “its arrangement change[d] ‘the basic melody or fundamental character’ of the original [Orbison song].”⁵¹

Section 115(a)(2) creates a complex web of rules, with a number of variables, each leading to a drastically different outcome for the arranger. The following table takes the analysis above and summarizes what appears to be the current state of the law. In this table, a lightly shaded cell corresponds to a positive outcome for the arranger, a medium-shaded cell represents something of a

such material has been used unlawfully,” a fair use is affirmatively “authorized by law.” *See* § 103(a); *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1154 (N.D. Cal. 2008). Moreover, copyright protection for works created via fair use was explicitly contemplated in section 103’s legislative history: “[u]nder this provision, copyright could be obtained as long as the use of the preexisting work was not ‘unlawful’—*even though the consent of the copyright owner had not been obtained*. For instance, the unauthorized reproduction of a work might be ‘lawful’ under the doctrine of fair use or an applicable foreign law, and if so the work incorporating it could be copyrighted.” H.R. REP. NO. 94-1476, at 58 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 1561 (emphasis added).

48. 17 U.S.C. § 107(1); *Campbell*, 510 U.S. at 579 (“The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely ‘supersede[s] the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’”) (internal citations omitted).

49. *Campbell*, 510 U.S. at 571-72.

50. *Id.* at 583.

51. *See id.* at 575 n.5. On remand, the parties settled—2 Live Crew simply agreed to pay royalties under a standard license agreement. *See* Peter Friedman, *What Happened After the Remand of Campbell v. Acuff-Rose*, WHAT IS FAIR USE (Mar. 30, 2008, 4:43 PM), <http://whatisfairuse.blogspot.com/2008/03/what-happened-after-remand-of-campbell.html> (quoting *The Associated Press, Acuff-Rose Settles Suit With Rap Group*, THE COMMERCIAL APPEAL (June 5, 1996)).

compromise between the interests of arranger and original composer, and the darkly-shaded cells represent a negative outcome for the arranger.

Type Of Transformation	Legal Classification	Arranger's Legal Status ⁵²	
		Liability	Rights
WEAK arrangement, no express consent: preserves melody and fundamental character of original work	Cover song under § 115	So long as the arranger pays for the appropriate license, no infringement.	Arranger has no copyright protection in the arrangement, because no express consent.
STRONG arrangement, no express consent: transforms the fundamental character of the original work (but is not a fair use)	Unauthorized derivative work under § 115(a)(2)	No compulsory license, and the arranger is liable to the copyright owner for infringement.	Arranger has no copyright protection in the arrangement, because no express consent.
FAIR USE arrangement, no express consent: transforms the fundamental character of the original work and is a fair use (ex: parody)	Derivative work under § 103(a)	Arranger is not liable and need not pay a compulsory license.	Arranger gets protection for any independently copyrightable contributions under § 103(b) regardless of consent.
WEAK arrangement, WITH express consent	Cover song under § 115	So long as the arranger pays for the appropriate license, no infringement.	Arranger gets protection for any independently copyrightable contributions under § 103(b).
STRONG arrangement, WITH express consent	Authorized derivative work under § 115(a)(2) and § 103(a)	So long as the arranger pays for the appropriate license, no infringement.	Arranger gets protection for any independently copyrightable contributions under § 103(b).
FAIR USE arrangement WITH express consent	Derivative work under § 103(a)	Arranger is not infringing and need not pay a compulsory license.	Arranger gets protection for any independently copyrightable contributions under § 103(b) regardless of consent.

It is clear that without the express consent of the copyright holder, the arranger faces harsh consequences—that is, unless his new work is considered a fair use. Applying these rules to the case of Jonathan Coulton and Glee: Fox would argue that even though Coulton paid the compulsory licensing fee for his version of “Baby Got Back,” he did not

52. In this table, a lightly shaded cell corresponds to a positive outcome for the arranger, a medium-shaded cell represents something of a compromise between the interests of arranger and original composer, and the darkly-shaded cells represent a negative outcome for the arranger.

obtain Sir Mix-A-Lot's express consent to create his arrangement and therefore has no rights for his arrangement as a derivative work. Fox would then likely argue that because Coulton's arrangement was unprotected, Fox was free to copy Coulton's arrangement at will.⁵³

ARGUMENT: SECTION 115(A)(2) MUST BE REFORMED

Section 115(a) (2) is fundamentally broken and must be reformed for the twenty-first century. This section must be rewritten in order to better achieve the goals set out by Congress when drafting it; namely, "to recognize the practical need for a limited privilege to make arrangements of music being used under a compulsory license, but

53. In this scenario, whether Coulton's arrangement is "weak" or "strong" only affects his *liability* to Sir Mix-A-Lot for infringement, and has no relevance to his rights against Fox. See 17 U.S.C. § 115(a)(2).

