

**Before the
UNITED STATES COPYRIGHT OFFICE
Washington, D.C.**

In the Matter of:

Music Licensing Study: Notice and
Request for Public Comment

Docket No. 2014-03

**COMMENTS OF THE
RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.**

The Recording Industry Association of America, Inc. (“RIAA”) is pleased to provide these Comments in response to the Copyright Office’s Notice of Inquiry (“NOI”) in the above-captioned proceeding. *See* Music Licensing Study: Notice and Request for Public Comment, 79 Fed. Reg. 14,739 (Mar. 17, 2014).

RIAA is the trade association that represents the music companies that create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States. The issues raised in the NOI are critically important to RIAA’s members. The musical works they license to include in their releases are an essential part of those releases, and they are major licensees of musical works. They are also copyright owners or distributors of audio-only and audiovisual sound recording releases accounting for the vast majority of music usage.

Sound recordings and the musical works incorporated therein are subject to disparate licensing systems, including three completely separate systems just for musical works (*i.e.*, for mechanical, performance and synchronization rights). Unfortunately, while the systems for sound recordings are working reasonably well in many respects, there is an emerging consensus that the systems for licensing musical works are not. Accordingly, the question is not whether

change would be desirable, but whether it will be possible to achieve consensus concerning what changes should be made to improve musical work licensing.

We believe that fixing this system will require all stakeholders to work together to take bold steps, rather than just a little tinkering. We do not claim to have all the answers concerning what a musical work licensing system for the next century should look like, but we think any reform effort must (1) simplify licensing by aggregating works under a blanket license, like Section 114; (2) cover all the rights needed to bring to market all modern music releases (physical and digital audio and video products); and (3) ensure that everyone in the value chain receives fair market value for their works. We would like to work with our partners in the music community to explore new ideas to achieve these objectives.

With these objectives in mind, we propose to replace the current overlapping musical work licensing systems with a single, simple and efficient system that incorporates marketplace royalty payments. As described below, such a system would have many potential advantages, including: (1) market rates for publishers and songwriters; (2) more consumer choice through easier funding and development of innovative services; (3) more revenue for services and higher royalties for creators due to savings from simplified licensing procedures; (4) improved accuracy of payments and transparency for publishers and songwriters; and (5) viability for ASCAP and BMI, and the revenue streams they administer.

Although our principal focus in these Comments is on the licensing of musical works, there also should be some changes in the law relating to sound recordings. Most importantly, as the Office has advocated for decades,¹ the performance right exemption for use of sound

¹ See, e.g., Register of Copyrights, *Report on Performance Right in Sound Recordings* (1978).

recordings by terrestrial radio in the U.S. should be eliminated. In addition, we believe that lessons learned after almost 20 years' experience with the sound recording statutory licenses suggest that those licenses should be adjusted in certain respects.

In these Comments, we address all of the Office's specific subjects of inquiry. Part I of these Comments addresses musical works, and Part II addresses sound recordings (including rate standard parity across platforms). In each of those parts, we provide a general response and proposals before turning to the Office's specific questions. Parts III through V address the remainder of the Office's specific questions.

I. Musical Works

Licensees have long complained about the current systems for licensing musical works. Now, *everyone* agrees that those systems are not working. Indeed, songwriters and music publishers have recently been among the most outspoken in their calls for reform. For example, David Israelite, CEO of National Music Publishers Association ("NMPA"), has complained about "outdated laws and antiquated government oversight."² Leaders of American Society of Composers, Authors and Publishers ("ASCAP") likewise have "call[ed] on policymakers to join the movement to update the nation's music licensing system for the digital age."³

The difficulty is figuring out *how* to update the existing systems of musical work licensing in a way that will enable the music industry as a whole to provide consumers with the music products and the music services they desire. Licensing of musical works presents inherent

² David Israelite, *Stop Shortchanging Songwriters*, The Hill (Mar. 25, 2014), <http://thehill.com/opinion/op-ed/201663-stop-shortchanging-songwriters>.

³ ASCAP Board Members Urge DC Policymakers to Update Music Licensing Regulations for the Digital Age (Feb. 25, 2014), <http://www.ascap.com/playback/2014/02/action/ascap-board-members-urge-dc-policymakers-to-update-music-licensing-regulations.aspx>.

challenges, because there is a vast number of commercially important musical works, and they are owned (and in most instances co-owned⁴) by thousands of commercial music publishers, and hosts of others, many of whom own only fractional interests in a few songs. Because of the volume of musical works and the even greater number of separately-owned shares in those works, music licensing has always involved specialized organizations and processes to aggregate rights and collect and distribute royalties efficiently, and probably always must. The key is to update the systems that address the inherent challenges of musical work licensing in a way that all can agree will fairly and appropriately serve creators, rightsholders and the marketplace.

The current U.S. systems for musical work licensing were designed to address the needs of the early twentieth century, when the music publishing business shifted from one dominated by the sale of sheet music as a stand-alone product and live performances, to a business where musical works were primarily licensed for use in the form of finished sound recordings that were either sold in a physical format or performed on terrestrial radio. By the 1940s, there was a patchwork of different licensing models applicable to then-current uses of musical works:

- “Performance” licenses used by broadcasters and venues where music is played;⁵

⁴ A key complicating factor in licensing of musical works is that they typically have multiple co-authors, and hence co-owners, who prefer to license their shares independently to avoid having to account to each other. The extent of this phenomenon is illustrated by a few recent hit songs: *Roar* and *Dark Horse*, which have recently been released by Katy Perry, have five and six songwriters, respectively. *We Can't Stop* (recently released by Miley Cyrus) and *Kiss You* (recently released by One Direction) have seven songwriters each. *Fancy* (recently released by Iggy Azalea), *Talk Dirty* (recently released by Jason Derulo) and *La La La* (recently released by Naughty Boy) have eight songwriters each.

⁵ Licensing of performances has always been handled almost exclusively by the performance rights organizations. ASCAP was formed in 1914 to create a market for performance licensing, and came into its own in 1917, when the Supreme Court recognized that performances in restaurants and hotels implicated the 1909 Act's performance right. *Herbert v. Shanley Co.*, 242 U.S. 591 (1917). As part of antitrust litigation in the 1940s, ASCAP agreed with the Department

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- “Mechanical” licenses used by record companies to create and market their finished sound recordings by packaging musical works with recorded performances, adding other value such as album artwork and liner notes, and providing the final music product to consumers;⁶ and
- “Synchronization” licenses used by motion picture studios (and later TV producers and advertisers) when preexisting sound recordings of musical works were included as part of their audiovisual products.⁷

Although not perfect, these familiar musical work licensing models worked well enough for a long time. However, technology has created a wide range of new ways to distribute sound

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of Justice that it would grant licenses to all responsible applicants at a reasonable (fair market value) royalty rate, with any rate disputes to be resolved by a judge of the U.S. District Court for the Southern District of New York sitting as a “rate court.” Broadcast Music, Inc. (“BMI”) was formed in 1939 and eventually agreed to do the same. These licenses are mostly granted on a “blanket” basis, meaning that all the licensor’s works are covered by a single license, with a payment that does not depend on the amount of usage of particular works.

⁶ The Copyright Act of 1909 first recognized rights to uses of musical works perceptible only with the aid of a machine (so-called “mechanical” copies), and created a compulsory license for such uses. *See* Copyright Act of 1909, Pub. L. No. 60-349, § 1(e), 35 Stat. 1075. At least since the 1940s, licensing of reproductions and distributions of audio products has largely been pursuant to licenses voluntarily issued by The Harry Fox Agency and individual publishers, largely on standardized rates and terms based on the compulsory license provisions now codified in Section 115. While record companies almost never use the actual Section 115 process for obtaining licenses, and the Section 115 license does not actually even apply to most uses of songs by record companies because they are so-called “first uses,” licenses have always been issued work-by-work for specific album projects in a manner similar to the Section 115 process, and record companies and music publishers almost always voluntarily agree to do business on the same terms as apply under Section 115 (or sometimes at a discount from the Section 115 rate).

⁷ Inclusion of existing songs in video productions (e.g., motion pictures) is generally handled by individual publishers and happens on more individualized terms. However, ever since MTV popularized the music video format in the 1980s, record companies have routinely obtained rights to the musical works used in their music videos as part of their artist contracts.

recordings – many of them including visual elements – and today’s music products and digital access models have pushed the existing musical work licensing models to their limit. As just one example, and as described further below, all the products derived from a single album project can require more than 1000 mechanical licenses for exploitation by the means commonly used today (more if each audio streaming service takes its own licenses). As the market transitions from physical to digital, PC to mobile, and download to subscription, these systems are not working well for any stakeholders – and these are the early days of the digital revolution. Because nobody likes the status quo, now is the time to significantly change the broken musical work licensing systems. Below we describe the problems with the current musical works licensing systems. We then propose a possible path to reform that we would like to explore with others in the music community. Finally, we address the Office’s specific questions concerning musical work licensing.

A. Problems in the Current Musical Works Licensing Systems

The musical work licensing systems that were developed for early twentieth century uses are being pressed beyond their limits by new technologies, consumer demands and business models requiring licenses for use of musical works as part of finished music products. We have systems of licensing right-by-right even though the marketplace needs bundles of rights. For most rights, we have cumbersome product-by-product, work-by-work and share-by-share licensing systems even though the marketplace needs licenses for full catalogs. This must change; the modern marketplace needs a blanket license that conveys all necessary publishing rights.

Consumer demand for music products has evolved constantly since the invention of the phonograph in 1877, and the pace of change is increasing. While all distribution once consisted of the sale of audio-only physical products by record companies, today music is mostly being

accessed on phones, computers and other electronic devices. Because those devices have screens, consumers now demand both audio and audiovisual products.⁸ Because those devices have network connections, consumers now access these products through online and mobile on-demand and other streaming services and cloud services (in addition to continuing to purchase physical products and downloads). Thus, just as putting a 45 on a turntable or playing a cassette tape in a Walkman were in their day, streaming a “lyric video” from YouTube on a phone is simply one of today’s basic ways for consumers to enjoy music products.

