Before the
United States Copyright Office
Washington, DC

In the Matter of	)	
Music Licensing Study:	)	Docket No. 2014-3
Notice and Request for Public Comment	)	

JOINT COMMENTS OF THE PUBLIC TELEVISION COALITION

The Association of Public Television Stations ("APTS"),[1] Public Broadcasting Service ("PBS"),[2] WGBH Educational Foundation ("WGBH"),[3] and WNET[4] (collectively, the "Public Television Coalition") submit these comments in response to the Copyright Office's request for public comment on the effectiveness of existing methods of licensing music.

Section 1 of these comments provides an overview of how public television broadcasters use copyrighted musical works and sound recordings and of the provisions of the U.S. Copyright Act of 1976 (the "Copyright Act") that relate specifically to public broadcasting and music licensing. Section 2 then provides some case studies that illustrate the music rights clearance difficulties that hinder public television broadcasters' ability to produce new content and distribute existing content and older archived materials — including news and public affairs programs,

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[1] APTS is a non-profit organization whose membership comprises the licensees of nearly all of the nation's 364 CPB-qualified noncommercial educational television stations. APTS represents public television stations in legislative and policy matters before Congress, regulatory agencies and the Executive Branch, and engages in planning and research activities on behalf of its members.

[2] PBS, with its over 350 member stations, offers all Americans the opportunity to explore new ideas and new worlds through television and online content. Each month, PBS reaches nearly 109 million people through television and over 28 million people online, inviting them to experience the worlds of science, history, nature, and public affairs; to hear diverse viewpoints; and to take front row seats to world-class drama and performances.

[3] WGBH is one of the nation's top public television and public radio broadcasters and a leading producer of high-quality content for television, radio, the internet, and other media. WGBH productions include *Frontline*, *Nova*, *Masterpiece*, *American Experience*, *Antiques Roadshow*, and children's series such as *Curious George* and *Arthur*. WGBH also is a major source of programs heard nationally on public radio, including the news program *The World*, and a pioneer in developing educational multimedia and new technologies that make media accessible for people with disabilities. WGBH's strong record of innovation in non-broadcast services includes partnering with PBS to launch *PBS LearningMedia*, a system-wide collection of online digital media resources for education based on WGBH's *Teachers' Domain*, and collaborating with the Library of Congress and the Corporation for Public Broadcasting ("CPB") to preserve and make available to the public the *American Archive of Public Broadcasting*, a historic collection of American public radio and television content.

[4] WNET, New York's flagship public media provider, brings quality arts, education and public affairs programming to more than 5 million viewers each week. WNET produces and presents such acclaimed PBS series as *Nature*, *Great Performances*, *American Masters*, *PBS NewsHour Weekend*, *Charlie Rose*, and a range of documentaries, children's programs, and local news and cultural offerings, available on air and online. Pioneers in educational programming, WNET has created such groundbreaking series as *Get the Math*, *Oh Noah!*, and *Cyberchase*, and provides tools for educators that bring compelling content to life in the classroom and at home.

documentaries, and artistic performances — as widely as possible to the public. Finally, Section 3 includes recommendations for future study and to improve the current system.

While we pursue marketplace solutions to our rights clearance challenges, there is a need for an improved copyright framework and collective licensing system that will facilitate the use of music and other pre-existing creative elements in public media and enable the distribution of such content as widely as possible for the public benefit.

1. PUBLIC BROADCASTING AND THE COPYRIGHT LAW

Public television broadcasters are committed to producing the highest quality noncommercial educational programming for the broadest possible audience. New technologies, such as smartphones, tablet computers, and other mobile devices, have generated new ways to distribute creative content. With digital distribution, audiences today increasingly demand access to content anywhere, anytime, anyhow, on demand, and in various formats ranging from short to long-form. Noncommercial public media leads the industry in expanding beyond broadcast-only to multi-platform service offerings, and we increasingly are curators and connectors, using our spectrum and all emerging technologies to engage directly with people and organizations, locally and nationally, to circulate information and catalyze community dialogue. But outdated copyright law provisions and music rights clearance obstacles hinder our efforts to meet the changing needs of the America public and serve our educational and cultural mission.

Copyright law generally requires that public television broadcasters and other media producers acquire all of the necessary distribution rights in the various creative elements, including musical compositions and sound recordings, that are contained in our television and radio programs, online content, and other materials. Congress has long recognized the civic value, important educational mission, and limited resources of public television broadcasters, and the Copyright Act includes several provisions designed to benefit public broadcasting and its audience, including some that relate specifically to the use of music.