However, it seems reasonable to argue that Coulton's version of "Baby Got Back" was actually a *fair use parody* of Sir Mix-A-Lot's original, which would obviate the need for a license altogether. In much the same way that 2 Live Crew's parody "Pretty Woman" "juxtaposes [Orbison's] romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility," Coulton's version of "Baby Got Back" juxtaposes Sir Mix-A-Lot's degrading taunts and bawdry demands for sex with a musical accompaniment and melody suggesting the romantic musings of a man whose fantasy comes true. *Campbell*, 510 U.S. at 583; Doctorow, *supra* note 11 (finding the humor inherent in Houlton's "soulful folkie crooning about . . . how he 'likes big butts and cannot lie'"). Although the thrust of Coulton's joke was delivered solely through his choice of musical accompaniment (as opposed to 2 Live Crew's "Pretty Woman," which delivered its joke mainly by rewriting Orbison's lyrics), it nonetheless seems clear that "a parodic character" in Coulton's work directed at the Sir Mix-A-Lot original "may easily be perceived," which could lead a court to find fair use when considered alongside the other factors. *Campbell*, 510 U.S. at 582 ("The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived."). *But see Campbell*, 510 U.S. at 599 (Kennedy, J., concurring), ("[A] rap version of Beethoven's Fifth Symphony or 'Achy Breaky Heart' is bound to make people smile. If we allow any weak transformation to qualify as parody, however, we weaken the protection of copyright.").

If it is correct that Coulton's version of "Baby Got Back" was fair use, Coulton was under no obligation to pay a compulsory license, and would be able to sue Fox for infringing the thin copyright in his new arrangement. On the other hand, as a matter of strategy, if Coulton's version of "Baby Got Back" was found to be a "strong arrangement" rather than a fair use, Coulton would risk not only losing his case against Fox but *also* being declared liable as an infringer of Sir Mix-A-Lot's original composition. Coulton likely decided to pay the compulsory license because he was unwilling to risk so much on a fair use defense: "[b]ecause liability is difficult to predict and the consequences of infringement are dire, risk-averse intellectual property users often seek a license when none is needed." James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 882 (2007). Whether the result of risk aversion or simply confusion as to his rights, Coulton has not filed suit against Fox, and so we are left without much-needed clarity as to the applicability of the fair use doctrine.

without allowing the music to be perverted, distorted, or travestied.”⁵⁴ Section 115(a)(2) fails to achieve this goal and the underlying goals of the Copyright Act for three reasons. First, the law is too difficult to practically implement. Second, the law creates an unjust windfall for third-party infringers, which in turn encourages the creation of “travestied” works. Third, insofar as the law was designed to protect musical integrity, it is unnecessarily and dangerously broad.

A. SECTION 115(A)(2) IS TOO UNCLEAR TO BE PRACTICAL.

The confusion surrounding Coulton’s case and the misinformation circulated about the legal issues at play suggests that many artists who create arrangements are not fully informed of their rights under the current regime.⁵⁵ As the chart in section II shows, the web of rules flowing from the language of section 115(a)(2) is complicated—arguably unnecessarily so—and there is a real possibility that uneducated arrangers suffer as a result.⁵⁶

In addition to being incomprehensible to most artists, the current regime under section 115(a)(2) is not practically administrable. The first issue in a section 115(a)(2) analysis—whether or not the arrangement changes the “fundamental character” of the underlying work—forces a court to consider questions completely outside of its area of competence. It is “a dangerous undertaking for persons trained only to the law to constitute themselves final judges” of an artistic work’s character.⁵⁷ What is the “fundamental character” of “Baby Got Back”? How is a court supposed to apply such a standard, much less an arranger uneducated in the law?

In the few cases that actually apply section 115(a)(2), courts have simply left the question of a work’s “fundamental character” up to the jury, which is no better equipped to discuss a musical work’s character

54. H.R. REP. NO. 94-1476, at 109 (1976).

55. *See infra* Part II.

56. *See generally* Gibson, *supra* note 53 (explaining how risk-averse artists tend to pursue licenses when their use may not require payment); Jaworski, *supra* note 23 (explaining that many artists have been confronted with similar issues in licensing and risk aversion to their detriment).

57. *See* *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (Harlan, J., dissenting) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”).

(and may be particularly susceptible to manipulation).⁵⁸ For instance, in *TeeVee Toons, Inc. v. DM Records, Inc.*,⁵⁹ the court held that the significance of the arranger's alterations with respect to the fundamental character of the underlying work presented "issues of fact" that could not be decided on summary judgment.⁶⁰

Unsurprisingly, the parties in that case settled rather than try the issue before a jury.⁶¹ Considering the costs of going to trial and the lack of predictability (or musical expertise) of most jurors, few arrangers are ever able to know whether their arrangement of another's work runs afoul of section 115(a)(2)'s prohibition.⁶² Because section 115(a)(2)'s "fundamental character" test presents a question with extremely important implications, but no administrable guidelines for either the general public or the courts to follow, it follows that the law ought to be reformed.

B. BY REVOKING AN UNAUTHORIZED COVER'S COPYRIGHT PROTECTION,
SECTION 115(A)(2) CREATES AN UNFAIR WINDFALL FOR DELIBERATELY
INFRINGING THIRD PARTIES.

When an arranger fails to secure the copyright holder's consent prior to creating a cover arrangement, section 115(a)(2) deprives the arranger of all his or her rights against all other third parties. This regime, which in practical terms serves only to enrich third-party infringers, is contrary to the goals of the Copyright Act, and moreover, is fundamentally unfair.

The injustice created by section 115(a)(2) is clearly illustrated by Fox's actions toward Jonathan Coulton and the numerous other artists whose work was stolen for use in *Glee*.⁶³ By relying on section 115(a)(2), Fox would argue that it cannot be held responsible for

58. See Jamie R. Lund, *An Empirical Examination of the Lay Listener Test In Music Composition Copyright Infringement*, JLUNDLAW, <http://www.jlundlaw.com/p/music-copyright-project.html> (last visited Feb. 20, 2014) (documenting jurors' susceptibility to gamesmanship and manipulation when asked to assess the similarities between works in copyright lawsuits).