Through all this change, the fundamental business of a record company has remained the same – discovering and nurturing talent, recording songs, packaging them into attractive consumer products, and marketing and distributing those products for consumers. However, the numbers and types of products into which the recordings are packaged are multiplying to meet today’s consumer demands.⁹ Today’s music products and access models often implicate all of the existing musical work licensing systems. For example, on-demand streaming requires licenses for both performance rights (from the performing rights organizations (“PROs”)) and reproduction and distribution rights (direct from publisher or from the publisher’s agent). The reproduction/distribution licenses are treated as “mechanical” for audio-only streaming and as “synchronization” for audiovisual streaming. The mechanical rights are subject to a compulsory license; the performance and synchronization rights are not. Yet the ultimate royalty recipients are the same for each form of license.

⁸ According to one study, 63% of U.S. music consumers used video to listen to music last year.

⁹ Record companies now commonly provide audio and audiovisual versions of the tracks associated with an album project, both as “singles” and in various physical and digital versions of the album, as well as in smaller bundles and specialized versions such as ringtones. As a result, a typical album project actually involves the creation of not one, but more like a hundred, distinct products that are distributed, sold and/or licensed and accounted for separately.

To be competitive, today’s streaming, cloud and subscription music services require licenses to the full catalog of songs (and shares thereof) owned by virtually every music publisher. This is unlike users of musical works in earlier eras – who typically only required licenses to a limited number of songs at any given time (e.g., to release a record album of 11 or 12 tracks, or use a song in a television show or motion picture). When these services seek to acquire rights in bulk for all the musical works included in the vast catalog of sound recordings consumers have access to via these services, they often find it difficult to identify the rights owners of the musical works, obtain licenses and administer the licenses once obtained.¹⁰

These systems are not working for songwriters and publishers either. As the Chairman of ASCAP recently explained, “[f]iguring out how to get paid from digital services is overly complex and time-consuming for music creators who’d prefer [to spend] our time writing music, not chasing down pennies.”¹¹

These problems affect each of the antiquated licensing structures into which new digital uses have been shoehorned, and none of them is working well for these uses.

¹⁰ The existence of these difficulties is consistent with economic theory. Overlapping rights can lead to “industry gridlock and holdout behavior” of the sort commonly associated with patents and “patent stacking.” See e.g., Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 Case W. Res. L. Rev. 673, 698 (2003); see also Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 Tex. L. Rev. 1991 (2007). Contracting challenges are to be expected in markets (like the one for digital music rights) with complementary inputs (e.g., music, production) and significant sunk costs. See Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & Econ. 297 (1978).

¹¹ Paul Williams, *A Rational, 5-Point Plan for Modernizing Music Copyright*, Digital Music News (May 7, 2014), available at <http://www.digitalmusicnews.com/permalink/2014/05/07/fivepointplanmodernizingcopyright>.

1. Performance Licensing

The performance licensing system already seems to be on the verge of unraveling due to new media licensing issues, even though today they represent only a small percentage of PRO revenues. Frustration with recent rate court decisions has led songwriters and music publishers to criticize the ASCAP and BMI consent decrees, referring to them as “a horse-and-buggy consent decree in a digital environment”¹² and “a godawful system that just doesn’t work.”¹³ Songwriters and publishers seem widely of the view that they “will never be paid fairly under World War II era consent decrees.”¹⁴ As a result, major publishers are considering the “radical step[]”¹⁵ of withdrawing from ASCAP and BMI, even though one of the industry’s leaders believes that “would be catastrophic for those two societies.”¹⁶ If the PROs were to unravel, this would greatly complicate performance licensing for all uses of music, and could lead to lost

¹² Ben Sisario, *Pandora Suit May Upend Century-Old Royalty Plan*, N.Y. Times, Feb. 13, 2014, at B1, available at www.nytimes.com/2014/02/14/business/media/pandora-suit-may-upend-century-old-royalty-plan.html?_r=0 (quoting Rick Carnes, President of the Songwriters Guild of America).

¹³ *Id.* (quoting Marty Bandier, CEO of Sony/ATV Music Publishing).

¹⁴ Ed Christman, *Rate Court Judge Rules Pandora Will Pay ASCAP 1.85% Annual Revenue*, Billboard (Mar. 14, 2014), www.billboard.com/biz/articles/news/publishing/5937528/rate-court-judge-rules-pandora-will-pay-ascap-185-annual (quoting David Israelite, CEO of the NMPA); see also *id.* (quoting John LoFrumento, CEO of ASCAP, as saying “the market rate for Internet radio is substantially higher”); Ed Christman, *Universal Music Publishing Plots Exit from ASCAP, BMI*, Billboard (Feb. 1, 2013), www.billboard.com/biz/articles/news/publishing/1537554/universal-music-publishing-plots-exit-from-ascap-bmi (quoting Zach Horowitz, Chairman of Universal Music Publishing Group, as saying “it’s especially challenging for either society to achieve market rates in negotiations with digital services”).

¹⁵ Ben Sisario, *Pandora Suit May Upend Century-Old Royalty Plan*, N.Y. Times, Feb. 13, 2014, at B1, available at www.nytimes.com/2014/02/14/business/media/pandora-suit-may-upend-century-old-royalty-plan.html?_r=0 (quoting Mr. Horowitz).

¹⁶ *Id.* (quoting Mr. Bandier).

“accuracy, efficiency and transparency” in tracking, collecting and distributing royalties to songwriters.¹⁷

2. Mechanical Licensing

The mechanical licensing problems are different, but equally important. Mechanical licensing has long been more complicated in the U.S. than it has been in many other countries. Obtaining mechanical licenses on a work-by-work and share-by-share basis was hard enough when record companies only needed a few dozen licenses at a time for a specific release such as an album. Now that the number of products associated with a new album project has ballooned, so too has the number of licenses that record companies must acquire for an album project. When an album project involves on the order of a hundred distinct consumer products, a record company will often have to obtain and administer over a thousand licenses to cover all rights for all the writers’ shares of all the songs on all the products just for that one album project. The record company responsible for one current, successful release obtained 1481 licenses for the project.¹⁸ Because the various writers’ shares (typically referred to as “splits”) are often not agreed upon by the time of first release of a song, the process of licensing an album is a highly inefficient process, with lots of “re-work” as split information trickles in. Publishing catalogs frequently change hands, so even for well-known compositions, ownership and splits must be re-

¹⁷ *Id.* (quoting Paul Williams, Chairman of ASCAP).

¹⁸ Mechanical licenses are typically issued separately for each separate product (such as a single, album or other bundle in a particular configuration or form of exploitation). This particular release involved three physical products and 92 different digital products (including audio and video singles, six different versions of the digital album, and various smaller bundles). In all, the project involved 27 songs, 51 songwriters (with 12 of them collaborating on one of the tracks), and a total of 89 separately-licensable shares of songs. Licensing reproduction/distribution rights for each share for each relevant product and means of exploitation required 1481 licenses from 34 publishers.

confirmed regularly.¹⁹ Bad as that is, licensing is exponentially more difficult for a new streaming or cloud music service, which requires licenses to millions of songs at once from multiple co-owners (many of whom are difficult to either identify or locate). Music publishers recognize that this is costing them business opportunities:

Facebook could be willing to spend \$100m launching a global music service, then end up with a cease-and-desist order from the widow of a drummer in a band that owns 15% of a song they haven't licensed. That's a problem that needs to be solved.²⁰

Moreover, while the affected industries have recently been able to reach agreements concerning mechanical royalty rates, including for a wide range of new media uses,²¹ mechanical royalty rate-setting has historically been a lengthy and contentious process.²² There are now 17 different statutory rate categories,²³ and relative musical work and recorded music compensation

¹⁹ Publishers, their collective licensing organizations, record companies, streaming and cloud music services and specialized rights administration firms all devote considerable resources and effort to investigating and keeping track of musical work ownership.

²⁰ Stuart Dredge, *Songs Music Publishing's Matt Pincus talks Spotify, YouTube, Lorde and Digital Disruption*, Music Ally (Jan. 9, 2014), <http://musically.com/2014/01/09/songs-music-publishings-matt-pincus-talks-spotify-youtube-lorde-and-digital-disruption/> (quoting Matt Pincus, CEO of Songs Music Publishing).

²¹ See Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords, 78 Fed. Reg. 67,938 (Nov. 13, 2013).

²² Record companies and music publishers recognized as early as 2001 that the process of delivering interactive audio streams of a kind at issue in the ASCAP case also required mechanical licensing. Mechanical and Digital Phonorecord Delivery Compulsory License, 66 Fed Reg. 64,783 (Dec. 14, 2001). However, the mechanical royalty rates for that activity were not set until 2009, after litigation and lengthy industry negotiations. Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. 4510 (Jan. 26, 2009). Because mechanical royalty rate proceedings occur only on a five-year cycle, 17 U.S.C. § 804(b)(4), it regularly has taken several years to determine mechanical royalty rates for new uses.

²³ These categories are physical phonorecords and permanent digital downloads (*see* 37 C.F.R. § 385.3(a)), ringtones (*see* 37 C.F.R. § 385.3(b)), five compensation models for services offering interactive streams and limited downloads (*see* 37 C.F.R. § 385.13(a)), three types of

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varies across formats.²⁴ The current rate structure is so byzantine that the Copyright Office has for five years been trying to figure out how to accurately reflect it in its reporting regulations.²⁵ Between the licensing process and rate structure, the system is so complex that streaming and cloud music services have to hire specialized rights administration firms to manage their mechanical licensing. However, music publishers and songwriters regularly criticize both the licensing and reporting practices of such firms, which criticisms have led them to call for mechanical licensing reform for almost a decade.²⁶

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promotional activities involving interactive streams and limited downloads (*see* 37 C.F.R. § 385.14(b)-(d)), five new business models addressed in the most recent rate proceeding (*see* 37 C.F.R. § 385.23(a)), and free trial periods for certain of those new business models (*see* 37 C.F.R. § 385.24).

²⁴ In the recent mechanical royalty rate settlements, royalties for musical work performance, reproduction and distribution vary between 17.11% and 18% of “total content cost” (the total royalty expense of the service). 37 C.F.R. §§ 385.13(b)-(c), .23(a). For the more economically significant category of permanent downloads, musical work rights at the statutory mechanical rate of 9.1¢ account for a much lower 10.1% of the approximate 90¢ wholesale price of a track retailing for \$1.29. On average, in 2012, mechanical royalties represented 13.2% of label net sales subject to mechanical royalty payments.

²⁵ Mechanical and Digital Phonorecord Delivery Compulsory License, 77 Fed. Reg. 44,179, 44,180 (July 27, 2012).