These provisions were enacted at a time when distribution of public media content almost always meant over-the-air broadcast of full-length programs. As a result, their application to new technologies and distribution formats that public television broadcasters take advantage of could be improved in order to satisfy the demands of viewers and fulfill public television broadcasters' public service mission. In spite of the original inspiration for these copyright law provisions, it remains extremely difficult for public television broadcasters to acquire all the rights necessary to incorporate music into content intended for modern multi-media platforms. Public media producers sometimes must make editorial or distribution-related sacrifices that limit a program's quality and impact while also reducing the revenue of rights holders such as music publishers and record labels.

Public television broadcasters respect the rights of creators and copyright owners, and do not seek or expect an unlimited grant of broad rights to use sound recordings and musical compositions for free. We desire to pay fair and predictable fees that take into account the special mission and economics of public broadcasting in a digital media world. We believe an improved copyright framework and music licensing system could create transactional

efficiencies, reduce costs, increase revenues for music publishers and record labels (and songwriters and recording artists), and also allow the American public to gain the full return on its investment in public media.

The Constitution identifies the central purpose of copyright law — "to promote the progress of science and useful arts" — and the legislative history for the first copyright law indicates that a primary goal was "to encourage learning." From the beginning, U.S. copyright laws have been designed to balance the interests of authors and users. They provide an economic incentive to create by means of a broad grant to authors of certain exclusive rights, combined with specific limitations on those exclusive rights intended to ensure public access to creative works. As described by Judge Benjamin Kaplan in his classic book, An Unhurried View of Copyright, "publication without easy access would defeat the social purpose of copyright."[5]

This balancing approach played itself out politically when the Copyright Act was passed. That law includes several provisions intended to benefit public broadcasting and our viewers and listeners, but which could benefit from being updated to explicitly reference new technologies and distribution formats. As examples:

a. Section 114 – Use of Sound Recordings

Section 114(b) of the Copyright Act exempts public broadcasters from having to obtain licenses to use "sound recordings in educational television and radio programs . . . distributed or transmitted by or through public broadcasting entities," provided that "copies" of such programs "are not commercially distributed . . . to the general public."

When the Copyright Act was passed more than thirty years ago, the principal means of delivering public media content to the public was via radio and television broadcasts. Today, however, public media is distributed through a range of platforms and models, including online streaming, digital downloads (including podcasts and vidcasts), DVDs, video-on-demand, digital applications ("apps") for use on mobile devices, and a host of other emerging ways by which the public consumes and interacts with media. Some of these platforms are not clearly within the ambit of the statutory exemption, thereby leading public media producers to seek permissions and pay license fees to record labels and other owners of sound recordings, effectively eliminating the intended benefit of the exemption.

Consider the following limitations and ambiguities of the Section 114(b) exemption:

- The sound recording must be included in "educational television and radio programs," a term which lacks definition. In a context in which content is presented and distributed in many ways other than traditional television and radio programming, this limitation is a significant constraint. The public would benefit from more explicit language that covers the various platforms for media content produced by and for public television broadcasters.

[5] Benjamin Kaplan, *An Unhurried View of Copyright* (Columbia University Press, 1968).

- While the exemption allows for distribution or transmission of programs "by or through public broadcasting entities," it does not cover commercial distribution of "copies" of such programs to the general public. Notably, public media content intended for sale in the "home video" market (including DVDs and digital downloads) cannot make use of the exemption. Some programs simply could not be produced without advance payments for home video rights as part of the funding mix. Therefore, as a practical matter, producers for public television must obtain the right to distribute almost all national programs in the home video market to produce the content and to make them available as widely as possible and thus fulfill our public service mission. If producers are unable to obtain the necessary home video rights for a particular sound recording, then such sound recording will not be included in the program notwithstanding the Section 114(b) exemption, and, in turn, there will be lost income for rights holders.

So, despite an exemption that was intended to allow automatically the use of sound recordings in our programs without requiring significant transactional efforts and costs to obtain licenses for each sound recording, for most programs public broadcasters still seek separate permissions and pay license fees for each sound recording.