59. 05 CIV. 5602 (JGK), 2007 WL 2851218, (S.D.N.Y. Sept. 27, 2007).

60. *Id.* at *7.

61. See Stipulation Of Dismissal And Order at 8, *TVT Music, Inc. v. Rep Sales, Inc.*, 1:05CV05602 (S.D.N.Y. Mar. 5, 2012).

62. Telephone interview with Paul Fakler, Partner, Arent Fox (Jan. 17, 2014) (noting the lack of case law or other guidance defining "fundamental character").

63. See generally Hudson, *supra* note 23.

violating Coulton's rights in his arrangement because Coulton failed to obtain the explicit consent of Sir Mix-A-Lot years earlier. Such a result does not provide justice to Sir Mix-A-Lot, who is unaffected by any suit between Fox and Coulton, and it does not provide justice to Coulton, who loses all rights in his arrangement. Meanwhile, Fox obtains a substantial windfall. Copyright should enrich artists and authors, not deliberate copiers. A system of copyright that leads to such a result is in dire need of repair.⁶⁴

C. INsofar AS SECTION 115(A)(2) WAS INTENDED TO CREATE A MORAL RIGHT FOR ARTISTS, THE STATUTE IS POORLY CRAFTED TO MEET THAT GOAL.

The legislative history for section 115(a)(2) provides that the provision "is intended to recognize the practical need for a limited privilege to make arrangements of music being used under a compulsory license, but without allowing the music to be perverted, distorted, or travestied."⁶⁵ This goal of preventing songs from being mutilated strongly suggests that Congress was trying to create a sort of "moral right."⁶⁶ In the United States, "moral rights" typically refer to a collection of rights given to the author of an artistic work, designed to ensure the integrity of both the artist and his or her creation.⁶⁷ One traditional moral right is the right "to prevent revision, alteration, or distortion of [an artist's] work,"⁶⁸ a goal that closely parallels Congress'

64. One might draw parallels between section 115(a)(2) and the doctrine of patent misuse (or "unclean hands"): under that doctrine, the "patentee [is prevented] from taking legal action against infringers (and thus prevents the patentee from obtaining his reward) because of a judgment that the patentee has done something wrong" to a wholly unrelated party in another proceeding. Mark A. Lemley, *The Economic Irrationality of the Patent Misuse Doctrine*, 78 CALIF. L. REV. 1599, 1615 (1990). Such a regime has been harshly criticized as "economically irrational," because it fails to provide relief to either the original intellectual property owner whose rights were violated, or to the person asserting his rights against the third party. *Id.*

65. H.R. REP. NO. 94-1476, at 109 (1976).

66. Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 38-39 (1985) (quoting H.R. REP. NO. 94-1476, at 109); see also Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 97 (1996).

67. Betsy Rosenblatt, *Moral Rights Basics*, BERKMAN CENTER FOR INTERNET & SOCIETY, <http://cyber.law.harvard.edu/property/library/moralprimer.html> (last visited Apr. 29, 2013).

68. *Id.*

stated intent in drafting section 115(a)(2).⁶⁹ Unlike in many European countries, the United States generally has chosen to keep the scope of moral rights extremely narrow, applicable only in specific cases and often only to purely visual works of art.⁷⁰ However, in the drafting of section 115(a)(2), Congress was apparently concerned that absent protection, unscrupulous cover artists could destroy the integrity of treasured original works through disrespectful arrangements.⁷¹

At this point, it is worth noting that there has been no shortage of discussion as to whether or not a system of moral rights is a good idea as a matter of policy.⁷² While many artists believe that an artist's connection with his or her work entitles the author to control the work's fate,⁷³ other critics have argued that strong moral rights impede innovation and raise the specter of censorship if they give the author too much power to control who may build off the work.⁷⁴ It is ultimately unnecessary to dive into that debate here. Regardless of one's opinions about moral rights, one can still see that section 115(a)(2) is overbroad and clumsily drafted, and has the potential to hurt authors as easily as it may help them. When compared to the parallel protections in the Visual Artists Rights Act of 1990 (VARA),⁷⁵ section 115(a)(2)'s shortcomings become clear.

1. *The protections of section 115(a)(2) vest in the copyright holder, not the original artist.*

Under VARA, “[e]ven if the author has conveyed away a work or her copyright in it, she retains the moral [rights] to the work.”⁷⁶ Under section 115(a)(2), the opposite is true. Once the original artist conveys his or her copyright interest in his composition, he or she loses the

69. H.R. REP. NO. 94-1476, at 109.

70. *See id.*; 17 U.S.C. § 106A (1990). The statute is also known as the Visual Artists Rights Act of 1990 (VARA), and applies exclusively to visual art. *Id.*

71. *See* H.R. REP. NO. 94-1476, at 109; Rosenblatt, *supra* note 67.

72. Compare Cassandra Spangler, Comment, *The Integrity Right of an MP3: How the Introduction of Moral Rights into U.S. Law Can Help Combat Illegal Peer-to-Peer Music File Sharing*, 39 SETON HALL L. REV. 1299, 1300 (2009) (advocating moral-rights protection for musical artists in the United States), with Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 265 (2009) (arguing that moral rights impede artistic progress).

73. Spangler, *supra* note 72, at 1300.

74. *See* Adler, *supra* note 72, at 265.