²⁶ *E.g.*, Ed Christman, *NMPA’s David Israelite To Congress: A More Efficient Mechanical Licensing System*, Billboard (June 13, 2012), <http://www.billboard.com/biz/articles/news/publishing/1093490/nmpas-david-israelite-to-congress-a-more-efficient-mechanical>; David Israelite, *NMPA President’s Guest Post: Why Music Publishers Must Adopt Blanket Licensing*, Billboard (June 24, 2011), <http://www.billboard.com/biz/articles/news/publishing/1177339/david-israelite-nmpa-presidents-guest-post-why-music-publishers>; Testimony of David M. Israelite before the House Judiciary Committee Subcommittee on Courts, the Internet & Intellectual Property (May 16, 2006) (advocating for the proposed Section 115 Reform Act (SIRA) of 2006), *available at* http://www.nmpa.org/pdf/press_releases/NMPAtestimony5_16_06.pdf.

3. Synchronization/Audiovisual Mechanical Licensing

The ability to access music on smart phones, tablets and other electronic devices with display screens, rather than just through audio-only devices like phonographs or CD players, is changing the nature of consumer demand for music products. Consumers expect that images will appear on the screens of their devices while they are listening to music. To meet that demand, the music industry increasingly offers products that include a visual element with the audio recording. That visual element might consist of the album cover art, a series of images such as photographs of the band, the lyrics for the song, or a full music video.

These products are very different from the traditional synchronization model, which involved granting rights to a movie or television studio or advertising agency that was investing in and creating an entirely new audiovisual program or experience in which the songwriter, publisher, artist and label had no input and assumed no risk. Record companies today offer music fans the same products they have always offered – recorded songs for personal use – it’s just that now a growing number have a visual component that is displayed while the song plays, creating a modern version of the experience of looking at a CD booklet while listening. While this part of the music business is not currently handled on an aggregated basis, music publishers are realizing that a system designed for licensing production of motion pictures does not work very well for licensing whole catalogs of music videos available online through services such as Vevo:

We’re very good at licensing synchronizations one at a time. The problem is that if you look at the opportunities for the future, they don’t just want one song for one purpose, they want mass synchronizations. And as an industry, we are completely

unprepared to give that type of licensing for what could be a very good business opportunity.²⁷

Record companies have tried through direct agreements with music publishers to aggregate music publishing rights associated with their music videos, to be able to pass those rights on to services to meet consumer demand. However, that process has already taken years and continues to be an ongoing effort.²⁸

B. Working Toward a Possible Solution

The problems identified above cannot be solved by piecemeal efforts. Experience teaches that breaking one use into many pieces and shoehorning those uses into multiple existing licensing systems makes no sense. Now is the time for the music community to get together to explore fundamental changes that would address the concerns of music publishers, songwriters and licensees alike.

We do not claim to know all the details of what such a system should look like. However, as a possible path forward, we would like to engage with our colleagues to explore whether stakeholders could agree to replace current Section 115 with a modern, efficient blanket license that would cover all the rights implicated when musical works are used as part of music products offered to consumers in the 21st century.

²⁷ David Israelite, *NMPA President's Guest Post: Why Music Publishers Must Adopt Blanket Licensing*, *Billboard* (June 24, 2011), <http://www.billboard.com/biz/articles/news/publishing/1177339/david-israelite-nmpa-presidents-guest-post-why-music-publishers>.

²⁸ In 2004, record companies and publishers began a process of negotiating “new digital media agreements” covering rights for video streams (among other things). While agreements among the major music companies were generally concluded within a couple of years, the process of assembling rights from other publishers continues many years thereafter. *See, e.g.*, NMPA, Warner Music Group Announce New Licensing Agreement for Music Videos (Apr. 2013), available at <http://www.nmpa.org/newsletter/NMPA-Newsletter-V3-I1/story1b.htm>.

The most challenging issue is likely to be rates and/or rate-setting. It is understandable that reform will be neither possible nor desirable unless songwriters and music publishers believe that it will provide for rates that are more market-based than rates determined by the Copyright Royalty Judges or rate court. The challenge is to allow continued aggregation of rights and collective rate negotiations while finding a way to arrive at market-based rates.

One possibility would be to replace rate-setting by the Copyright Royalty Judges and rate court, and the 17 existing mechanical royalty rate categories (many of which incorporate performance rates), with a rate that is an agreed, consistent, set percentage of label revenues from modern music products. Although there may be other possible structures, we would like to explore this possibility with our industry partners because publishers and songwriters have long wanted their compensation to bear a clear relationship to labels' compensation for sound recording rights,²⁹ and the current mechanical royalty rates for streaming services already link musical work and sound recording royalties. Such a percentage would be negotiated based on factors such as our respective investments, risks and returns. Only if a precise percentage were agreed by stakeholders might it then be suggested to policymakers as legislation, so that no party would be agreeing to reform without understanding its economic consequences. This would be a market-based royalty, because labels' deals are negotiated in the marketplace, and publishers and

²⁹ In the 2006 mechanical royalty proceeding, publishers advanced benchmarks linking musical work royalties to sound recording royalties. *See* Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. 4510, 4517-19 (Jan. 26, 2009). Music publishers' recent attempts to withdraw from the PROs have been motivated by a desire to achieve higher compensation relative to sound recording rights. *United States v. American Society of Composers, Authors (In re Petition of Pandora Media, Inc.)*, No. 12 Civ. 8035(DLC), 2014 WL 1088101, *13-14, *43-44 (S.D.N.Y. Mar. 14, 2014). Most recently, songwriters and music publishers have lobbied for the Songwriter Equity Act of 2014 (H.R. 4079) to allow the ASCAP and BMI rate courts to take sound recording royalty rates into account.

songwriters would receive the percentage of that deal that they had previously negotiated with record companies.³⁰

Other aspects of a new music licensing system that we think are important include:

- Inclusion of all relevant rights for music products in a single licensing system. The existing three-part system makes no sense today in cases where those rights overlap. In each case, there should be one licensing and accounting procedure and one rate structure.³¹
- A blanket license with a single, coordinated means of license administration. In today's business climate, the PROs' blanket licensing model makes far more sense than the product-by-product, work-by-work and share-by-share model that typifies mechanical and synch licensing. For songs used in music products, there should be one simple and efficient process for businesses using musical works to obtain licenses, pay royalties and account for usage, and for royalties to be allocated to the proper creators and rightsholders. Subject to the foregoing, publishers and songwriters should have substantial discretion to determine how licenses will be

³⁰ Potentially this rate could be adjusted from time to time by the Copyright Royalty Judges if required by changed market conditions. However, if one accepts the publishers' view that musical work and sound recording royalties should bear a relationship to each other, then that relationship should not vary by product type or need to change much at all.

³¹ It follows that recordings made with the assent of the relevant writer/publisher should be accommodated in the same licensing system as "covers." Writers and publishers should control what artist will be the first to record their songs, but instead of having entirely separate licensing processes for "first uses" and other uses, the system should recognize the reality that songwriters and publishers have always chosen to license first uses at the same royalty rates as other recordings and allow that to happen by means of the same business processes.

administered and royalties allocated (*e.g.*, through a new organization or an existing organization).³²

- A blanket license that would cover the full range of modern music products. Any new musical work licensing system should enable distribution of the full range of commercially-relevant music products, because they all are situated similarly as the end products of a single process of writing and recording songs and packaging, marketing and distributing them for consumers. Thus, such a system should include the various varieties of music videos, including ones with accompanying text lyrics, because all are delivered as finished recorded music products, and it doesn't make sense to license mechanical uses involving a visual component differently from audio-only sound recordings. However, where the musical work is licensed for use in a third-party created product (*e.g.*, synch rights for movies, television and advertising; traditional television broadcasting; internet performance of television programming; performances within live venues; stand-alone lyrics; and sheet music) it should remain outside this arrangement (unless publishers and songwriters desire otherwise) because licensing for these uses seems to be working reasonably well, and musical work copyright owners should be able to negotiate in a free marketplace to the maximum extent possible.

³² It will be important to have a coordinated means for tracking ownership and “split” information for use in allocating payments. Pursuing existing private-sector efforts to build a repertoire database will be important. As part of that, record companies would be willing to continue their efforts to help identify new musical works and help develop a database.

C. Advantages of the Proposed Solution

Our proposal stacks up well against the objectives we identified at the outset and would have other significant advantages as well:

- Publishers and writers would get the benefit of a market-based rate. Any new system must allow songwriters and publishers to be paid at rates that they perceive as more market-based than rates determined by the Copyright Royalty Judges and/or rate court. Musical work rates that are a consistent, set percentage of label royalties should satisfy that condition, because publishers and songwriters would receive a mutually agreed-upon percentage of whatever value record companies are able to capture in the marketplace for their finished product.
- Rates that are a consistent share of services' total content cost would satisfy publishers' and songwriters' desire for rates that are set relative to royalties for sound recordings. Replacing rates set by the Copyright Royalty Judges and the rate court with a rate that is a mutually agreed-upon percentage of label receipts would accomplish a long-professed goal of many publishers and songwriters.
- Facilitating new business models and consumer offerings. This proposal would facilitate the launch of new digital services and business models for consumers. By making the economics and availability of licenses for new types of services and new business models clear and eliminating the delays caused by rate-setting litigation, this proposal would: (1) spur funding and development of innovative services; (2) offer

consumers more choice; and (3) open the door to new streams of revenue for both musical work and recorded music stakeholders.³³

- Simplifying license procedures for services. Music is virtually unique among copyrighted works in that digital distributors of finished recorded music products such as sound recordings and music videos must obtain separate licenses for the underlying musical work. For example, similar to record companies acquiring rights to musical works, movie studios acquire rights to books and screenplays, and combine the underlying story and other elements into a finished movie product – finding the featured and nonfeatured talent, forming a production team, refining the underlying work to fit the project, working with designers and engineers. Motion picture studios, like record companies, fund, market and distribute this finished product to outlets for consumer enjoyment. However, motion picture distributors (such as Netflix) negotiate directly with motion picture studios and do not also have to negotiate with the authors or publishers of the underlying books or screenplays. Providing a simple way for distributors of sound recordings to pay mutually agreed-upon compensation to music publishers and songwriters would significantly improve the music licensing marketplace.
- Eliminating redundant license administration overhead for all parties. Licensing of musical work rights has long been substantially aggregated – through The Harry Fox Agency (“HFA”) for mechanical rights and the PROs for performance rights.