This limitation also impedes the ability of public media to experiment with new revenue models that could support investment in content, even if only to cover the costs of production and distribution. This is especially problematic when one takes into account budget constraints that are inherent in the current system for funding public broadcasting, and the fact that our decision to produce a particular program is based on whether it serves a public education need rather than a commercial profit-oriented goal.

b. Section 118 – Use of Published Nondramatic Musical Compositions

Section 118 of the Copyright Act includes an exemption from antitrust laws and provides a licensing scheme for the use of published nondramatic musical compositions in "a transmission made by a noncommercial educational broadcast station." This arrangement avoids the time-intensive and costly process of negotiating individual licenses by allowing various voluntary blanket agreements and fee arrangements that the CPB, PBS, and NPR negotiate on behalf of all public broadcasters with the representatives of rights holders; for musical compositions, this involves both public performance rights (administered by ASCAP, BMI and SESAC) and mechanical rights (administered in part by The Harry Fox Agency).

In the analog era when the principal activity of public media was broadcasting alone, this provision was sufficient to enable use of musical compositions in our content. Today, however, in the multi-platform digital universe, it falls far short. Examples of the challenges include:

- The statutory license does not clearly allow distribution of "copies" of programs, such as by means of DVDs and digital downloads, and thus does not explicitly cover some educational sales to schools, distribution by means of podcasts/vidcasts, or distribution in the home video market, a requirement for almost all programs distributed for national broadcast by PBS. This restriction also frustrates public television broadcasters' ability to include programs and related promotional materials in apps, such as monthly program

guides that used to be print-only but are now accessible via new media that technically may require the download of a copy for viewing.

- The license only covers "transmission" of a program by a public broadcasting entity. It is not explicitly clear whether this allows streaming on the Internet by third parties on their websites or similar digital platforms that reach the broader public.

  This restriction is especially troublesome as public television broadcasters increasingly rely on third-party websites to reach and expand their audiences. For example, digital platforms are key to *Frontline*'s goals to expand its capacity for investigative journalism, and *Frontline* is midway through a transition to become a truly trans-media news organization. Its cross-platform digital strategy integrates journalistic reporting, production, and distribution models with audience development efforts designed in part to appeal to younger "digital native" news consumers. This coordinated approach leverages the potential of new media platforms and changing media consumption habits to extend each story's reach and its impact well beyond television broadcast, such as by distributing short-form videos to YouTube audiences for further sharing and circulation. This model is not explicitly covered by the Section 118 statutory license.

- Section 118(c)(3) provides that teachers who want to show a public television program to their classes may make a copy for that purpose provided such use occurs "within seven days of broadcast." Because of their core educational mission, PBS, WGBH, WNET and other producers seek to ensure that programming can be used in classrooms for more time. In furtherance of that educational goal, PBS generally requires that producers acquire "off-air record rights" that last for *one year* following broadcast of a program.[6] Accordingly, producers must negotiate and pay for such added educational rights. Some rights holders are unfamiliar with these rights and uses, so the licensing process can be time-consuming and the fees are unpredictable. Sometimes licensors refuse to grant the needed additional rights. In any event, the obligation to obtain such additional educational rights counteracts the advantages supposedly conferred by the compulsory license scheme: an automatic grant of rights and reduced transaction costs.

The Section 114 exemption for sound recordings and the Section 118 statutory license for musical compositions were intended to create a cost-efficient system that acknowledges the special non-profit educational mission of public broadcasters and their funding constraints. However, the limited scope of these provisions compel public television broadcasters to negotiate a separate license for each copyrighted sound recording and musical composition or, frequently, forego the use of such creative elements in order to meet production deadlines or distribution requirements.

While rights holders often are responsive to the requests of public television broadcasters and agree to fair fees and broad rights packages that fit their needs, at other times rights holders are less responsive and receptive to their offers, sometimes because public television broadcasters are unable to offer the same fees paid by commercial producers. In recent years especially, when

[6] For example, PBS, CPB, and NPR have negotiated an agreement with the Harry Fox Agency that allows schools to retain off-air copies for one year.

consolidation and downsizing among the major music companies have led to smaller staffs managing larger catalogs, it can on occasion be more difficult to obtain licenses on a timely and affordable basis.

c. Orphan Works

Public television and radio producers frequently incorporate preexisting content into documentaries, local programming and noncommercial educational content, much of which is made available online. Often, due to the age of the programming and the lack of a paper trail concerning rights, the owners of such content are difficult or impossible to locate. With limited financial resources, public television broadcasters are reluctant to use copyrighted materials for which no owner can be found (so-called "orphan works"), and as a result producers sometimes must use an inferior replacement. This works against our goal of producing the highest quality educational programming. As discussed in Section 3.c. below, public television broadcasters also desire to digitize their vast libraries of archival content, portions of which have no identifiable owner, and make it available to the American public.