75. § 106A.

76. Rosenblatt, *supra* note 67; § 106A(d), (e)(1).

ability to provide consent with respect to future arrangements. Meanwhile, the arranger must seek the express consent of the “copyright owner,” as opposed to the original artist of the song.⁷⁷

Within the music industry, it is extremely common for an artist to assign her copyright in a song to a music publisher upon completion of the work.⁷⁸ In some cases, the music publisher and the artist’s record label (which owns the right to exploit the audio recordings of the song) are the same entity.⁷⁹ It is also unfortunately common in the music industry that the record label’s desires do not align with the artist’s, particularly with respect to issues of artistic integrity.⁸⁰ If a record label owns the copyright to the artist’s original composition, it will likely refuse to give consent for any cover that it feels could pose a threat to the original song within the marketplace. If section 115(a)(2) were truly designed to protect the integrity of artists, it would have put the power to consent to derivative works in the hands of the artists responsible for the work, as opposed to solely with the copyright owner.

2. Section 115(a)(2) creates a burdensome, “opt-in” regime.

Under section 115(a)(2), the power to consent to a derivative arrangement rests with whoever holds the copyright to the original song. This creates a burden on an arranger to locate and negotiate with the copyright holder for consent, often many years after the

77. 17 U.S.C. § 115(a)(2) (1990).

78. See *Music Publishing 101*, NAT’L MUSIC PUBLISHER’S ASS’N, <https://www.nmpa.org/legal/music101.asp> (last visited Feb. 20, 2014) (“In exchange for acquiring the copyright, a portion of the copyright, or a percentage of the revenue earned from the exploitation of the musical composition, the music publisher seeks opportunities to exploit the musical composition . . .”).

79. See Ethan Trex, *The Time John Fogerty Was Sued for Ripping Off John Fogerty*, MENTALFLOSS (Apr. 13, 2011, 8:03 PM), <http://mentalfloss.com/article/27501/time-john-fogerty-was-sued-ripping-john-fogerty> (describing a case in which John Fogerty of Creedence Clearwater Revival was sued by his former label (and publisher) for allegedly plagiarizing one of his old songs).

80. See, e.g., Stephen Adams, *Pink Floyd Stops EMI from Cutting up Albums Online*, THE TELEGRAPH (Mar. 11, 2010, 1:45 PM), <http://www.telegraph.co.uk/culture/music/music-news/7421247/Pink-Floyd-stops-EMI-from-cutting-up-albums-online.html> (stating the band members of Pink Floyd successfully sued their label to prevent their albums’ tracks individual sale on digital stores. Anticipated disagreement about issues of “artistic integrity” led the band to negotiate specific clauses in their contract to protect these interests).

original song is first released. Section 115(a)(2)'s consent regime is "opt in" when it should be "opt out." By default, an arrangement is not protected unless the copyright holder gives his or her express consent. In other words, the law presumes the copyright holder has withheld consent for any arrangements until he or she expressly states otherwise.

This default "no covers allowed" setting does not comport with modern songwriters' general attitudes towards derivative arrangements. Most modern songwriters understand that if their music is to stand the test of time, others will necessarily adapt and re-imagine their work; countless artists in a wide variety of genres have thus embraced and encouraged the production of transformative covers.⁸¹ While there are certainly some musicians who object—perhaps reasonably—to unauthorized covers,⁸² this small minority ought not to be treated as the default position in the twenty-first century.

81. See John Dolen, *Interview with Dylan: 09/29/95*, FORT LAUDERDALE SUN SENTINEL (Sept. 29, 1995), available at <http://www.interferenza.net/bcs/interw/florida.htm> (replying to a question about Jimi Hendrix's cover of his song "All Along the Watchtower," Bob Dylan replied: "[Jimi] had such talent He found things that other people wouldn't think of finding in there. He probably improved upon it by the spaces he was using. I took license with the song from his version, actually, and continue to do it to this day"); RZA Digs Justin Bieber "Runaway Love" Remix, MUSICIANS ENTOURAGE (Sept. 14, 2010), <http://musiciansent.com/2010/09/rza-digs-justin-bieber-%E2%80%9Crunaway-love%E2%80%9D-remix/> (rapper RZA approving of a remixed arrangement of Wu-Tang song "Wu-Tang Clan Ain't Nuthing ta F' Wit," combined with the vocals of Justin Bieber song "Runaway Love"); Chris Vinnicombe, *Trent Reznor talks Johnny Cash*, MUSICRADAR (Aug. 5, 2008), <http://www.musicradar.com/us/news/guitars/trent-reznor-talks-johnny-cash-168199> (describing the reaction of Nine Inch Nails frontman Reznor upon hearing Johnny Cash's arrangement of the Nine Inch Nails song "Hurt": "It really, really made sense and I thought what a powerful piece of art"); Douglas Wolk, *Beck's New 'Song Reader' Album, and Destroy It Yourself Music*, MTVHIVE (Dec. 12, 2012), <http://www.mtvhive.com/2012/12/12/beck-song-reader/> (artist Beck encouraging internet users to create their own arrangements of his new album: "[p]ersonalizing and even ignoring the arrangements is encouraged. Don't feel beholden to what's notated. Use any instrument you want to. Change the chords; rephrase the melodies Play it for friends, or only for yourself."); Robert Wright, *Introduction to Alchemy: A Study of Tom Waits through Cover Songs*, EMPTY MIRROR, <http://www.emptymirrorbooks.com/features/tom-waits-cover-songs.html> (last visited Jan. 19, 2014) ("Most songwriters view their songs as "children" or "babies," implying a paternal bond of care and affection, while the cover artist's relationship to the song is that of spouse or lover, a union of intimacy and desire, seeking completion and fulfillment from someone else's creation.").

