



Via Online Submission

May 22, 2014

Jacqueline C. Charlesworth,
General Counsel and Associate, Register of Copyrights.
Library of Congress
Copyright Office
101 Independence Ave., SE
Washington, DC 20559-6000

**Re: Music Licensing Study: Notice and Request for Public Comment
[78 Fed. Reg. 14739] [Docket No. 2014-03]**

Dear Ms. Charlesworth,

We are pleased to have the opportunity to submit these comments in response to the above-cited request from your office.

Modern Works Music Publishing represents, licenses, and administers over 30,000 music copyrights on behalf of their underlying rights holders. Founded in 2004 to administer the nascent catalog of John Legend and his cowriters, the catalog has grown to encompass some of the most iconic American music, including such evergreens as Erroll Garner's "Misty," Herbie Hancock's "Rockit," Janis Ian's "Society's Child," and Jonathan Edwards' "Sunshine (Go Away Today)."

As an independent music publisher, and a small business, we are particularly sensitive and sympathetic to the needs of individual creative artists, and yet we are able to observe inefficiencies in music licensing that distort the market. We believe that a reevaluation of copyright law can help remove many causes of friction. Doing so will foster a healthier environment for creative artists to thrive, which in turn serves the ultimate goal of copyrights as future public goods.

Introduction & Assumptions

The numbered paragraphs below directly address the questions outlined in the Request for Public Comment. This introduction serves to provide context for the positions advocated herein.

As screenwriter William Goldman remarked, there is no reliable way to predict the success of a new copyright (in any medium): “nobody knows anything.”¹ Thus music publishers and distributors of recordings perform an important function as aggregators of risk in the marketplace.

An individual composer or recording artist cannot hedge the inherent risk of a single copyright, but a firm that aggregates many copyrights can do so.

When we refer to music copyright law creating “incentives” for artists, we mainly mean the preservation of a viable marketplace for music. Our country has eschewed direct government subsidy as the primary form of arts funding in favor of a strong copyright law (with the NEA, state, and local arts councils existing to provide marginal help). Therefore licensing is essential to the value of music copyrights. Without freely traded cash flow derived from music copyrights, the decision to make art would rarely be an economic one.

When a firm buys portfolios of music copyrights, individual creative artists benefit by receiving an advance on future cash flow (a lump sum paid at the time of sale) and they transfer risk to the buyer (a music publisher or record label).² The buyer’s risk is diminished through diversification, which is an advantage generally unavailable to an individual artist who cannot outsource her own talent or otherwise increase her productivity.

The primary buyer of a compositional music copyright is a music publisher, and the primary buyer of a master recording copyright is a record distributor (or “label”). While publishers and labels both buy music copyrights, their business models are distinct.

Music publishers seek songs whose qualities transcend a particular historical moment. Publishers seek the proverbial “perennial holiday song,” “timeless love song,” or “universal protest song.”

Labels, on the other hand, seek master recordings that amplify the charisma of particular performing artists.

The licensing authority of the underlying music copyright holder (i.e. the composer or music publisher) is effective when it is distinct from the owner of the master recording copyright because each type of licensor can focus on a different type of promotional emphasis and risk, and this distinction should be preserved by copyright law.

¹ William Goldman, *Adventures in the Screen Trade: A Personal View of Hollywood and Screenwriting*. (New York: Sections 20, 21, and 23 of this document contain more detailed comments about the nature of discounted cash flows from music copyrights, and incentives for creators.

The following is an example of this interplay between two types of music copyrights: Whether Frank Sinatra is recorded singing a jazz standard or a pop song in a duet with his daughter, Nancy, a record label is less concerned with the aesthetic difference between the two performances than the commercial result. The label's function is to market all musical facets of Sinatra's public image. However, the composers behind such contrasting repertory only overlap in this one performer, and otherwise occupy distinct aesthetic realms, with distinct audiences. Thus music publishers' interests are aligned more closely with composers, whereas labels' interests are aligned more closely with performers (who may not compose their own repertory).

The risks and rewards calculated by music publishers (and their composers) and record labels (and their performers) are distinct from each other, and constitute sub-economies of the overall business of music copyright.

The comments below are based upon two tenets: *Copyright law should (i) adequately preserve incentives for creators and (ii) benefit licensees with protocols that keep transaction costs as low as possible.*

1. Effectiveness of Section 115 Mechanical Licensing

Although a label is free to manufacture and sell recordings of musical compositions in accordance with §115's compulsory license provisions, such terms—which include monthly accounting requirements—are often perceived as burdensome. Alternatively, §115(b)(2) provides that a “negotiated license” (i.e. a license obtained through direct negotiation with a copyright holder or his agent) is allowable in place of filing notice in conformance with the statutory license procedure.