³³ As noted above, determining performance royalty rates through rate court litigation, determining mechanical royalty rates in proceedings before the Copyright Royalty Judges, and determining synchronization royalty rates through industry-wide bilateral negotiations have all taken years.

Aggregation provided benefits both to licensees, who could obtain licenses for most works from one source (HFA) or three sources (the PROs), and to music publishers, who shared licensing and accounting staff and infrastructure and received aggregated payment and reporting from a central source. Over time, however, uses increasingly implicated both licensing systems, and on the mechanicals side, more publishers sought to “go direct.” Record labels maintained detailed records of who represented which shares of compositions. New music streaming and cloud services who took on the burden of direct licensing and were distributing millions of tracks could not readily replicate all of those label databases, and so turned to specialized rights administration firms to do their mechanical licensing and payment (while also maintaining PRO licenses). Now, labels and publishers maintain data for their own use, HFA and the PROs maintain data, and each of the specialized service bureaus maintains databases in order to effectuate licensing and payment. Keeping these multiple databases current in a world where new works are added every day, and publishing rights frequently change hands, is a massive undertaking. Add to that the task of managing the mechanical licenses and rates for each share of each song that must be licensed, and the monumental inefficiency of these redundant databases is evident. Eliminating the need for multiple types of licensing for the same activities, and adopting a streamlined blanket licensing system rather than work-by-work licensing systems where they apply, would create efficiencies for stakeholders up and down the value chain. This would unlock new value that could more productively be used to provide more royalties for creators and copyright owners of musical works and improve the profitability of music distribution.

- Improving accuracy of payments and transparency for publishers and songwriters. With a single, straightforward and efficient process for licensees to obtain licenses, pay royalties and account for usage, royalties could flow more directly to creators of musical works. Accounting by services would be more straightforward, and hence more accurate, with a simpler rate structure, and whatever entity is empowered to administer the statutory license could have a direct right to audit service providers, which would improve transparency for songwriters and publishers.
- ASCAP and BMI would remain viable. Including the rights that publishers have tried to withdraw from ASCAP and BMI in a new system would keep ASCAP and BMI viable. The PROs play an extremely valuable role in aggregating rights and enabling efficient licensing within their traditional lines of business (e.g., broadcast TV and radio, and performances within bars, restaurants and other venues), which today represent over 90% of their revenues, as well as the growing areas of new media licensing for television and motion picture programming.³⁴ Problems in the online music space should not cause the significant advantages of ASCAP and BMI to be lost. Potentially, one or more of the existing PROs also could play a role in administering the new blanket license.
- Eliminating costly and contentious rate court proceedings, and eliminating or focusing relevant proceedings before the Copyright Royalty Judges. While new media licenses for music services contribute only a small part of overall PRO

³⁴ See, e.g., BMI Announces Highest Royalty Distributions in Company's History (Sept. 23, 2013), available at http://www.bmi.com/news/entry/bmi_announces_highest_royalty_distributions_in_companys_history.

revenues, rate-setting for those uses consumes a large amount of their resources.³⁵

Consolidating rate-setting for mechanical and performance uses where they overlap, or eliminating both types of proceedings with a rate that is an agreed-upon percentage of label receipts, would be significantly more efficient.

- Providing a structure for a voluntary marketplace effort to track ownership and splits.

As noted above, tracking ownership of musical works (and shares of musical works) is a difficult and costly process for record companies, publishers, their licensing agents, services and specialized rights management firms. Today, all of those types of entities have to maintain their own databases of ownership information, and devote a great deal of effort to keeping this information current and resolving inconsistencies among those databases. There have been discussions concerning development of a definitive repertoire database, but not much progress has been made anywhere in the world. Implementing a single, efficient process for licensees to pay royalties and account for usage would require such a database, and provide an opportunity to eliminate the redundant efforts that presently go into maintaining overlapping and inconsistent databases. Record companies are prepared to contribute information concerning new works, and potentially a share of start-up costs.

D. Specific Areas of Inquiry Raised by the Office

In the remainder of this part we briefly address the Office's specific areas of inquiry concerning music licensing, with reference to the general discussion above.

³⁵ See, e.g., ASCAP Reports Strong Revenues in 2013 (Feb. 12, 2014), *available at* <http://www.ascap.com/press/2014/0213-2013-financials.aspx> (ASCAP's operating expense ratio increased from 11.3% in 2012 to 12.4% in 2013 due to litigation expenses incurred for the *Pandora* case).

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

As described above, all the stakeholders agree that the Section 115 license system has problems and should be reformed. Today, it serves primarily as a structure to enable industry negotiations of royalty rates in a manner consistent with the antitrust laws, and to standardize accounting terms and procedures. As the Copyright Royalty Judges have explained:

The complexity of compliance, and the associated transactions costs, create a curious anomaly: virtually no one uses section 115 to license reproductions of musical works, yet the parties in this proceeding are willing to expend considerable time and expense to litigate its royalty rates and terms. The Judges are, therefore, seemingly tasked with setting rates and terms for a useless license. The testimony in this proceeding makes clear, however, that despite its disuse, the section 115 license exerts a ghost-in-the-attic like effect on all those who live below it. Thus, the rates and terms that we set today will have considerable impact on the private agreements that enable copyright users to clear the rights for reproduction and distribution of musical works.

Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. 4510, 4513 (Jan. 26, 2009) (citation omitted).³⁶

Some such structure for facilitating agreement on rates and accounting procedures is needed where a diffuse market and huge volume of transactions for small-scale uses otherwise would make individual negotiations impracticable. However, all stakeholders would be better served by addressing the need for aggregation and standardization with a licensing system built for the needs of this century rather than a century ago. And if the new system is a statutory

³⁶ While the compulsory license process has been invoked by services more often recently than in the many decades before, this is not a sign that the system is working, but rather an indication that musical work licensing is so broken that mass use of the compulsory license process is the best of a lot of bad options. We understand that such compulsory licenses are commonly converted to voluntary licenses when the parties agree to variations on the statutory scheme.

license, it should not remain a “ghost in the attic.” The industry needs a viable, practical mechanism for utilizing the statutory license that is purportedly available. Today, even with the best of intentions, a distributor trying to use the compulsory license is likely to be guilty of an occasional “gotcha” infraction. This is the opposite of the 114 license which is a complete blanket license that is easily used by any potential licensee.

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

The Section 115 rate-setting process is extremely slow, difficult and costly, and has resulted in a rate schedule with 17 different rate categories, and in which publishers and songwriters can receive varying percentages of the relevant content royalty pool. Understanding what uses are subject to which rates is difficult, and administering payments under many of these rate categories is exceedingly complex. As described above, all stakeholders would be better served by providing for market-based royalty payments within a system in which both rate-setting and license administration are simpler.

If there remains a need for broad-ranging Section 115 rate proceedings as today, the rate-setting process should be modified to simplify and expedite the adoption of settlements among the affected industries, and perhaps provide a simple mechanism for addressing technical and drafting concerns that might not have been evident to the participants negotiating the settlement. There have been two settlements in mechanical rate-setting proceedings since rate-setting by the Copyright Royalty Judges was established. That is exactly what Congress desired when it created the current rate-setting process. *See* H.R. Rep. No. 108-408, at 24 (2003). However, we believe that adoption of the more recent of these took far too long (almost two years) and required much more process than was warranted by the perceived issues in the provisions ultimately excised from the settlement. *See* 78 Fed. Reg. at 67,939-42. The resulting delay also

impeded the launch of new locker services. We agree that some level of review of settlements is appropriate to protect persons not participating in the proceeding or the settlement from unreasonable agreements among participants. We also recognize and appreciate that the Office believes it is faithfully executing current law when it reviews settlements in rate-setting proceedings. However, settlements in rate proceedings are carefully negotiated among knowledgeable industry representatives, and in practice represent a substantial consensus of the affected industries that generally should be implemented as soon as practicable. Review processes should be expedited, and geared toward protecting substantial interests of unrepresented persons.

In contrast to Section 114, we don't think that application of the Section 801(b)(1) rate standard to Section 115 has resulted in rates that reflect less than fair market value.³⁷ However, as a matter of principle, we believe that fair market value should be the goal of any rate-setting process, regardless of the type of work or right involved. Thus, just as we think that the Copyright Royalty Judges should not have discretion to set a below-market rate under Section 114, we would support a change to the willing buyer/willing seller rate standard for Section 115

³⁷ In the over 35 years that the Section 801(b)(1) standard has applied to Section 115, there have only been two litigated proceedings, and in both the tribunal sought to set a fair market value rate. *See* Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords; Rates and Adjustment of Rates, 74 Fed. Reg. 4510 (Jan. 26, 2009); 46 Fed. Reg. 10,466 (Feb. 3, 1981). Indeed, the Copyright Royalty Judges have held that the Section 801(b)(1) standard should be applied by starting with consideration of benchmarks that are indicative of fair market value, and then adjusting only as necessary where the Section 801(b)(1) "policy objectives weight in favor of divergence from the results indicated by the benchmark marketplace evidence." 74 Fed. Reg. at 4523 (quoting Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 4080, 4094 (Jan. 24, 2008) (*SDARS I*)). In Section 115 proceedings, no such divergence has been found to be warranted.

as part of statutory rate standard harmonization, if there continues to be a need for a general Section 115 rate standard.

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

Yes, as described above, the key elements would include a blanket license for all commercially-relevant music products that easily can be used by licensees.

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

Yes, as described above.