82. *Prince Hates Random Stars Covering His Songs*, ACESHOWBIZ (April 14, 2011, 6:05 PM), <http://www.aceshowbiz.com/news/view/w0011693.html> (artist Prince criticizing the power compulsory licensing gives other artists to cover his songs).

Moreover, placing the burden on arrangers to locate the original artists they cover is impractical. For the vast number of so-called “orphan works”—works for which the copyright owner cannot be located even after a reasonably diligent search—obtaining the copyright owner’s consent to make a cover will be effectively impossible.⁸³ This problem of “orphaned” copyrighted works is growing,⁸⁴ and is particularly troublesome because under section 115(a)(2), the copyright owner’s consent is a prerequisite for the arrangement of a copyrighted work to have any legal protection against third parties.⁸⁵

It is reasonably likely that Sir Mix-A-Lot would have approved of Jonathan Coulton’s humorous folk version of “Baby Got Back” had Coulton approached him directly—after all, Sir Mix-A-Lot is not opposed to the lampooning of his song or of his own hip-hop persona in his own self-parodies (or indeed, on *Glee*).⁸⁶ Moreover, Sir Mix-A-Lot would be especially unlikely to prevent Coulton’s arrangement from reaching the market, when doing so would mean foregoing the not-insubstantial royalties Coulton pays upon each sale of his arrangement.⁸⁷ Nevertheless, because section 115(a)(2) requires affirmative and express consent, Sir Mix-A-Lot is presumed to have disapproved of all new arrangements of his work, and Coulton’s arrangement is unfairly punished as a result.

83. See *Orphan Works and Mass Digitization*, U.S. Copyright Office (Mar. 15, 2013), <http://www.copyright.gov/orphan/> (announcing an effort to collect comments regarding the problems created by orphan works and possible resolutions).

84. See *id.*

85. See *infra* Part III.(B).

86. See, e.g., Advertisement: SpongeBob Squarepants Burger King_(2009); *Robot Chicken: Table Be Round* (Cartoon Network television broadcast Oct. 5, 2008), available at <http://video.adultswim.com/robot-chicken/table-be-round.html>. Sir Mix-A-Lot had to have given his express approval in order to allow Fox to publicly perform the folk version of “Baby Got Back” on *Glee*. See 17 U.S.C. § 115(a)(1) (2012) (compulsory license applies only to phonorecords); § 115(c)(3)(J) (compulsory license does not cover public performances (including by means of digital transmission), and thus direct negotiation is needed). Given that Sir Mix-A-Lot did not object too strenuously to the *Glee* version, it seems unlikely that he would have objected to Coulton’s version.

87. See 17 U.S.C. § 115(c)(2).

3. *VARA conditions recovery on a showing of prejudice to the artist's integrity or reputation, whereas section 115(a)(2) does not contain this important safeguard.*

Under VARA's rights of attribution and integrity, a visual artist has the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation."⁸⁸ Under section 115(a)(2) however, the copyright holder may refuse to consent to the protection of a new derivative work for any reason, regardless of whether the cover arrangement would harm the artist's reputation.⁸⁹

There is no reasonable justification for giving copyright holders more power to withhold consent under section 115(a)(2) than visual artists currently have under VARA. The limitation in VARA is important because without it, a copyright holder could sue to stop production of a new work whenever it modifies the original in a way that the copyright holder simply does not like. This power to withhold consent, even unreasonably, is incredibly powerful and is easily abused;⁹⁰ therefore, it should be tempered.

SUGGESTIONS FOR REFORM

Although the previous section points out many flaws in section 115(a)(2),⁹¹ this article does not go so far as to argue that this provision ought to be removed in its entirety. Trying to protect the artistic integrity of music creators is a noble goal. One could imagine a situation in which an obnoxious cover song could in fact cause the original work to be "perverted, distorted, or travestied" in such a way that a mechanical royalty would be insufficient compensation.⁹² For example, a hypothetical musician who writes a sincere love ballad

88. 17 U.S.C. § 106A(3)(A) (emphasis added).

89. *Cf. id.* § 115(a)(2); H.R. REP. NO. 94-1476, at 109 (1976).

90. See Mike Masnick, *Prince Sends A Takedown Over Six Second Vine Clips*, TECHDIRT (Apr. 3, 2013 7:53 AM), <http://www.techdirt.com/articles/20130402/18194922552/prince-sends-takedown-over-six-second-vine-clips.shtml> (describing artist Prince's "irrational" tendency to object to any use of his work on the Internet, regardless of the use's likely effect on his reputation). Furthermore, the power of consent under the current regime affects both the arranger's liabilities and rights against third parties, making it extremely powerful. See *infra* Part II, III.(B).

91. See *infra* Part III.

92. See H.R. REP. NO. 94-1476, at 109 (1976).

might justifiably feel upset if Coca-Cola then were to write an obnoxious “dubstep” arrangement of his work without his consent and then use it to sell Coca-Cola products during the Super Bowl.⁹³ Even assuming Coca-Cola does not imply the hypothetical musician’s endorsement of Coca-Cola products,⁹⁴ one can imagine the musician could reasonably feel as though his own reputation was damaged if listeners later heard his original arrangement and their minds immediately drifted to the Coca-Cola commercial and its corporate message.⁹⁵ Section 115(a)(2) provides a real benefit to the integrity of the artist by discouraging the creation of these highly distorted works.