A solution must be found to reduce the risks associated with the use of orphan works, and allow public television broadcasters to fulfill their educational mission. Both the 2006 Copyright Office report on orphan works,[7] as well as legislation introduced during the 109th and 110th Congresses,[8] recognized that noncommercial uses are uniquely situated and deserve added protections in any statutory solution to the orphan works problem.

d. Fair Use

Section 107 of the Copyright Act allows for the limited "fair use" of copyrighted works for certain purposes without requiring permission of the copyright owner. This provision represents a fundamental effort by Congress to balance the legitimate interests of copyright owners with First Amendment concerns and other public policy purposes. Producers of public media rely on fair use in limited circumstances only after making a good faith judgment that the use is consistent with the purpose of the copyright law and the doctrine of "fair use" as it has been defined in various court cases over the years. These fair use determinations frequently require consultations among lawyers and can be extremely time-consuming and costly.

It must be noted that Section 504(c)(2) of the Copyright Act provides there will be no statutory damages in cases of infringement where public broadcasters mistakenly "believed and had reasonable grounds for believing" that its use of a copyrighted work was a fair use. Curiously, this protection applies only to our use of literary materials, and does not cover a public television

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[7] *See* Register of Copyrights, *Report on Orphan Works*, at 11 (Jan. 2006), *available at* http://www.copyright.gov/orphan/orphan-report-full.pdf (providing that where noncommercial use of copyrighted work occurred after a reasonably diligent search for the copyright holder, there shall be "no monetary damages" in a subsequent infringement action); *id*. at 107 (providing that there generally should be a lesser standard for a "reasonably diligent search" for the owner of an orphan work where the use of such work is noncommercial).

[8] *See* H.R. 5439, 109th Cong. § 2(a); S. 2913, 110th Cong., § 2(a).

broadcaster's reasonable efforts to make a "fair use" of musical compositions or sound recordings.

2. ILLUSTRATIVE CASE STUDIES

The current legal framework for the use of music by public broadcasters as set forth in Sections 114 and 118 of the Copyright Act has led to the development of a licensing system that is inherently inefficient, involves substantial transaction costs for both public broadcasters and rights holders, and fails to serve the public's interest in gaining access to important content. The following examples help illustrate these problems.

a. Documentaries

Historical and other documentaries present especially difficult rights clearance problems for public television broadcasters and other producers. Documentaries frequently are filled with a variety of pre-existing copyrighted works: popular music (compositions and recordings) for the soundtrack, pieces of news footage, film clips, photographs and other images, and more. For a typical one-hour *American Experience* documentary, as an example, WGBH may need to negotiate and enter into 50 or more separate license agreements from rights holders around the world. Each year, for all documentary programs combined, WGBH producers must negotiate and execute many hundreds of licenses within sometimes tight production schedules. Consider the number of documentaries produced by and for all public television broadcasters, and it is clear that substantial transaction costs are incurred — by both producers and rights holders — in order for us to acquire the rights to produce and distribute this content.

While the producer generally owns the copyright in the final documentary, this does not mean it owns unlimited distribution rights for each of the individual creative elements contained within. As a practical matter, producers for public broadcasting frequently are unable to afford licenses that cover "all rights in all media," which is a common practice for better-funded commercial producers. Moreover, rights holders frequently refuse to grant rights for distribution on media platforms not yet developed, so many documentaries produced before the digital era were not cleared for online distribution.

Any effort to distribute an archival documentary in new forms of media or for an extended term requires the producer to re-clear each individual creative element that was previously licensed, including sound recordings and musical compositions. This process can be extremely time-consuming and costly. As described above in connection with orphan works, in many cases, due to the age of the programming and lack of a paper trail concerning rights, the owners of such licensed content are difficult to locate. Even after great effort and expense, there are no assurances that needed rights will be obtained for affordable fees. As noted by Professor Lawrence Lessig:

> "The copyright and contract claims that burden these compilations of creativity are impossibly complex . . . . The consequence . . . is that the vast majority of documentaries from the twentieth century cannot legally be restored or distributed. They sit on film library