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

As explained above, it would be far more efficient to establish a single path for rights owners to license and be paid for a single use of their works, rather than multiple paths. Furthermore, the process of licensing and setting performance royalty rates for new media uses is currently threatening the viability of the whole performance licensing system. For several years, major music publishers and the PROs have been discussing the possibility of complete or partial withdrawal from the PROs. This has been motivated in part by a desire to be able to bundle performance, mechanical and synchronization rights to simplify licensing³⁸ and in part by a desire to secure royalty rates that the publishers perceive as being fair relative to sound recording

³⁸ *E.g.*, Ed Christman, *EMI Music Publishing Taking over Licensing Digital Rights from ASCAP*, *Hollywood Reporter* (May 4, 2011), <http://www.hollywoodreporter.com/news/emi-music-publishing-taking-licensing-184688>.

royalties.³⁹ By 2013, several major publishers had withdrawn their new media rights from either or both of ASCAP and BMI. However, in quick succession, both rate courts found that the consent decrees that ASCAP and BMI had entered into with the Department of Justice do not permit partial withdrawals from those PROs.⁴⁰ These decisions left publishers scrambling to decide whether to withdraw entirely from ASCAP and BMI, to perhaps secure higher rates, but at a considerable cost in terms of disruption to the system and inefficiency in licensing.⁴¹

Rather than allow controversy over performance licensing of music products to unravel a system that seems to be working for the radio and television broadcasts and live venues that constitute the vast majority of the PROs' business, reproduction, distribution and performance rights for music products should be rolled into a consolidated licensing system. It makes no sense to have three entirely separate processes for setting rates, licensing and paying for a single set of activities. And such a division makes even less sense now that the statutory mechanical royalty rate addresses the combined economics for performance/reproduction/distribution rights for many such uses. In effect, the performance licensing and rate-setting process for such uses simply serves to determine the allocation of royalties among publishers, songwriters and their intermediaries. Because both performance and reproduction/distribution payments ultimately

³⁹ *Pandora*, 2014 WL 1088101, *14, *43, *44.

⁴⁰ *Broadcast Music, Inc. v. Pandora Media, Inc.*, No. 13 Civ. 4037(LLS), 2013 WL 6697788 (S.D.N.Y. Dec. 19, 2013); *United States v. American Society of Composers, Authors (In re Pandora Media, Inc.)*, No. 12 Civ. 8035(DLC), 2013 WL 5211927 (S.D.N.Y. Sep. 17, 2013).

⁴¹ See Ed Christman, *After Judge's Ruling, Publishing Companies' Digital Rights Withdrawal Anything But Clear-Cut*, *Billboard* (Jan. 14, 2014), <http://www.billboard.com/biz/articles/news/publishing/5869706/after-judges-ruling-publishing-companies-digital-rights> ("If the DOJ appears unwilling to amend the consent decrees, large music publishers say that the existing licensing structure will blow up, changing the face of music licensing in America.").

end up in the pockets of the same writers and publishers, labels and services should be able to write one check to satisfy their publishing obligations, and publishers/writers should have the benefit of an efficient and transparent process for allocating those payments to the proper payees.

- 6. Please assess the effectiveness of the royalty rate-setting process and standards applicable under the consent decrees governing ASCAP and BMI, as well as the impact, if any, of 17 U.S.C. 114(i), which provides that “[l]icense fees payable for the public performance of sound recordings under Section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works.”**

As described above, we do not think that it makes sense to have separate rate-setting and licensing processes for performance and reproduction/distribution rights where those rights overlap. Accordingly, our proposal would eliminate the need for rate court processes in such cases.

With respect to Section 114(i) specifically, we note that it is part of the law only because music publishers and PROs insisted on it in 1995. We are skeptical of their more recent conclusion that Section 114(i) is artificially depressing musical work royalty rates. The Copyright Royalty Judges have repeatedly found that musical work royalty rates are not economically valid evidence of the market value of sound recording rights.⁴² For the same reasons, sound recording royalty rates are not economically valid evidence of the market value of musical work rights. Thus, while the ASCAP rate court cited Section 114(i) as a reason for not

⁴² Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23,054, 23,058 (Apr. 17, 2013) (*SDARS II*); Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 4080, 4089-90 (Jan. 24, 2008) (*SDARS I*); Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24,084, 24,094-95 (May 1, 2007) (*Webcasting II*).

taking sound recording rates into account in its recent *Pandora* decision, it also noted that “the record is devoid of any principled explanation . . . why the rate for sound recording rights should dictate any change in the rate for composition rights.” *United States v. American Society of Composers, Authors (In re Petition of Pandora Media, Inc.)*, No. 12 Civ. 8035(DLC), 2014 WL 1088101, at *44 (S.D.N.Y. Mar. 14, 2014). Accordingly, it is not evident to us that Section 114(i) has actually had any effect at all on musical work rates. However, we are not opposed to eliminating Section 114(i)’s restriction on the use of sound recording royalty rates in rate court, if that is done in a way that does not have a detrimental effect on sound recording royalty rate-setting. In particular, we do not oppose the compromise language included in the Songwriter Equity Act (H.R. 4079).

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

As indicated above, the unique characteristics of the musical work licensing market make aggregation of rights important to the operation of that market. That is why songwriters and publishers formed ASCAP a century ago, and why collective administration of musical work rights remains important today. In such an environment, it is important that collective action by music publishers does not unreasonably limit opportunities for commercialization of sound recordings. We believe we have suggested a good approach to allowing publishers collectively to negotiate a market-based royalty, as we believe they desire to do, in a manner consistent with the antitrust laws. To the extent that the need for the consent decrees is not addressed by our proposal, we agree that details of the consent decrees may need to be updated.

II. Sound Recordings and Platform Parity

In contrast to the licensing of musical works, we believe the systems for selling and licensing sound recordings are working reasonably well where they apply. Contrary to concerns expressed in the early 1990s when the creation of the sound recording performance right was under discussion, the last 20 years have demonstrated that record companies are well-motivated to make their works widely available on a voluntary basis.⁴³ It is also clear that services can assemble rights to a critical mass of recordings through voluntary transactions, although the statutory licenses have proven to provide an efficient mechanism for administering licensing and payment for the large number of services providing radio-like programming. Despite these successes, there are some sound recording licensing issues that should be addressed.

First, U.S. terrestrial radio enjoys an unfair exemption from the sound recording performance right. U.S. Radio broadcasters use sound recordings to their commercial advantage and should pay for that privilege just like other types of services. The absence of a performance right as to broadcast radio also distorts the international flow of sound recording royalties, because it prevents U.S. artists and record companies from collecting royalties accrued for foreign radio broadcasts of U.S. sound recordings. And while songwriters and music publishers envy the royalties new services pay for the use of sound recordings (as discussed in Part I

⁴³ For example, concerns were expressed that record companies might become “gatekeepers” to the performance of musical works by employing restrictive exclusive licensing practices for interactive services. S. Rep. No. 104-128, at 25-26 (1995); H.R. Rep. 104-274, at 21 (1995). As a result, Section 114(d)(3)(A) regulates the terms of exclusive licenses of sound recordings, unless the conditions in Section 114(d)(3)(B) are satisfied. Development of the marketplace has shown that exclusive licensing is rare, and record companies regularly make substantially their whole catalogs available on a nonexclusive basis. This far surpasses the thresholds in Section 114(d)(3)(B), which as a practical matter has made Section 114(d)(3)(A) inoperative. In retrospect, it is clear that these provisions are unnecessary.

above), they actually receive much more performance revenue overall than do artists and record companies, because they are paid for broadcasts and live performances while artists and record companies are not. We need not belabor this point in these Comments, since the Office understands the issues well and has repeatedly advocated the creation of a sound recording performance right.⁴⁴ However, it cannot be emphasized enough that this historical inequity is a major issue for sound recording licensing that should be addressed in any discussion of a fair market.

Second, it does not make any sense for Section 114 to provide below-market royalty rates for a handful of services “grandfathered” under its pre-1998 provisions. Pursuant to Section 114(f)(1), Sirius XM, Music Choice and Muzak have for more than 15 years enjoyed rates set under the Section 801(b)(1) standard rather than the willing buyer/willing seller standard that applies to every other service. That standard has been used to set royalty rates that are deliberately less than fair market value, effectively forcing artists and record companies to subsidize these services’ business models on a continuing basis.⁴⁵ These services were originally

⁴⁴ *E.g.*, Statement of Marybeth Peters, Hearing before the S. Comm. on the Judiciary, 111th Cong. (Aug. 4, 2009), available at <http://www.copyright.gov/docs/regstat070509.html>; Statement of David O. Carson, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 108th Cong. (July 15, 2004), available at <http://www.copyright.gov/docs/carson071504.pdf>; U.S. Copyright Office, *Copyright Implications of Digital Audio Transmission Services* (Oct. 1991); Register of Copyrights, *Report on Performance Right in Sound Recordings* (1978).

⁴⁵ *See, e.g.*, *SDARS II*, 78 Fed. Reg. at 23,058 (rejecting marketplace benchmark for preexisting subscription services as “so far from the current rate” and basing new rates on below-market rates previously established; selecting a lower SDARS rate because of cost structure); *SDARS I*, 73 Fed. Reg. at 4087 (selecting a lower SDARS rate because of concerns about profitability and cash flow); Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, 63 Fed. Reg. 25,394, 25,399-25,400, 25,405-09 (May 8, 1998) (rates to be based on policy considerations, not the marketplace; sustaining low rate based on service risk exposure and perceived precarious financial position).

grandfathered under the Section 801(b)(1) standard because of concern for the business expectations of nascent industries, but Congress never intended that grandfathering to produce permanent below-market royalties. These services are no longer nascent businesses. They should no longer enjoy a rate subsidy and an unfair advantage over their competitors that pay market-based royalties. All services subject to the statutory licenses should be subject to the same willing buyer/willing seller rate standard.

Third, we propose incorporating pre-1972 recordings into the federal statutory license system. It is clear that pre-1972 recordings are generally protected under state law, and those rights have been found to be implicated by Internet streaming.⁴⁶ Services that operate outside the scope of the Section 112 and 114 statutory licenses understand that they must obtain rights to pre-1972 recordings just like post-1971 recordings, and regularly do so. However, services relying on the statutory licenses have not generally sought licenses under state-law rights in pre-1972 recordings, and many have sought to avoid all payment for their use of pre-1972 sound recordings. We are confident that application of state law protection to these kinds of services will be vindicated in litigation currently pending before courts in various jurisdictions.⁴⁷

While in principle voluntary transactions are always preferable to statutory licensing, it does not make sense to have a statutory license covering use by a certain type of service of most recordings, but then exclude from the statutory license works constituting on average perhaps

⁴⁶ *Capitol Records, LLC v. BlueBeat, Inc.*, 765 F. Supp. 2d 1198 (C.D. Cal. 2010) (unauthorized streaming pre-1972 sound recordings constituted misappropriation, unfair competition and conversion under California law).