When passing section 115(a)(2), it appears then that Congress was concerned about preventing the harm that occurs when an artist’s song is “perverted, distorted, or travestied.”⁹⁶ If so, the statute should be revised to better address that harm. Section 115(a)(2) should therefore be rewritten as follows:

A compulsory license includes the privilege of 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. *However, the license may be revoked if the artist of the original work or his assignees can show that material prejudice to the artist or song’s integrity or reputation will result from distribution of the new arrangement.*

93. “Dubstep” is a genre within electronic dance music characterized by loud, reverberating electronic bass. *See Dubstep—Define Dubstep*, DICTIONARY.COM, <http://dictionary.reference.com/browse/dubstep> (last visited Jan. 13, 2014).

94. Courts already provide relief under the Lanham Act when a user mutilates an original work and then falsely attributes the mutilated work to the original artist or implies that the original artist endorsed the new work. *See, e.g., Gilliam v. Am. Broad. Cos., Inc.*, 538 F.2d 14, 24-26 (2d Cir. 1976) (Monty Python creator prevailing against ABC for airing a heavily edited version of the show and implying that Monty Python created or endorsed it).

95. To give another example, one might also feel that the classic B.J. Thomas single “Hooked on a Feeling” (Scepter Records 1968), was subsequently “travestied” by the infamous David Hasselhoff cover in 1999. (AllMusic 1999). *See also* Matthew Perpetua, *12 Songs Republicans Used Without Permission*, BUZZFEED MUSIC (Aug. 17, 2012, 2:11 PM), <http://www.buzzfeed.com/perpetua/12-songs-republicans-used-without-permission> (describing musicians who objected to the use of their compositions in campaigns run by politicians the artist disagreed with); Henry L. Self, MORAL RIGHTS AND MUSICIANS IN THE UNITED STATES, 2003-2004 ENT’M, PUB. & THE ARTS HANDBOOK 165, 1 (2003), *available at* <http://www.lavelysinger.com/MoralRights.pdf> (describing how pop singer Connie Francis, a rape victim who suffered from years of mental instability, objected to her label Universal licensing her songs for use in sexually themed motion pictures).

96. *See* H.R. REP. NO. 94-1476, at 109.

The new language above effectively addresses each of the problems pointed out in Part III.

A. THE PROPOSED LAW IS CLEARER AND EASIER TO ADMINISTER.

The new language eschews any vague discussion of the “fundamental character” of the underlying work in favor of a standard that relies on material prejudice to the integrity or reputation of the original artist or song, similar to the standard under VARA.⁹⁷ Under the new standard, a jury would have to decide whether the artist or song’s reputation had been sufficiently injured to warrant revoking the arranger’s compulsory license. Establishing damage to an artist or song’s reputation could be accomplished using evidence and arguments analogous to the ones employed for cases brought under VARA, the Lanham Act, or common-law defamation, such as public opinion polls, news coverage or sales numbers.⁹⁸ While this standard is not without its own set of interpretative challenges, quantifying reputational harm is at least a question that requires little or no musical expertise. Additionally, the proposed law would impose a requirement that the plaintiff show “material” prejudice to his or her integrity or reputation. This standard would ensure that the artist’s interest in integrity is respected, while preventing the plaintiff from haphazardly punishing an arrangement merely because he or she disapproves of it.

B. THE PROPOSED LAW CORRECTLY ELIMINATES THE PROVISION THAT REVOKES COPYRIGHT PROTECTION FOR UNAUTHORIZED COVER ARRANGEMENTS.

Cover arrangements should receive, at minimum, “thin” copyright protection to protect against those who would otherwise obtain a

97. See 17 U.S.C. § 106A(a)(3)(A) (2012) (“[T]he author of a work of visual art . . . shall have the right . . . to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation.”).

98. Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (recognizing “trial courts have wide experience in framing appropriate jury instructions in tort actions,” and suggesting that juries can understand the impact of many different types of injury even apart from actual out-of-pocket expenses).

windfall by making virtually identical copies. Under the proposed law, a cover arrangement will be protected as a derivative work against infringing third parties by default, unless the original artist revokes that protection by showing material prejudice to his or her reputation or the reputation of the song.⁹⁹ If the original artist successfully proves that the cover would be materially prejudicial and that the arrangement is infringing without a valid license (i.e., there is no fair use), then the cover arrangement forfeits copyright protection – not under the revised section 115, but rather under section 103(a).¹⁰⁰ By removing the existing deterrent on those who make expressive arrangements, the proposed law would spur the growth of these new creative arrangements, which in turn would result in artistic progress, as well as additional royalties for the beneficiaries of the compulsory licenses.¹⁰¹ Applying the law to the Glee facts, Fox would pay a compulsory license royalty directly to Coulton for using his arrangement.¹⁰² Coulton would then forward a portion of that royalty to Sir Mix-A-Lot for arranging his original song.¹⁰³

99. Note that in cases where *multiple* artists have contributed to a work, a supermajority should be required to bring suit under the revised statute, unless there is a pre-existing contractual relationship between the artists covering these types of issues. See generally Roberta R. Kwall, “*Author - Stories*”: *Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 37 (2001) (discussing the many difficulties applying moral rights doctrine to works with multiple authors).