> shelves, . . . most of them forgotten, since no content company or anyone else can do anything with them."[9]

Sometimes, with great effort and expense, WGBH and other producers can clear the rights necessary to make an archival program available, but the costs are high and often may be prohibitive. One notable example is *Eyes on the Prize*, a 1987 documentary about the civil rights movement considered among the best and most compelling films of its kind. The program includes a substantial amount of pre-existing creative elements owned and controlled by third parties, including music, pictures, quotations, and film footage. Use of much of the material (such as original Motown songs and other music of the times) was protected under statutory provisions, but only for limited distribution platforms. The limited scope and the expiration of the term of rights in various licenses meant the acclaimed documentary was completely unavailable for years. Only after years of fundraising and troublesome clearance efforts, and at great expense, were the producers of this important documentary able to obtain rights to broadcast the program again (as part of the *American Experience* series) and to distribute it in the educational and home video markets.

As another example, a few years ago WNET and PBS arranged to re-broadcast on television the important documentary series *An American Family,* which was produced in the early 1970s featuring the Loud family and consists of twelve 1-hour programs shot cinema-vérité style. WNET sought to clear home video rights for the series, but determined that license fees for more than 100 sound recordings and musical compositions (combined), to distribute up to 10,000 DVDs/downloads worldwide for a 10-year term, would likely cost approximately $120,000 (based on a going rate of 12¢ for each sound recording and musical composition). In the end, WNET could not afford music clearances for the entire series and could only produce for DVD/download distribution a significantly scaled back 2-hour version that used a relatively small amount of pre-existing music.

b. Derivative Use of Materials for Noncommercial Educational Purposes: *PBS LearningMedia*

Developed as a partnership between PBS and WGBH, *PBS LearningMedia* is an online educational platform that offers direct access to thousands of classroom-ready, curriculum-targeted digital resources. *PBS LearningMedia* contains high-quality multimedia resources from PBS member stations and award-winning PBS broadcast programs, aligned to national and local educational standards, tagged for easy searching, and offered through customized digital services provided by local public television stations. Resources are aligned to state and national standards and can include short videos, interactives, and in-depth lesson plans. Users can browse by standards, grade level, subject area, and special collections, and can share resources with their class and colleagues through folders and social media. It is anticipated that *PBS LearningMedia* will enable teachers and students to interact with, assemble, share, and modify available resources to create engaging and transformative educational experiences.

[9] Lawrence Lessig, "For the Love of Culture," THE NEW REPUBLIC (Jan. 26, 2010), *available at* http://www.tnr.com/article/the-love-culture.

The statutory rights of public broadcasters described in Section 1 above do not explicitly cover the re-use of content from programs for projects such as *PBS LearningMedia*, despite its purely noncommercial educational purpose. As rights holders are reluctant to grant such derivative rights upfront for no additional fee, and original program production budgets generally do not include funding to cover the extra costs for uncertain future uses, producers for *PBS LearningMedia* must navigate an often cumbersome and expensive process to re-clear the rights to use the same materials that had already been cleared for the original programs. The financial sustainability of educational services such as *PBS LearningMedia* depends on an improved rights clearance system that acknowledges the special public service mission of these projects.

Our job becomes even more difficult when we seek the right to create "open educational resources," sometimes referred to as "open content," which would allow teachers and students to re-use the materials we distribute — "mix and mash" — for educational purposes. While we understand the reasonable concerns that copyright owners have about maintaining control over the use of their works and ensuring fair compensation for themselves and the creative artists whose interests they represent, public television broadcasters believe that the significant educational and social benefits of making materials available for "user-generated content" need to be recognized as well.

c. News and Public Affairs Archives: *American Archive of Public Broadcasting*

The American public is increasingly reliant on the Internet for news and public affairs content. Public television broadcasters have developed over decades a rich source of historical materials that offer substantial educational and informational benefits. Online media provides public television broadcasters with an ideal platform to serve the public interest by providing easy access to older archival materials, but rights clearance problems can block us from taking advantage of the opportunity. Consider, as an example, the *American Archive of Public Broadcasting* (the "*American Archive*"), a collaboration among CPB, the Library of Congress, and WGBH that aims to preserve and make available to the public a historic collection of American public radio and television content.