Unfortunately, the ability of US labels and distributors to negotiate mechanical licenses allows for a very problematic “pass-through” arrangement, which is described as follows.

A composer or music publisher may contractually agree for a label to account for mechanical royalties directly (after collecting gross sales revenue), by “passing through” the mechanical royalties to the underlying copyright holder within the larger context of the recording artist agreement.

When a label is so authorized under the current system, it is possible for that label to negotiate a discounted mechanical rate that may, in extreme cases, constitute an outright waiver, thus circumventing the consideration that should be paid to composers under the Copyright Act. For many years, a so-called “three-quarter rate” was the prevailing discount on mechanical fees negotiated as a provision in a record contract. When major labels dominated the music business, they preserved this discount on mechanical royalties because the labels' parent companies often owned music publishing firms, and the parent company would benefit from this (arguably lateral) movement of income. However, in recent years, many independent labels in

the USA have negotiated a complete waiver of mechanical royalty payments as partial consideration for agreeing to distribute and promote the associated master recordings.

Another device used by record labels is the cross-collateralization of mechanical royalties to other royalties owed to the recording artist under their contract, again creating an artificial discount that circumvents payments to composers.

The “pass-through” procedure constitutes a loophole in current copyright law, and is rare among Berne Convention countries. In fact, the three largest music markets outside of the USA (Japan, UK, Germany) require that distributors of recordings pay mechanical royalties directly to collective rights societies, effectively at the point of manufacturing or sale.

The latter model for mechanical royalty collection is analogous to the current performing rights collection method already sanctioned by Congress and the US Supreme Court.

RECOMMENDATION: *Congress should authorize a collective rights society to license mechanicals in a manner similar to societies in foreign markets, and prohibit the business practice of negotiated, “pass-through” mechanical licensing.*

2. Rate-setting for Mechanical Licenses

Currently two general methods are in effect for the calculation of mechanical royalties, as published in the Federal Register in accordance with 17USCS §801 et seq.

When sales are discrete—as in the case of physical recording media such as vinyl records or compact discs, and in the case of full digital downloads of audio files to the consumer’s storage medium—a so-called “penny rate” (a flat rate) is in effect. When sales are based on a subscription model—such as so-called “streaming” services that act as digital jukeboxes—mechanical royalties are based on a complex formula that considers licensee revenue and deductions for performing rights royalties.

Non-compliance with mechanical licensing statutes, and the prevalence of negotiated mechanical licenses in variance of the statutes, appears to be a result of perceived complexity and high transaction costs incurred by potential licensees.

The “penny rate” (currently 9.1¢ for songs under five minutes) constitutes roughly 9% of the customary retail price of a recording of that song. Viewed as a percentage of the gross sale price, the statutory mechanical rate clearly undervalues the musical composition itself, without which the recording artist would literally have nothing to record. This imbalance between the allocation of royalties to the musical composition and the master recording owner is an historical accident stemming

from copyright statutes that were not conceived to keep pace with inflation. Even as the Copyright Royalty Judges have amended the provisions such that *future* mechanical rates will keep pace with inflation, owners of musical compositions are still disadvantaged because the baseline rate was not reset to compensate for decades of prior inflation.

RECOMMENDATION: *Fifty percent (50%) of licensee revenue should be allocated to mechanical royalties, no matter what the medium or method of transmission.*

3. The potential for blanket licensing of mechanical royalties.

Composers and performers have interdependent, but separate markets for their copyrights.

Performing artists collaborate (directly, or in spirit) with composers when they interpret a song. Without the nuance, style, and charisma of a performer, a musical composition may not communicate its meaning to an audience.

Conversely, a particular musical composition often becomes associated with a performer, and that performer's success can be credited in large part to a song. The example of Willie Nelson establishing himself as a songwriter while simultaneously giving Patsy Cline her signature tune is embodied in the iconic Country record entitled "Crazy."

A blanket licensing scheme for mechanical rights would be desirable if a collective rights society were able to afford a greater weight to specific successful recordings for the benefit of composers and music publishers, in a manner similar to the disbursement calculation currently used for performing rights. This arrangement would be compatible with the recommendation in §1 above, which states that mechanical licenses should become the purview of collective rights societies.