⁴⁷ *Capitol Records, LLC v. Pandora* (N.Y. Sup. Ct., N.Y. Cnty.); *Capitol Records, LLC v. Sirius XM Radio, Inc.*, Case No.: BC-520981 (Cal.); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, Case No. 13-CV-23182 (S.D. Fla.); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, Civ. A. No.: 13-CIV-5784(CM)(HP) (S.D.N.Y.).

10% of usage by the services relying on the statutory license. Accordingly, we believe that the market would be well served by making all recordings accessible under the statutory license process for services operating within the scope of the statutory license. We also are willing to work through the complicated set of issues raised by more comprehensive federalization of pre-1972 recordings. However, those issues should not delay action on the more straightforward and time-sensitive issue of including pre-1972 recordings in the statutory licenses.

Fourth, the Second Circuit's decision in *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148 (2d Cir. 2009) has disrupted the sound recording licensing market. That decision interpreted the definition of interactive service in section 114(j)(7), and found that the defendant's webcasting was not an interactive program "specially created" for users because it was not so predictable as to cause users to forgo purchasing copies of sound recordings. *Id.* at 161-62. We think that decision is contrary to Congress' clear intent, as well as marketplace developments, and was wrongly decided. However, for purposes of these comments, we focus on the marketplace context and effects of the decision.⁴⁸

While the recorded music business was once based almost exclusively on the sale of copies of sound recordings, that is no longer true. Consumers are showing increasing interest in access models for acquiring music. Subscription and streaming services constituted 21% of U.S.

⁴⁸ As to the law, Congress added the concept of specially-created programs to Section 114(j)(7) as part of the DMCA, to expand the definition of interactive service beyond the definition of that term that was included in the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"). When Congress did so, it unambiguously explained that "personalized transmissions – those that are specially created for a particular individual – are to be considered interactive." H.R. Conf. Rep. No. 105-796, at 87 (1998). The Second Circuit reached its conclusion that a service can be materially personalized without being considered interactive based primarily on legislative history of the unamended DPRA. By interpreting the DMCA amendment based on the purposes of the DPRA rather than the amendment in the DMCA, the court ignored the effect the amendment was designed to achieve.

industry retail revenue in 2013, and that proportion is growing fast as streaming revenues increase and sales revenues decrease. As the market moves in that direction, it is clear that streaming displaces sales for some consumers, and that lower-priced streaming services displace higher-priced streaming services. That trend is illustrated by the effects of the *Launch* decision. Previously, personalized services paid royalties under voluntary agreements that were materially in excess of the statutory royalty rate. The *Launch* decision has emboldened services to offer listeners an increasingly personalized listening experience under color of the statutory license, and all but extinguished voluntary licensing of personalized streaming services at a premium to the statutory rate. Moreover, because on-demand subscription services must compete with personalized free-to-the-listener services, increasing personalization of free services offered in purported reliance on the statutory license interferes with on-demand services' efforts to attract subscribers. That has limited the business opportunities of both the providers of such services and of artists and record companies. In view of these marketplace developments, we think it is important to revisit the treatment of personalized services under the statutory license. While, at this juncture, we do not necessarily advocate excluding from the statutory license services that have been generally accepted as operating within the statutory license based on the *Launch* decision, we do think it is important, at a minimum, that services offering more functionality, such as personalization features, should pay higher rates.

Finally, the statutory license system should also be adjusted to promote compliance with statutory license requirements by the services purporting to rely on it. We understand from SoundExchange that the record of compliance with Section 112/114 statutory license conditions is rather poor. For 2012, about one quarter of Section 112/114 royalty payments were not made on time; 69% of licensees required to deliver reports of the sound recordings they use have not delivered at least one required report; and 31% of such licensees have not delivered *any* such

reports at all. No copyright owner would tolerate this level of noncompliance with voluntary licenses. Irresponsible licensees probably would not receive licenses in the first place, and noncompliant licensees would have their licenses terminated, or at least not renewed. As Section 115 permits publishers to terminate licenses for default in certain circumstances, the Section 112/114 licenses should provide mechanisms short of federal court litigation to ensure that only generally compliant services can purport to rely on the statutory licenses.

B. Specific Areas of Inquiry Raised by the Office

In the remainder of this part we briefly address the Office's specific areas of inquiry concerning sound recording licensing and platform parity, with reference to the general discussion above.

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

Subject to the issues noted above, the statutory licenses have proven to provide an efficient mechanism for administering licensing and payment for the large number of services providing radio-like programming. While some of these services are businesses with enough scale that they could (and sometimes do) secure rights to the recordings they stream through direct licenses, many of them are small businesses or even noncommercial entities engaging in uses generating only a few thousand dollars a year in royalties, or less. Using recordings on that small a scale requires an efficient means of license administration. Thus, while voluntary licensing is in principle preferable to statutory licensing, we support continuation of the Section 112 and 114 statutory licenses as a means of providing licensing for the purposes for which they were intended, with the adjustments described above.

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

As described above, twenty years after the creation of the statutory licenses, Sirius XM, Music Choice and Muzak have matured sufficiently that they no longer need or deserve to have their rates subsidized by artists and record companies, and should no longer enjoy a unique competitive advantage over other digital music services in the form of royalty rates that have been deliberately set below market. While these services were early market entrants, consumers now have access to a wide range of different services providing music in various means, on various platforms and at various price points. Sirius XM, Music Choice and Muzak should participate in today's digital music ecosystem by managing their costs and pricing their services in a way that reflects the full value of the music they use, rather than a continuing subsidy from artists and record companies. All services operating under the statutory licenses should pay fair market royalties set under the willing buyer/willing seller standard.

Turning to the rate-setting process, proceedings before the Copyright Royalty Judges are costly. The high cost is to some extent inherent in litigation over the amounts of money typically at stake in those proceedings. However, it is possible that costs could be reduced without prejudice through adjustments to the Judges' procedures, such as earlier or more limited discovery, less extensive written submissions, or conducting one live hearing rather than two. We do not have any specific proposals in this regard at this time, but we think the possibility of procedural changes to make rate proceedings more efficient is worthy of further consideration.

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

As stated above, we propose incorporating pre-1972 recordings into the federal statutory license system. We think that doing so would be desirable because it makes no sense to provide a statutory license as an efficient mechanism for licensing recordings for a certain type of service, but then exclude from the statutory license works constituting on average perhaps 10% of usage by services relying on the statutory license. Outside the scope of the statutory licenses, the distinction between state and federal protection is of much less practical consequence, because pre-1972 recordings are commonly sold and licensed on the same basis as post-1971 recordings.

Any further federalization is a complicated topic. As the Office found in its recent study of this subject, bringing pre-1972 recordings into the federal system would present a long list of issues, including matters such as ownership, termination, term of protection and registration.⁴⁹ However, we are open to considering full federalization if the issues identified in the Office's study can be resolved in a practical and satisfactory manner.

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

As described above, the Second Circuit's *Launch* decision has blurred the distinction between interactive and noninteractive services, and the resulting creep in the scope of functionality being provided in purported reliance on the statutory licenses is having adverse

⁴⁹ U.S. Copyright Office, *Federal Protection for Pre-1972 Sound Recordings* 139-78 (Dec. 2011).

effects on the market for licensing sound recordings to streaming services. Accordingly, we think it is important to restore royalty rate differentiation between services offering varying degrees of functionality.

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

The different rate standards applicable under Sections 112 and 114 do not make sense. As described above, Sirius XM, Music Choice and Muzak uniquely and unfairly benefit from royalty rates that have been deliberately set under the Section 801(b)(1) standard at less than fair market value. The willing buyer/willing seller standard should apply to all services operating under the Section 112/114 statutory licenses.

As also noted above (in Part I.D), the Section 801(b)(1) rate standard also applies to Section 115 proceedings. While that standard has not been used in a Section 115 context to set royalty rates that are deliberately below-market, we agree that if there continues to be a need for a general Section 115 rate standard, it should be harmonized with the Section 112/114 rate standard.

13. How do differences in the public performance right impact music licensing?

As described above, U.S. terrestrial radio broadcasters enjoy an unfair exemption from the sound recording performance right. In addition to the fundamental unfairness of their using copyrighted sound recordings without paying, the absence of a terrestrial performance right in the U.S. prevents U.S. copyright owners and performers from collecting accrued royalties for foreign radio broadcasts of U.S. sound recordings. The absence of a terrestrial performance right also skews the relationship between sound recordings and musical works. While sound recording royalty rates are generally much higher than musical work royalty rates given the

much larger investments that record companies make in the creation and marketing of sound recordings, songwriters and music publishers enjoy infinitely higher compensation for use of their works by broadcasters and public venues, because they are paid while artists and record companies are not. As a result, they actually receive much more performance revenue overall than do artists and record companies. Congress should create a terrestrial performance right in sound recordings.

III. Changes in Music Licensing Practices

In this part we address the Office's questions concerning changes in music licensing practices.

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

We discussed direct performance licensing by musical work copyright owners in Part I above. Historically we understand that there was almost no direct performance licensing. As described above, major publishers have recently tried to withdraw their new media rights from ASCAP and BMI. Because their rate courts have held that such partial withdrawal is not permitted under the consent decrees they agreed to, outright withdrawal is a possibility that imperils the whole musical work performance licensing system, and creates a risk that there will be no practical way to access works, and shares of works, owned by smaller publishers. Our proposal for reforming musical work licensing would address the reasons major publishers have felt compelled to withdraw rights from ASCAP and BMI by providing market-based compensation, consolidation of performance and mechanical rights and increased transparency and efficiency.

On the mechanical licensing side, for many decades a high proportion of mechanical licenses were issued by HFA, a subsidiary of NMPA that represents most commercial music publishers in mechanical licensing. Our member companies report that in recent years music publishers increasingly have been asking them to handle mechanical licensing directly, and as a result, a smaller share of their mechanical license acquisition and accounting is occurring through HFA. Direct mechanical licensing is something that record companies have been able to accommodate within the current Section 115 framework, because a large portion of the mechanical licenses record companies obtain are for new songs on new album releases. When that is the case, Section 115 does not technically apply, and usually neither the publisher nor HFA knows about the existence of the song until the record company tells them about it. Since HFA cannot license a song it does not know about, and the record company and publisher are in contact with each other to confirm ownership of the new song, it is almost as easy for the record company and publisher to put in place a direct license as to put in place an HFA license, when that is the publisher's preference. Our sense is that publishers increasingly are embracing direct licensing as a means of getting paid faster and avoiding HFA's commission on new releases. However, the combination of declining HFA market share and declining record sales has meant that publishers that are not set up to support direct licensing are bearing a higher proportion of HFA's costs, due to HFA's costs being spread over a smaller volume of mechanical royalties.