Our goal is for the rich resources of the *American Archive* and other similar archives to be available free-of-charge to all — educators, students, scholars, community groups, and the general public. Unfortunately, we have learned that the efforts to digitize archives and make them publicly accessible online involve substantial rights clearance problems, costs (for preservation, staff time, and rights fees), and legal risks.

i. *Clearance Problems*: Archives at public media stations include a vast amount of content that was created as far back as the 1920s, and include many materials that were never intended for broad distribution. Most stations lack the funding and staff needed to assess the rights they hold in this "legacy" material, which includes musical compositions, sound recordings and other pre-existing copyrighted works (e.g., film footage and photographs). Supporting documents associated with the original production of the content (e.g., releases, license agreements, and union/guild agreements covering talent) frequently do not exist, or, if they do exist, are not likely to address digital rights clearly.

ii. *Costs*: It is hard to predict accurately the amount of time and expense required to assess the rights status of archival materials and acquire necessary online access rights. In recent years the British Broadcasting Corporation ("BBC") in the United Kingdom and NHK in Japan funded major archival projects from which much can be learned. The BBC estimated it took six full-time staff members one year to clear 1,000 hours of programming; NHK estimated it took twenty full-time staff members eight months to clear 1,000 hours of programming. (For perspective, both the BBC and NHK have in excess of 600,000 hours of television and radio programming, and the BBC currently adds 1,000 hours of programming to its archive every week.)

iii. *Legal Risks*: Given the difficulties of identifying the owners of rights in certain archival materials (i.e., orphan works), and the uncertain application of old contracts that did not anticipate and do not address digital rights, the *American Archive* and other public media archive projects confront a wide range of legal risks and transaction costs. Without sufficient funding and a supportive legal rights framework, the bulk of public media's valuable archival content, as represented by the *American Archive*, will continue to exist only in "dark" archives, without the public benefit of easy online access.

d. Public Radio

Various provisions of the Copyright Act apply specifically to public radio. We understand NPR will submit separate comments concerning the Copyright Act and music rights clearance challenges that confront public radio stations and their online and other activities.

3. RECOMMENDATIONS

Public television broadcasters are committed to producing the highest quality programming for the broadest possible audience. The unique kinds of programs and other materials we produce, which frequently include many different pre-existing creative elements, such as sound recordings and musical compositions, present complex and troublesome rights clearance challenges. Current licensing practices make it difficult for public television broadcasters to produce the highest quality programming and to distribute our materials by any and all means to the broadest possible audience. We believe provisions in the Copyright Act concerning public broadcasting require modernization to continue to fulfill their purpose.

We seek an improved legal framework and licensing system that will benefit public broadcasters, rights holders, and the general public. We recognize the difficulties involved in amending the Copyright Act, but suggest consideration be given to a variety of statutory changes, ranging from narrow updates and clarifications of the provisions that apply to public broadcasters to more substantial reforms, including the following:

a. Update Sections 114 and 118 of the Copyright Act to Explicitly Cover All of the Distribution Methods and Technologies That Are Critical to a Robust and Vibrant Public Media Service.

The Public Television Coalition urges the Copyright Office to recommend that Congress amend Sections 114 and 118 of the Copyright Act to clarify and broaden the rights of public broadcasters to use sound recordings and musical compositions in noncommercial educational programs, websites, and other materials in a technology neutral manner. This clarification would resolve any ambiguity that the protections do or should apply to: DVDs and digital downloads; websites and other educational uses; new and emerging media; and the derivative re-use of materials for noncommercial educational purposes, such as in *PBS LearningMedia* and as part of archival projects such as the *American Archive*. These rights should explicitly take into account recent trends among educators and students to seek out downloadable, sharable, and editable materials for purposes of creating "user-generated" content.

b. Facilitate the Use of Collective Licensing Systems By Broadening the Antitrust Exception Contained in Section 118 of the Copyright Act.

Lawmakers should take steps to facilitate collective licensing systems, which are efficient for numerous reasons, including: only one license need be negotiated; consistent and predictable fees are charged; and the administrative burden of upfront individual clearances is eliminated. To help accomplish this goal, lawmakers could broaden the antitrust exception contained in Section 118 of the Copyright Act so that public broadcasters could negotiate blanket license agreements with the collective representatives of a range of rights holders, including music publishers and record companies, for public media uses beyond the scope of their current limited rights. In the new digital era of convergence, program materials move from platform to platform in an environment of constantly changing media formats, with the purpose of reaching the broadest possible audience. A system that facilitates the licensing process through the use of blanket licenses would support broad access to public media, reduce transaction costs, and make the most efficient use of taxpayer resources.