RECOMMENDATION: *Congress should give exclusive authority to collective rights societies to license mechanical rights, and negotiated licenses (i.e. direct, "pass-through" licenses between record labels and composers/music publishers) should be prohibited. In this scenario, a blanket license could permit predictable income and expenses for record labels, allowing them to negotiate license fees on a term basis.*

4. Unified licensing of Performing and Mechanical Rights

In keeping with the logic of the above three sections, mechanical and performing rights could be licensed together by a collective rights society, thus lowering transaction costs for all parties.

Crucial to such an arrangement would be the authorization of collective rights societies to calculate disbursements to composers and music publishers based on

actual success in the marketplace, as is currently done in the realm of performance licensing.

An exception here are performance rights granted to recording artists and master owners in accordance with the Digital Performance Right in Sound Recordings Act of 1995.³ As those rights do not redound to the composers and publishers, the specially commissioned performance rights society SoundExchange should be excluded from licensing mechanical rights.

RECOMMENDATION: *Performing rights organizations (excluding SoundExchange and its equivalents operating under the 1995 Act) should be authorized by Congress to license mechanical rights.*

5. Effectiveness of Current Performing Rights Licensing

The advent of performing rights blanket licensing fees, and statistical sampling for distribution therefrom, dates from a time when the ability to track and license individual performances throughout all broadcast media was technologically infeasible.

While “granularity” of data is now eminently possible, the current scheme of blanket licensing has the advantage of simplicity, which lowers transaction costs.

Encouraging a licensee to broadly use an entire repertory in exchange for a blanket fee has positive cultural and economic effects. First, it lowers the initial transaction cost of the license. Second, it discourages licensees from seeking out direct, discounted licenses with “proven” repertory. “Riskier” repertory (music that may be particularly appropriate for a particular context) is no more or less expensive to use under a blanket license. Third, it allows for the performing rights organizations to sustain themselves through healthy and predictable cash flow, which can be applied toward better advocacy of the arts and music copyright protection.

It is also heartening to note that the three performing rights organizations sanctioned by Congress and the courts have succeeded in their missions for decades, even as each organization is structured and operated differently: ASCAP is a membership association of composers and publishers, BMI is controlled by a board of broadcasters on behalf of its composer and publisher affiliates, and SESAC is a privately-held company that licenses rights for composers and publishers while maintaining profits for shareholders. The three societies are successful and functional as they advocate for the rights of composers and publishers and their mandate should be strengthened.

³ [Pub. L. No. 104-39, 109 Stat. 336](#)

Large publishers have recently challenged the PROs by attempting to withdraw certain types of rights licensing from the blanket system. While the judicial reactions have conflicted, the effect on PROs is detrimental and should be prohibited by Congress.

RECOMMENDATION: *The authority of performing rights organizations should be renewed and expanded by Congress.*

6. Independent performing rights rate setting for music copyrights and sound recordings.

The remuneration of performing artists (as distinguished from composers) and master recording owners for public performance and broadcast of their work is a relatively new benefit of US copyright law, with its origin in the Digital Performance Right in Sound Recordings Act of 1995, however many other Rome Convention nations have recognized this right to compensation for decades. And the current US law falls short of other Rome Convention countries in recognizing these rights only in the context of digital broadcasts.

In keeping with previous statements above, the risks and rewards of performing artists and labels overlap with, but are independent of, the risks and rewards of composers and publishers.

Thus the marketplace for performers should be considered independently. In point of fact, most firms employing new music business models designed for Internet distribution (such as iTunes, Spotify, and Pandora) allow the consumer to choose whether to emphasize the work of a particular performer or composer, and to search databases for either.

As sales of recordings decline in favor of digital broadcasts and streams, the performance right for sound recordings increases in importance. Essentially, the performance right in sound recordings creates value for master recording copyrights that was previously derived by record sales. Copyright statutes should be updated to recognize this value proposition in the digital age, otherwise the right of master copyright protection recognized by Congress in 1971 will erode.⁴

RECOMMENDATION: *Performance royalties to recording artists and master recording owners should continue to be independent from music copyright performance royalties. As a corollary to comment #2 above, a simple percentage of licensee revenue should be allocated to performance license fees, and divided 25% to performing artists, 25% to master recording owners, and 25% to composers, and 25% to publishers.*

⁴ Sound Recordings Act, Pub. L. No. 140, 85 Stat. 39 (1971).

7. Consent Decrees

Collective copyright societies such as ASCAP and BMI are public cartels. A consent decree is a reasonable restraint on their virtual monopoly of rights.