This phenomenon highlights the inefficiency of the current Section 115 framework. Considerable effort is expended confirming and tracking the ownership of songs, setting up licenses on a song-by-song and product-by-product basis, and worrying about matters such as whether a product's projected sales volume warrants expending effort to set up a direct license to avoid HFA's commission. It would be far better to have a more efficient licensing system. Our proposal discussed in Part I would create such a system.

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?

We believe that there may be a useful role for the government in encouraging the development of micro-licensing. There clearly is marketplace demand for micro-licensing, as evidenced by frequent requests that RIAA and its members receive for licenses for use of recordings in wedding videos and other small-scale uses. It would be good for artists, record companies, copyright users and the copyright system to be able to meet that demand, and we have devoted considerable time and effort to exploring options for doing so.⁵⁰

However, turning that demand into a licensing market has proven challenging. Between the relatively low revenue that likely would be realized from micro-licensing, the difficulty and cost of operationalizing it, and the antitrust risk of collective action to facilitate micro-licensing, progress has been very slow. We encourage the Office to consider competition policy relevant to micro-licensing to evaluate whether there are mechanisms that might facilitate an efficient micro-licensing marketplace in a manner consistent with the antitrust laws.

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?

Over the last fifteen years, record companies have transformed their businesses to make music licensing and digital distribution more effective. Today, consumers take it for granted that any sound recording they have ever heard of – and more recordings than they could possibly

⁵⁰ See, e.g., Ed Christman, *RIAA & NMPA Eyeing Simplified Music Licensing System, Could Unlock 'Millions' in New Revenue* (June 13, 2013), <http://www.billboard.com/biz/articles/news/record-labels/1566550/riaa-nmpa-eyeing-simplified-music-licensing-system-could>.

listen to in a lifetime – are available online through a host of digital music services.⁵¹ However, it is seldom appreciated that the access to music that consumers enjoy today is only possible because of years of sustained effort and the investment of billions of dollars by record companies. Their efforts are less apparent than those of the services with which consumers interact directly. As a result, there is a common misperception that making recordings available online is solely a function of digital music services and is without cost to record companies. It should be recognized that digital music services have music to make available only because record companies have remastered tens of millions of recordings for digital distribution, developed and digitized metadata for those recordings, cleared background rights to those recordings for new media, created and operate digital asset management systems and supply chains, maintain and continually upgrade sophisticated royalty systems to properly account to and pay artists and music publishers for new types of uses, and formed digital business affairs groups to work with potential service providers to develop new types of services.

SoundExchange is another great music licensing success. Formed by RIAA at the request of Section 114 licensees to operationalize the statutory licenses, SoundExchange efficiently collects royalties from over 2,000 digital music services and distributes them to over 28,000 copyright owners and over 90,000 featured artists. Since being spun off from RIAA a decade ago, it has distributed over \$2 billion in royalties to artists and record companies at a cost

⁵¹ The iTunes Store offers a catalog of over 26 million recordings. <http://www.apple.com/pr/library/2013/12/16BEYONC-Shatters-iTunes-Store-Records-With-Over-828-773-Albums-Sold-in-Just-Three-Days.html?sr=hotnews.rss>. Streaming service Spotify has more than 20 million songs in its worldwide catalog. <http://press.spotify.com/us/information/>.

that recently has been less than 5% of royalties distributed. It is a model of what an efficient system for musical work licensing might look like.

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

Yes, as described above.

IV. Revenues and Investment

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

The shift of the music marketplace first from physical products to digital downloads, and more recently toward access through streaming services, has transformed the business of every participant in the music industry. The changes have been positive in many respects. Consumers now have many choices for accessing music, at various price points (including free), and everyone in the music value chain has access to new revenue streams as a result.

However, declining album sales due to online piracy (which remains a very real issue today), the disaggregation of albums into individually-purchasable tracks, and the migration toward streaming has produced economic dislocation for everyone in the music industry. Since the original Napster peer-to-peer file-sharing service emerged in 1999, recorded music retail revenues in the U.S. have dropped about 53%. This has inevitably led to significant cuts in recording industry employment and artist rosters, and declining investment in discovering, developing and promoting new artists, which in turn has diminished the size of the middle class of songwriters and recording artists who can make a living from their creative efforts without being major pop stars.

As the revenues of record companies have declined, they have been paying an increasing share of their revenues to artists, songwriters and publishers. In the decade 2003-2012, the U.S. labels associated with the major record companies spent a total of over \$22 billion on talent,

including artist advances and royalties and publishing royalties.⁵² As a percentage of relevant U.S. revenue, the labels' artist royalty expense increased by about 36% over the decade, and publishing royalties by about 44%.

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

As described in Part I, it does not make sense that the relationship between musical work and sound recording royalties varies among different types of music products, because in each case what the consumer receives is the record company's finished product, and the respective contributions of songwriters/publishers and artists/record companies don't vary significantly among the different configurations of recorded music products. The proposal we described in Part I would address these variations by providing a negotiated, consistent, market-based relationship between sound recording and musical work revenues across product types.

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?

In the decade 2003-2012, the U.S. labels associated with the major record companies invested about \$13.5 billion in the creation of music products and the marketing to give those products a commercial life. However, as described in Part I, the current system for licensing musical works limits the money available for investment at every step of the music value chain, by foreclosing revenue opportunities and requiring excessive license administration expenses. For record companies, continued investment in the development of new projects and products and the discovery and development of new talent requires the possibility that new types of

⁵² In addition to the labels' spending on talent, artists received hundreds of millions of dollars from SoundExchange, and songwriters received billions of dollars from the musical work PROs.

services promptly can obtain musical work rights necessary to launch, thereby bringing new revenue into the music industry, and that record companies receive fair market value from all uses of their recordings.

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

As described in Part I, musical work licensing has been a problem for new types of services and for record companies as they have tried to work with technology entrepreneurs to develop new types of services. It is difficult to obtain mechanical licenses, particularly in the absence of an applicable statutory rate category. Long delays in establishing new statutory mechanical royalty rate categories and final performance royalty rates have also frequently made it impossible to understand the economics of possible new types of services until substantial time and effort has been committed to developing them. This may be limiting investment in new types of services such as so-called “life of device” services like Nokia’s Comes with Music and BOINC, which were not able to enter the U.S. market because of publishing issues. The proposal we describe in Part I would address these problems by making licenses for musical works readily available at predictable market-based rates. There never would be a new use without an applicable statutory rate category, because songwriters and music publishers would always receive a royalty that is a negotiated, consistent percentage of label receipts across all product types.

V. Data Standards and Other Issues

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?

There are several things the government could do to encourage the adoption of standards for the identification of musical works and sound recordings.

First, Copyright Office databases and systems should be capable of ingesting and storing standard identifiers on a voluntary basis. Most relevant to the music industry are the International Standard Recording Code or “ISRC” (ISO 3901) and International Standard Musical Work Code or “ISWC” (ISO 15707). As their names suggest, these are standard unique identifiers capable of distinguishing sound recordings and musical works that may have the same or similar titles. A newer standard that is also potentially useful is the International Standard Name Identifier or “ISNI” (ISO 27729). This is a standard for unique identification of the creators of works (including both sound recordings and other types of works).

Second, the Office could support current efforts to develop a registry of issued ISRCs by making its databases interoperable with the ISRC registry that is being developed.

Finally, the Office should recognize that meaningful musical work licensing reform will depend upon private sector development of a database of musical work ownership information. As described in Part I, it is difficult to identify and keep track of musical work ownership due to changes when musical works and catalogs change hands. Currently, this is something that must be done by publishers, their licensing agents, record companies, digital music services and specialized rights management firms. And their records frequently disagree. This complicates musical work licensing, and probably results in misdirected payments with some frequency. The government should not have to build a database of musical work licensing information apart from the Copyright Office Catalog, but the Office should recognize that private sector development of a more current and comprehensive database will be important to meaningful reform.

- 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.**

RIAA has for decades collected and reported shipment and revenue data on a format-by-format basis. Recent data is available on RIAA's website,⁵³ and we have attached a copy as Exhibit A. RIAA's website also provides access to a variety of other music-related research reports.⁵⁴

CONCLUSION

RIAA appreciates the Office's examination of the music licensing landscape and will be pleased to participate in further discussions concerning the many important issues raised in the NOI.

Dated: May 23, 2014

⁵³ http://www.riaa.com/keystatistics.php?content_selector=2008-2009-U.S-Shipments-Numbers.

⁵⁴ http://www.riaa.com/keystatistics.php?content_selector=research-industry-research-reports.

Respectfully submitted,



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Exhibit A
RIAA 2103 Shipment and Revenue Data

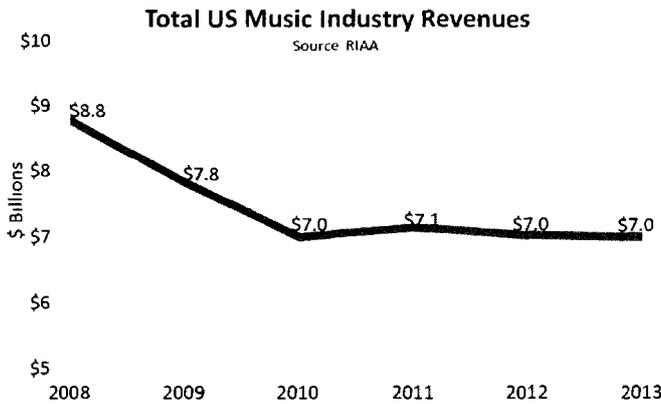
News and Notes on 2013 RIAA Music Industry Shipment and Revenue Statistics

Joshua P. Friedlander
Vice President, Strategic Data Analysis, RIAA

In 2013, strong growth in streaming revenues contributed to a US music industry that was stable overall at \$7 billion for the fourth consecutive year.

These streaming services have grown rapidly over recent years, contributing 21% of total industry revenues in 2013, compared with just 3% in 2007.

Figure 1



Overall, this was a decrease of 0.3% versus 2012 revenues (at wholesale, the industry was \$4.8 billion, up 1.9% versus 2012).