100. 17 U.S.C. § 103(a) (“[P]rotection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”). Additionally, the proposed regime allows an arranger whose work does not qualify for a compulsory license to nonetheless claim protection for any elements of his arrangement that are independent from the original infringing composition—for example, if the arranger adds a new verse with a new melody to an otherwise infringing arrangement. See BRAUNEIS & SCHECHTER, *COPYRIGHT: A CONTEMPORARY APPROACH* 92 (2011) (“[I]f the derivative author can isolate some part of her work that does not make unauthorized use of the prior work, he can preserve copyright in that part; otherwise, her work falls into the public domain.”).

101. See 17 U.S.C. § 115(c)(2).

102. *Mechanical License Royalty Rates*, UNITED STATES COPYRIGHT OFFICE, <http://www.copyright.gov/carp/m200a.pdf> (last updated Jan. 2010) (stating the current statutory rate is 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever is larger).

103. It is helpful to further explain the fee structure that the proposed law would create. In order to allow Coulton to retain some portion of the royalty, it would be necessary to create a new statutory rate for “covers of covers.” The default rate could be 4.55 cents, allowing for a 50-50 split in royalties between Coulton and Sir Mix-A-Lot. See 17 U.S.C. § 115(c)(2) (“[T]he royalty under a compulsory license shall be payable for every phonorecord made and distributed in accordance with the license.”). This is a fair split in the *Glee* scenario, because both Coulton’s and Sir Mix-A-Lot’s

C. THE PROPOSED LAW VESTS THE DEFAULT POWER TO OBJECT TO AN ARRANGEMENT IN THE ORIGINAL ARTIST OR HIS OR HER ASSIGNEES, RATHER THAN SOLELY IN THE COPYRIGHT HOLDER.

Rather than requiring the express consent of the copyright holder, the proposed regime allows only the artist or his or her assignees to object to an arrangement of their original work. The purpose of reallocating the ability to bring suit is simply to grant more power to artists to preserve the integrity of their work. The power should also be given to the artists' assignees, including heirs if they exist.¹⁰⁴ While it is true that VARA protection ends with the death of the author,¹⁰⁵ allowing the proposed right to exist posthumously is also a necessary compromise in order to protect the investment of a third-party copyright owner such as a publisher or label, which would likely not invest in as many developing artists if it believed it could not control the market for derivative works after the artists' death (when such a right is often quite valuable).

Publishers may object to this proposed change because it appears to take away their right to control the derivative works market. However, an analysis of the proposed rule shows that the practical effects of this change would actually be minimal. Assuming the artist has transferred his or her copyright interest to a publisher, but not assigned the right to object under the new law,¹⁰⁶ there are only three ways the artist-publisher relationship can play out.

creative contributions were necessary to inspire the *Glee* version. In this scenario, the Fox version of "Baby Got Back" is "in accordance with" the compulsory license between Coulton and Sir Mix-A-Lot, and thus would be treated as a "sale" subject to royalties. See 17 U.S.C. § 115(c)(2).

One might argue that not *all* derivative arrangements are so transformative so as to deserve a fifty percent royalty share; however, the 4.55 cent rate could only apply in the fairly rare case where a judge determines that an arrangement contains elements that both (a) qualify for independent copyright protection, and (b) have been infringed upon by a third party.

104. Society arguably has an interest in preventing material prejudice to an artist or song's integrity, even if the composing artist has died—fans and family of the deceased artist may be justifiably outraged to hear the songs of a recently deceased artist immediately repurposed to endorse products that the artist denounced while she was alive.

105. See Rosenblatt, *supra* note 67.

106. Note that a record label could always stipulate in its standard contracts that the signing artist must consent to assign its right to object to the publisher. Nonetheless, the publisher suing on the artist's behalf will still be required under the proposed law to show damage to the *artist or song's* reputation, rather than simply showing damage to the song's viability in the marketplace. That said, a showing of

In the first, the artist and publisher's interests will be aligned: both the publisher and artist object to the new arrangement. In this scenario, there is no meaningful change from the current regime; the label will agree to bring suit on behalf of the artist in order to prevent the distribution of the offending cover.

In the other two other scenarios, the interests of the artist and publisher diverge. In the second scenario, the artist objects to the creation of a derivative work but the label approves of it. Even if the artist prevails against the derivative arranger and revokes the arranger's compulsory license, the publisher can simply provide the arranger with a direct license, allowing the new arrangement to be distributed against the artist's wishes. As such, the ultimate outcome in this scenario is essentially the same as it is under current law. While perhaps frustrating to the artist, this would be a fair result: if the artist has conveyed to the publisher the right to make money off his or her work, the artist's right to integrity ought not to trump the label's ability to pursue that economic interest through licensing.¹⁰⁷

In the third scenario, the publisher wishes to sue an arranger but the artist or his or her assignees does not. Unlike in the previous two scenarios, this marks a change to the current regime. Here, the publisher could not prevent the new derivative work from being distributed under the compulsory license without the original artist's consent. Although losing some control over the derivatives market may frustrate the publisher, this would be a justifiable outcome; a publisher with only an economic interest in a song ought not to be able to prevent new works from being distributed solely by relying on rights derived from the artist's moral rights.¹⁰⁸ If no legal remedies were available, at least the copyright owner could console itself with

market harm might be useful in proving harm to the artist or song's reputation. It remains an open question under this theory how often artists will actually contract away this right to object to covers of their works. The value of the right granted by the proposed law might vary wildly depending on the genre of music involved and the independent legal resources of the contracting artist; this makes the right an ideal term for case-by-case bargaining.