Disruptive to the spirit of consent decrees are firms that abuse their position by distributing unlicensed copyrighted work with impunity by relying on specious third-party warranties. An example of such a firm is YouTube (and its parent company, Google), whose contributory infringement of music copyrights was shielded by the Digital Millennium Copyright Act's so-called "safe harbor" provision.⁵

The PRO consent decrees should be limited to business models where licensing custom and practice has been codified. For example, a new internet radio station (with no ability for the consumer to rearrange the programming) should be licensable, whereas a streaming model that permits a subjective amount of listening for free prior to interruption by advertising should not be licensable *a priori*.

RECOMMENDATION: *The consent decree should be amended to permit its application only in situations where the parameters of the licensed use are codified by law. Licensees with new business models where existing statutory license fees are not applicable should not be granted a license.*

8. Section 112 and 114 Statutory Licensing

9. Section 114 rate setting

[No comments on the above.]

10. Extension of federal Copyright protection to pre-1972 recordings.

Copyright protection of pre-1972 master recordings should be considered within the bounds of the Berne Convention. The restoration *de novo* of master recording copyrights in the USA which are not aligned with foreign copyright protection may precipitate litigation in contexts where firms exploited uses with the presumption of public domain status.

One area of pre-1972 copyright for master recordings that should be considered by Congress is the status of works for which no initial work-made-for-hire or copyright assignment exists. An example of the foregoing is a master recording discovered in 2014 by an artist or heir that has not yet been published or distributed.

⁵ [Pub. L. 105-304 §512\(c\)](#)

RECOMMENDATION: *Congress should extend Federal Copyright protection to pre-1972 recordings that were previously unpublished, or whose title was never transferred from the creator.*

11. Distinction between interactive and non-interactive services as defined by §114.

12. Impact of varying rate-setting standards applicable to statutory licensing.

[No comment on the above]

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

A perception voiced by Modern Works Music Publishing's own clients is that public performance rights for sound recordings and featured artists diminish the "royalty pie" available to songwriters and music publishers.

At the same time, firms championing new forms of distribution argue that they are at a disadvantage because they must pay an "extra" royalty that does not apply to terrestrial broadcasts.

RECOMMENDATION: *Congress should recommend a "royalty pie" for all music copyright holders (writers, publishers, recording artists, labels) equal to a straight percentage of gross licensee revenue, divided equally amongst the copyright holders.*

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?

Direct licensing for so-called "synchronization" uses is the norm in the USA under current copyright law and business practice. Since the advent of digital distribution in the 1990s, and the well-documented decline of mechanical licensing revenue (partially due to copyright infringement), synchronization licensing has become a more important source of revenue for composers and music publishers, and is thus a competitive arena.

Competition has forced the price of synchronization license fees downward, especially for copyrights that are new or obscure. Popular songs that are recognized by large audiences command high synchronization fees. The ability to trade on the value of a popular song in the context of synchronization license negotiation is appropriate and should not be substituted with a blanket-licensing scheme.

Google/YouTube has used its extraordinary leverage to coerce rights holders into accepting a dubious form of blanket synchronization licensing, which purports to

distribute a share of advertising revenue (using Google’s proprietary formula) linked to the use of music copyrights in online videos that were not otherwise directly licensed by copyright holders. The context for this unilateral arrangement is addressed further below.

Direct licenses are also common in the context of “dramatic performing rights,” such as music accompanying choreographed dance. These licenses are traditionally not the province of PROs, and they are time consuming to negotiate.

Not all direct licenses are created equal. A license for a music copyright in association with an advertisement for a commercial product or service should logically command a higher fee than a license for the use of music in a non-commercial, or purely artistic context. However, the custom and practice of synchronization licensing has not evolved to reflect this distinction, and non-commercial uses of music are often burdensome to negotiate. The USA can learn from the business practices in certain foreign countries, where a direct synchronization license from a publisher is only necessary when the use of music implies endorsement of a product or service. In all other, non-commercial contexts, collective copyright societies could be used to facilitate licensing.

RECOMMENDATION: *US PROs should be authorized to issue synchronization licenses for ephemeral broadcast uses limited to the US territory that are not (i) for sale to home video and (ii) do not imply any product endorsement. PROs should also be authorized to issue dramatic performing rights licenses based on statutory formulas.*

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?