Such blanket licenses could establish a consistent and shared set of rights definitions that are not tied to particular technological formats. Licenses that limit the rights granted to uses on specified delivery platforms do not acknowledge the rapid convergence among various forms of media as best illustrated by the increasingly common practice of watching "television" programs on the Internet and mobile devices. Reliance on a "common language" when negotiating license terms and fees, whether in individual or blanket licenses, would simplify transactions and reduce administrative costs for licensors and licensees.

As described above, we believe any compulsory license should cover distribution or transmission "by or through public broadcasting entities" (as provided in Section 114(b)). Appropriately expansive language would more clearly allow public broadcasters to distribute their content on other platforms and portals, which, in turn, would broaden our impact by more effectively reaching individuals who may not regularly tune into public broadcasting on television. Such collective licensing systems also conceivably could offer the additional important benefit of covering territories outside the United States.

Of course, all compulsory license arrangements must provide for fair fees to rights holders that reflect the special mission and economics of public broadcasting in a digital media world, as well as reasonable reporting obligations by public broadcasters in order to ensure the proper allocation of such fees.

c. Address the Issue of "Orphan Works."

We urge the Copyright Office to support legislative efforts to resolve the "orphan works" problem. Such legislation should address the special concerns of public television broadcasters, including their efforts to make news and public affairs archives accessible online. In order to support public media archive projects, other proposals to consider might include: identifying certain kinds of archive or other public service uses that are deemed to be a "fair use" and limiting the financial liability of public broadcasters for certain preservation and other archive activities, such as in respect to copyright claims.

d. Expand Section 504(c)(2) to Cover Fair Use of Any Copyrighted Work, Not Just Literary Materials.

The Copyright Office should request that Congress amend Section 504(c)(2) of the Copyright Act to expand the types of works for which there are no statutory damages in cases of infringement where a public broadcaster mistakenly "believed and had reasonable grounds for believing" that its use of a copyrighted work was a "fair use." For policy reasons, this protection should apply to all kinds of copyrighted work, including sound recordings and musical compositions, and should not be limited to cover only literary materials.

e. Consider International Models for Music Rights Clearance for Public Media.

The United States should seek guidance from the laws and business practices relating to public broadcasting and rights clearances in other countries.[10] For example, a more efficient licensing model benefits the BBC in the United Kingdom, which has voluntary blanket license agreements with collective organizations representing music rights holders (i.e., PRS for Music for rights in musical compositions, and Phonograph Performance and Video Performance Limited for rights in sound recordings). For a recent four-part series produced by WGBH entitled *Latin Music*, CPB, PBS and other funding entities rightfully required WGBH to clear broad distribution rights, including all forms of television, online streaming, and sales of DVDs and digital downloads. The four hours of programming included more than 300 songs and recordings (combined), each of which could have required a separate license agreement. By co-producing with the BBC, WGBH was able to take advantage of the BBC's blanket license agreement; otherwise, WGBH simply would not have been able to produce this important series.

[10] For an analysis of the impact of copyright clearance issues on the efforts of Australian public broadcasters to put their program archives online, see Sally McCausland, "Getting Broadcaster Archives Online: Orphan Works and Other Copyright Challenges of Clearing Old Cultural Material for Digital Use," 14 MEDIA ARTS L. REV. (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1408346.

Recent developments, including legislative activity relating to the use of "orphan works" and the proposed settlement of the copyright infringement class action brought against Google by the American Authors Guild and the Association of American Publishers (the so-called "Google Books Settlement"), suggest some movement away from the traditional "opt-in" licensing system towards an "opt-out" approach that creates a presumption in favor of certain uses of creative content for publicly beneficial purposes.

The proposed Google Books Settlement would have accomplished several goals that mirror those for public broadcasting discussed in these comments (e.g., making valuable copyrighted content more readily available to the public, avoiding countless negotiations of individual license agreements, and increasing revenues for copyright owners). If the judicial rejection of the Google Books Settlement leads to a legislative response, thought should be given to addressing at the same time issues relating to public media and rights clearances.