The increase in digital sales was driven by streaming music services, which at \$1.4 billion were up 39% versus 2012. This category includes revenues from subscription services (such as Rhapsody and paid versions of Spotify, among others), streaming radio service revenues that are distributed by SoundExchange (like Pandora, SiriusXM, and other Internet radio), and other non-subscription on-demand streaming services (such as YouTube, Vevo, and ad-supported Spotify).

Figure 2

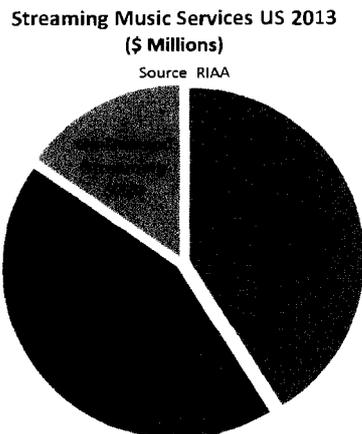
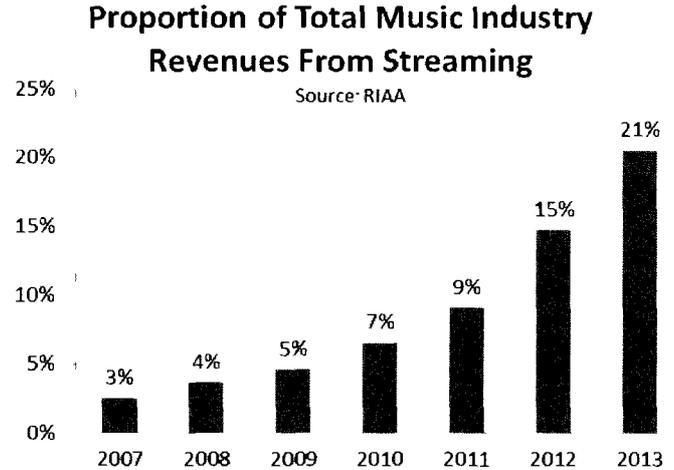
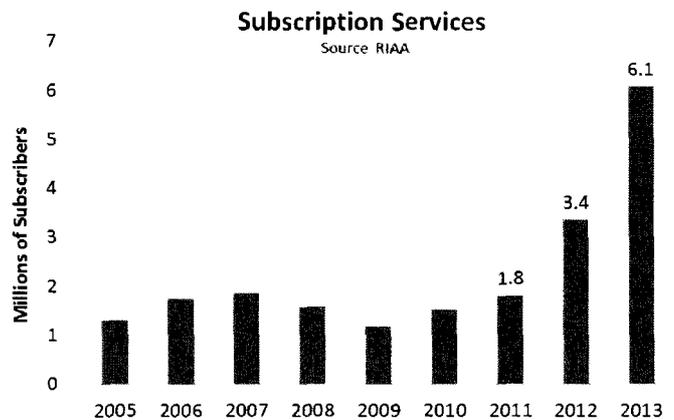


Figure 3



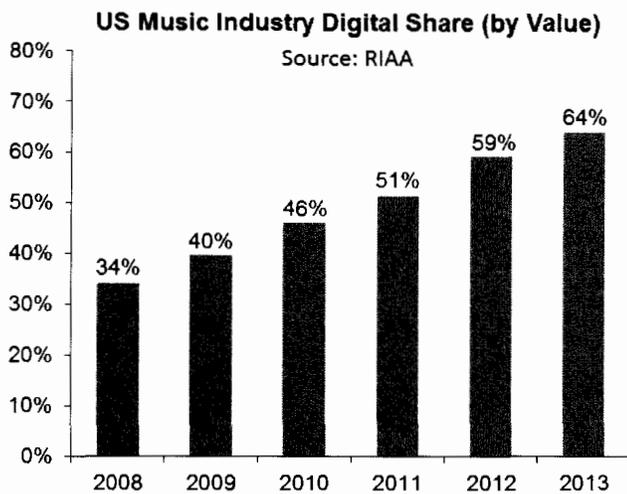
Paid subscription services grew the fastest of the digital formats, up 57% to \$628 million in 2013. Growth came not just in dollars, but in the number of subscribers as well, with the annual average totaling over 6 million subscriptions.

Figure 4



Overall, digitally distributed formats grew 7.6% to \$4.4 billion, a new high, and accounting for 64% of the overall market by value (note Synchronization excluded from this figure).

Figure 5



Specifically, revenues from permanent digital downloads (including albums, single tracks, videos, and kiosk sales) declined 1.0% to \$2.8 billion. There were 118.0 million digital albums sold in 2013, up just 1.1% versus 116.7 million in 2012. Total value of digital albums was \$1.2 billion, up 2.4% versus the prior year. Digital track sales volume was down 4.5% to 1.3 billion, and the total sales value of tracks was down 3.4% to \$1.6 billion.

Shipments in physical formats continued to decline in 2013, overall down 12% in value from \$2.8 billion in 2012 to \$2.4 billion in 2013. CDs continued to be by far the largest physical format with 87% of the physical market. Vinyl continued to buck the physical sales trends as shipments grew 33% to \$211 million in 2013.

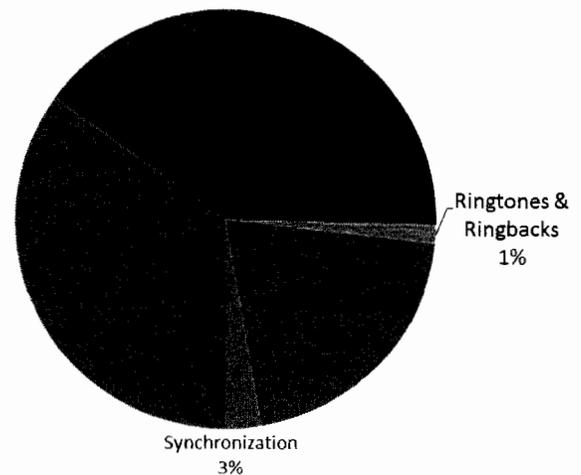
Revenues from Synchronization were \$189.7 million, down 0.5% versus 2012.

Overall, 2013 sales results show the continuing emergence of streaming music models as meaningful contributors to industry revenues. As recently as 2009, 95% of US music industry revenues came from traditional purchasing (with the majority in physical formats). In 2013, 21% of revenues came from streaming models, where fans can listen to vast libraries of music either for free or as part of a subscription, and nearly 2/3 of total revenues came from digitally distributed formats. All of this shows the music industry today has grown into a diverse digital business teeming with a wide variety of innovative services catering to all types of music fans.

Figure 6

US Music Industry Revenues 2013

Source: RIAA



Please note that the RIAA presents the most up-to-date information available in its annual industry revenue reports and subscription-only online statistics database

(http://www.riaa.com/keystatistics.php?content_selector=riaa-shipment-database-log-in).

Based on additional market research, historical data has been updated for 2012.

For news media inquiries, please contact: Jonathan Lamy
Cara Duckworth Weiblinger
Liz Kennedy
202/775-0101



2013 Year-End Industry Shipment and Revenue Statistics

202-775-0101

United States Unit Shipments and Estimated Retail Dollar Value

(In Millions, net after returns)

Digital Permanent Download

	2012	2013	% CHANGE 2012-2013
(Units Shipped)			
Download Single	1,392.2	1,328.9	-4.5%
(Dollar Value)			
Download Album	\$1,116.7	\$1,118.0	1.1%
	\$1,204.8	\$1,233.5	2.4%
Kiosk ¹	2.0	3.7	90.6%
	\$3.7	\$6.1	67.9%
Music Video	10.5	8.4	-19.6%
	\$20.8	\$16.8	-19.6%
Ringtones & Ringbacks ²	69.3	39.2	-43.4%
	\$166.9	\$97.6	-41.5%

Digital Subscription & Streaming

SoundExchange Distributions ³	\$462.0	\$590.4	27.8%
Paid Subscription ⁴	3.4	6.1	81.3%
	\$399.9	\$628.1	57.1%
On-Demand Streaming (Ad-Supported) ⁵	\$170.9	\$220.0	28.7%

TOTAL DIGITAL VALUE

	\$4,052.7	\$4,361.5	7.6%
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Synchronization Royalties ⁶	\$190.6	\$189.7	-0.5%
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Physical

(Units Shipped)			
CD	198.2	172.2	-13.1%
(Dollar Value)			
CD Single	\$1.1	\$0.6	-41.4%
	\$3.2	\$2.4	-24.2%
LP/EP	6.9	9.4	35.2%
	\$160.7	\$210.7	31.1%
Vinyl Single	0.4	0.3	-18.8%
	\$4.7	\$3.0	-37.2%
Music Video	6.0	4.7	-21.8%
	\$116.6	\$104.7	-10.2%
DVD Audio	0.0	-0.1	-711.1%
	\$0.2	-\$0.5	-371.0%
SACD	0.1	0.0	-30.8%
	\$1.3	\$1.0	-27.1%
Total Physical Units	212.7	187.2	-12.0%
Total Physical Value	\$2,772.4	\$2,444.8	-11.8%

Total Retail Units	182.9	159.1	-13.0%
Total Retail Value	\$2,584.3	\$2,267.7	-12.3%

TOTAL DIGITAL AND PHYSICAL

Total Units⁷	1,803.3	1,685.6	-6.5%
Total Value	\$7,015.7	\$6,996.1	-0.3%

% of Shipments ⁸	2012	2013
Physical	41%	36%
Digital	59%	64%

Retail Value is the value of shipments at recommended or estimated list price

Formats with no retail value equivalent included at wholesale value

Note: Historical data updated for 2012 and 2011

¹ Includes Singles and Albums

² Includes Master Ringtunes, Ringbacks, and prior to 2013 Music Videos, Full Length Downloads and Other Mobile

³ Estimated payments in dollars to performers and copyright holders for digital radio services under statutory licenses

⁴ Streaming, tethered, and other paid subscription services not operating under statutory licenses

Volume is annual average number of subscribers for subscription services

⁵ Ad-supported audio and music video services not operating under statutory licenses

⁶ Includes fees and royalties from synchronization of sound recordings with other media

⁷ Units total includes both albums and singles, and does not include subscriptions or royalties

⁸ Synchronization Royalties excluded from calculation

Permission to cite or copy these statistics is hereby granted, as long as proper attribution is given to the Recording Industry Association of America