RECOMMENDATION: *Any firm that desires to use music—whether via a familiar or novel technology—should be required to register with the Copyright Office indicating their intent to license, even if the method of licensing or distribution is experimental. To encourage participation, such firms would be allowed a limited term license (e.g. six months) for a non-precedential, nominal fee (such as \$100 per composition and \$100 per master) in order to test the market.*

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?

While the Berne Convention prohibits copyright registration as a requirement of legal protection, Congress should encourage cooperation among licensors to create technologies that enable licensees to easily search rights databases. This should dramatically lower the transaction costs for the clearance of music over time, since the burden is currently placed on prospective licensees who must review multiple databases.

RECOMMENDATION: *Congress should mandate that collective copyright societies publish databases in a coordinated effort that allows licensees to easily find copyright proprietors at all societies in a single search.*

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

Synchronization licensing should be subject to carefully conceived statutory license provisions in order to lower transaction costs. My recommendations are contained in §§ 14 and 15 above.

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

In 1995, the ratio of global performance income to mechanical income was roughly 3 to 2.⁶ By 2010, with the advent of digital distribution, the ratio had become roughly 7 to 3 in favor of performance income.⁷ This trend shows that future values of music copyrights will depend more heavily on performance income, and that advances on royalty income by firms to creators will be calculated on the basis of performance data.

RECOMMENDATION: *Congress should recognize that the performance right under copyright is in ascendance, and that further examination and statutory protections for those rights are necessary to maintain a viable market for 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?

In keeping with recommendations above, distributors of musical works and sound recordings should be limited to a 50% of total copyright revenue.

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?

⁶ "1995 International Survey of Music Publishing Revenues." *NMPA*. N.p., n.d. Web. 08 May 2014. <<http://nmpa.org/media/survey.asp>>.

⁷ "Music Publishing Market Overview." » *Round Hill Music*. N.p., n.d. Web. 08 May 2014. <<http://rhmusicroyaltypartners.com/resources/music-publishing-market-overview>>.

The above two questions are addressed here simultaneously. The valuation of music copyrights is based on discounted cash flow. To the extent that Congress can simplify the formulas for licensing, the more transparent the marketplace will be for investment in music copyrights.

RECOMMENDATION: *Congress should recognize successful new business models (such as YouTube) that are built on ostensibly licensed copyrighted content, and create statutes that assign a fair and transparent share of total revenue to the copyright holders.*

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?

RECOMMENDATION: *Congress should authorize the PROs to enforce such standards.*

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.

Our company contributed information to the Future of Music Coalition's white paper on artist income, found at this URL:

<http://money.futureofmusic.org/>

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

The so-called "take down notice" procedure formalized by the Digital Millennium Copyright Act has effectively erased the concept of contributory infringement for uses on the Internet, with disastrous results for copyright holders.

In the current system, a copyright holder most often issues a notice, the recipient firm complies by removing the infringing use, and a new infringer quickly appears to take the place of the old one. This makes affirming copyrights a Sisyphean task for licensors. New firms have crafted business models based on distribution of copyrighted content (infringed by third parties) while taking the position under the DMCA that they are free of direct liability. While some court cases against infringing firms have prevailed, the YouTube model is especially dispiriting in its continued "success" under Google's own unilateral terms.

Our company sees two potential paths to improving issues related to contributory infringement that are unresolved under the current system:

- i. Congress could repeal the “safe harbor” provision of the DMCA and cause firms to be liable for contributory infringement. As this path would be hugely disruptive to an existing market, we also consider the following strategy.
- ii. A tariff could be placed on Internet Service Providers and firms whose business primarily consists of distributing third-party content. Such a tariff, devised under a newly crafted Copyright Act, could be based on the number of subscribers or viewers, and it would have the effect of a gross revenue tax that redounded to copyright holders. The distribution of such money could help fund Federal and State arts programs, or be distributed via a collective rights society to copyright holders.

RECOMMENDATION: *Congress should replace (not incorporate) the provisions of the DMCA in the reevaluation of the Copyright Act, and consider taxing Internet Service Providers and distributors of third-party content as a method of maintaining adequate consideration paid to copyright holders in the absence of proper licensing.*

Conclusion

The officers and staff of Modern Works Music Publishing look forward to working with our colleagues in the music business, the Copyright Office and our elected representatives to effect change and participate further in the discussions of the issues above.

Respectfully,

A handwritten signature in black ink, appearing to read "Dan Coleman", with a long horizontal flourish extending to the right.

Dan Coleman
Managing Partner, Co-Founder
Modern Works Music Publishing