One alternative to a traditional blanket license agreement is an extended collective license ("ECL"). ECLs operate as a hybrid between statutory licenses and traditional collective agreements and are used in several Nordic countries. These arrangements allow collective rights organizations that represent a substantial number of rights holders to incorporate into their license agreements works that are not represented by the organization but are of the same nature as those represented by the organization. In Denmark, the use of ECL agreements originated with broadcasting and now covers many areas, including reproduction within educational institutions or by business enterprises, digital reproduction by libraries, cable retransmission to more than two connections, and more. ECLs in Denmark may be invoked by users who have an agreement on the exploitation of works with an organization comprising a substantial number of right holders of certain types of work that are used in Denmark. In order to be voluntary, the ECL must include an opt-out feature in which the rights holder may exercise their exclusive copyright.[11]

f. Consider Whether Comprehensive Copyright Reform Is Needed.

Some have suggested a more ambitious approach to copyright reform. For example, Judge Miriam Patel, who presided over the *Napster* litigation, has proposed a comprehensive revision of the administration of copyright licensing, royalties, and enforcement. In particular, she urges the establishment of an administrative body made up of representatives of all competing interests, including the public, authorized to, among other things, issue licenses and administer royalties.

In a recent article, Professor Lessig reached a similar conclusion:

> "The vast majority of the problems that we now face in preserving and securing access to our cultural past are caused by the failure of the past to anticipate the radical potential of technology in the future. The past can be forgiven for this. Even the designers of the

[11] *See* Thomas Riids & Jens Schovsbo, "Extended Collective Licenses and the Nordic Experience: It's a Hybrid but is it a Volvo or a Lemon?" 33 COLUM. J. L. & ARTS 471 (2010).

> Internet did not foresee its size or significance. But our response to this complexity should not be simply to suffer through. The thicket of legal obligations that buries film, music, and every other form of creative work (save books) should be re-made using a rule that gives current owners the ability to secure value for those rights, but through a clearinghouse that would shift us away from a world of endless negotiation to a world where simple property rules function simply."[12]

The Copyright Office should continue to study whether these or other reform efforts are advisable.

4. CONCLUSION

In a recent speech and article entitled "The Next Great Copyright Act," Maria A. Pallante, the Register of Copyrights, observed:

> "Congress is aware that the development of newer, more efficient licensing models is essential to the digital marketplace . . . . Congress may need to consider legislating new forms of licensing regimes as appropriate, e.g. by updating, or in some cases repealing, compulsory licenses, or perhaps by enacting extended collective licensing models . . . . Congress could make a real difference regarding gridlock in the music marketplace. Considering the issue comprehensively may be the most productive course of action."[13]

We greatly appreciate the efforts of the Copyright Office to explore ways to update the Copyright Act and improve the current methods of licensing music. We recognize the wide range of important and difficult copyright and music licensing issues that are raised in connection with this study.

Public television broadcasters are committed to producing the highest quality programming to fulfill their public service mission and meet the journalism, education, and civic engagement needs of their communities. The unique public programming that we distribute, which frequently includes many different pre-existing creative elements such as sound recordings and musical compositions, presents complex and troublesome rights clearance challenges.

The exponential growth of the Internet as a media platform has enormous potential for broadening and transforming public broadcasting's identity as a developer and distributor of public content. Unfortunately, outdated copyright law provisions compromise the ability of public television broadcasters to maximize the distribution of content across multiple platforms,

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[12] Lawrence Lessig, "For the Love of Culture," The New Republic (Jan. 26, 2010), *available at* http://www.tnr.com/article/the-love-culture.

[13] Maria A. Pallante, "The Next Great Copyright Act," 36 COLUM. J. L. & ARTS 315, 333-35 (2010).

including new and emerging media. The resulting inefficient rights licensing practices lead to substantial transaction costs for both producers and rights holders, limit the value and reach of publicly funded content, and result in lost income for rights holders.

Public television broadcasters recognize the rights of creators and copyright owners, and desire to pay fair fees. While we pursue marketplace solutions to our rights clearance problems, there is a critical need for an improved copyright framework and collective licensing system that will facilitate the use of music and other pre-existing creative elements in public media, including news and public affairs programs, documentaries, and artistic performances, and enable the distribution of such content as widely as possible for the public benefit. An expanded use of blanket license agreements could lead to fair and predictable fees that take into account the special mission and economics of public broadcasting, and at the same time improve transactional efficiencies, reduce costs, and increase revenues for music publishers and record labels, which in turn will benefit songwriters and recording artists.

We look forward to working with the Copyright Office as it considers these important issues.

Respectfully submitted,

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