107. If the artist's moral rights *always* took precedent over the label's economic interest, it would greatly reduce the value of the copyright for the label.

108. If the artist's moral rights *never* took precedent over the label's economic interest, it would greatly reduce the value of the copyright for the artist.

the royalties generated from a successful derivative work produced under the compulsory license.¹⁰⁹

D. THE PROPOSED LAW CHANGES THE CONSENT REGIME FROM “OPT-IN” TO “OPT-OUT.”

The proposed law effectively shifts the burden from the arranger, who currently must affirmatively seek permission in order to receive protection for a derivative work, to the original artist, who would have to police for cover arrangements that harm the artist’s integrity. There are a few justifications for this change. The first is that, practically speaking, the latter situation—in which the artist polices for unauthorized covers—is already the status quo.¹¹⁰ Many arrangers do not seek compulsory licenses when releasing their arrangements, preferring instead to release their work unlicensed and hope that no one sues them for infringement.¹¹¹ With that fact in mind, formally acknowledging the creator’s duty to police does not make his or her situation any worse than it already is.

The second argument is again that copyright holders benefit greatly from compulsory licensing royalties. Incentivizing new derivative works under the compulsory licensing umbrella will ultimately increase the original artists’ revenues.¹¹² In today’s remix-centric society,¹¹³ both artists and copyright holders should look to maximize

109. See 17 U.S.C. § 115(c)(2).

110. See Masnick, *supra* note 90; *Music Publisher Silences Scores of Videos in Spat with YouTube*, THE ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/takedowns/music-publisher-silences-scores-videos-spat-youtube> (last visited Apr. 30, 2013) (Warner Music issuing a takedown notice to YouTube to remove videos of “[o]ne fan’s a capella tribute to the film music of John Williams,” and “[a] teenager singing ‘Winter Wonderland’ for her friends”). While the average teenager would not be able to pay a judgment in an infringement case, a teenager *would* be able to pay royalties on the profits they derive from a successful arrangement.

111. Telephone interview with Paul Fakler, Partner, Arent Fox (Jan. 17, 2014). See also Dale Turner, *The Cover Song Quagmire: Three Ways to Obtain Mechanical Licenses, for Legally Recording/Distributing Cover Versions on CD*, INTIMATEAUDIO, http://www.intimateaudio.com/cover_song_quagmire.html (describing the extremely lengthy, complicated and expensive process all artists must go through in order to properly give notice under the current compulsory licensing scheme, and suggesting that reading the “overwhelmingly incomprehensible (to my neophyte self) U.S. Copyright Office web site . . . was almost enough to make me toss in the towel (and my cookies)”).

112. See 17 U.S.C. § 115(c)(2) (describing the mechanism for sharing royalties).

113. See generally Kirby Ferguson, *Everything is a Remix*, EVERYTHINGISAREMIX (last

these sources of revenue, not discourage them. A cover of a song that goes viral has the potential to make both the original artist and the arranger very rich.¹¹⁴ Allocating to the artist the burden of objecting to inappropriate covers is a fair tradeoff for encouraging the distribution of new, often lucrative covers.

CONCLUSION

It is often difficult to balance the rights of an author to maintain his or her artistic integrity with the rights of the public to rearrange and adapt the artist's work. Music is not merely a commodity sold like a toaster; artists put a piece of themselves in their musical works, and therefore suffer legitimate harm when a cover artist perverts, distorts, or travesties their work. At the same time, the desire to protect an artist's personal connection to his or her work should not lead the law to punish innovative arrangers who advance art through new and creative arrangements of existing songs. As much as society wants to protect artists, some of the greatest and most beloved American songs were actually innovative covers built from lesser-known compositions.¹¹⁵

Section 115(a)(2) as it is currently written is badly out of balance, hurting both original and derivative artists, while at the same time creating a legal loophole allowing entities like Fox to deliberately appropriate the creative contributions of independent artists. Rather than eliminate the law entirely, the proposed statutory reform will correct this imbalance, protecting the rights of all artists while incentivizing the creation of novel derivative works. The proposed law effectively fixes the problems of the existing regime while striking an equitable balance between all stakeholders. With the adoption of the

visited Feb. 20, 2014) (containing a four-part video on the prevalence of remix culture in both the past and present).

114. See, e.g., *Storytellers: Bruce Springsteen Storytellers 'Devils And Dust' and 'Blinded By The Light'* (VH1 television broadcast), available at <http://www.vh1.com/video/misc/177957/storytellers-devils-and-dust-and-blinded-by-the-light.jhtml> (Bruce Springsteen explaining how the Manfred Mann cover of "Blinded By The Light" was Springsteen's only song to hit number 1 "—which I appreciate"); See also Dylan Moore, *Top 10 Cover Songs More Famous than the Original*, TOP TENZ, <http://www.toptenz.net/top-10-cover-songs-more-famous-than-the-original.php> (last visited Apr. 30, 2013) (cataloging highly successful cover arrangements, many of which enriched both the cover artist and original composer).

115. See Moore, *supra* note 114.

proposed language, the copyright system will be better able to foster the creation of a diverse and vibrant library of music.