Before the United States Copyright Office
Comments on Music Licensing
By Bennett Lincoff
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I welcome this opportunity to comment in response to the Copyright Office's Notice and Request for Comments in connection with its Music Licensing Study. I am an intellectual property law attorney with more than thirty-five years of experience, the last ten of which as a sole practitioner. I submit these comments on my own behalf and not on behalf of any client, past or present.

I. Introduction

In my view, public policy should strongly support the right of composers, authors and recording artists to share meaningfully in the bounty derived from online use of their creative works. It should provide a mechanism by which music publishers and record labels can earn a reasonable return on their investments in creative people and creative works. And it should promote technological innovation and the free market for technology products and services, facilitate the growth of all manner of digital music services, and allow Internet users to participate in the lawful enjoyment of music when, where and how they want.

Stakeholders in the debate concerning use of recorded music online have taken and held fast to extreme positions in support of their narrow self-interest. Because of this, the debate is often shrill, sometimes coarse and, in all events, insufficiently nuanced. For their part, policy makers have been reluctant to proceed with needed reforms in the absence of voluntary agreement among stakeholders. In the meantime, the music industry languishes in steep economic decline.

Policy makers should act without delay and on their own initiative to reconcile the rights, expectations and responsibilities of the many disparate stakeholders in the use of recorded music online.

The crisis in the digital music marketplace arises from the disruptive effect of the Internet on music industry business models that are possible under the Copyright Law as it exists today. It is my purpose here to propose changes to the Copyright Law that are

necessary to foster development of a music industry business model that responds to the changed circumstances imposed by the Internet.

II. The Internet Has Irreversibly Disrupted the Music Industry's Pre-Existing Business Models

The Internet is fundamentally incompatible with the music industry's sales-based revenue.

The Internet is everywhere and music is everywhere a part of it. Every Internet user, music service provider and Internet intermediary in the world is a potential source of unauthorized mass distribution of recorded music. Through the Internet, the market for sale of individual recordings can be compromised in a matter of moments. The music industry's efforts to the contrary notwithstanding,[1] users continue to download and share whatever music they want, whether or not it is legal to do so; and sources beyond the industry's control continue to provide users with the music they demand whether or not rights holders approve or are paid.

Simply put, the sales based revenue for recorded music is no longer sustainable. Neither law, nor technology, nor moral suasion will change this result.

Nevertheless, the sales based revenue model is enshrined in the Copyright Law. For example, treatment of non-interactive and interactive streaming services under the DMCA is specifically structured to protect the sale of recorded music.

To the extent that users of interactive services can request that particular recordings be streamed or that music programming be specially created for them, they may be able to download those recordings without paying for them. Therefore, the law gives record labels the exclusive right to license interactive services on whatever terms and conditions the labels are able to impose.

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[1] The music industry has sought legislation that grants it enhanced enforcement mechanisms; legislation that limits the business models in which music service providers and technology firms may lawfully engage; and legislation that limits the products that can be brought to market by consumer electronics makers. The industry has experimented with a variety of access restrictions and anti-copying measures, the circumvention of which is a crime. It has pursued infringement litigation against Internet users seeking ruinous damages for conduct occurring in the privacy of peoples' homes. It has seeded unlicensed music services with spyware in an effort to disrupt them; and it has engaged in spoofing whereby users who search P2P networks for music have instead been sent corrupted files that may damage their computers. It has sought to deny US colleges and universities federal funding if they fail to serve as enforcers on behalf of music industry rights holders. And it has sought to require ISPs to deny Internet access altogether to users who engage in file sharing.

Non-interactive webcasting services are subject to a compulsory license. They are not permitted to offer interactive streaming. Nevertheless, even these services are required to comply with certain business model limitations, content restrictions and user-interface requirements specifically designed to inhibit downloading and to promote the sale of recorded music. For example, webcasters may not offer programming dedicated to particular artists, or that contain more than a few songs by the same artist or from the same recording; may not promote their services by publishing program guides or by making announcements of the recordings they will stream, other than immediately prior to the transmission itself; and may not offer archived programs shorter than five hours duration. On the other hand, in order to promote the sale of recordings on behalf of the record labels whose music they stream, qualifying webcasters must display on the user's computer screen the title of the recording being streamed and the name of the recording artist.

Music publishers also distinguish between interactive and non-interactive streaming services. They demand mechanical rights license fees from interactive but not from non-interactive services. Publishers assert that on-demand streaming by interactive services is tantamount to the distribution of copies of the recordings involved; and, because the mechanical right is exploited upon the making and distribution of copies, the publisher is entitled to a mechanical rights license fee payment. On the other hand, non-interactive streaming services are viewed as less of a threat to the sales based revenue model because their users are unable to anticipate when a particular recording will be transmitted. However, in terms of actual copies made, there is no difference between interactive and non-interactive streaming services. Both involve the same server copies and the same transitory and incidental intermediate copies integral to the transmission process itself; but neither definitively results in a permanent copy being made by the end user who receives the transmission.

In any event, given that the sales based revenue model is no longer sustainable, there is no rationale for the way that interactive and non-interactive streaming services are treated under existing music industry licensing practices.

More generally, the Internet has blurred the distinction between the music industry's pre-existing rights. For example, prior to the Internet, the reproduction and distribution rights, on the one hand, and the public performance right, on the other, were separate and distinct,

exploited in different ways, and subject to different licensing regimes. Through the Internet, the means of reproduction, distribution and public performance of musical works and the recordings that embody them have been merged. These are now all subject to simultaneous exploitation every time a recording is digitally transmitted. However, it is not possible to know with any degree of certainty whether users merely listen to streaming performances, download and retain perfect digital copies of the recordings involved, or both. The music industry's licensing practices lack credibility because they depend on the ability to draw these particular distinctions.

To date, the music industry has resisted change. From the start, those who benefited most from how the industry operated before the Internet arose, have insisted that the established relationships upon which their past successes were based be preserved as the digital music marketplace develops.

Even if the industry were now willing to undertake the transformation needed to prosper, it could not do so without Congressional assistance.

The rights of music industry stakeholders do not arise from the "free market." Congress, through the Copyright Law, specifies the rights that composers, authors, music publishers, recording artists and record labels shall have in their respective musical works and sound recordings. In turn, the business models that the industry may lawfully pursue are delimited by the nature and scope of the rights Congress has granted it. Accordingly, there cannot be a "free market" solution, as such, to the ongoing crisis in the digital music marketplace. Congress alone has the authority to induce the change that is needed.

An alternative to the existing rights structure and corresponding business model is needed for digital transmissions of music works and sound recordings. I suggest this:

III. A Newly-Created Right, Specific to the Digital Music Marketplace, Is Needed for Musical Works and Sound Recordings

A. Definition and Scope. Congress should aggregate the rights of composers, authors, music publishers, recording artists and record labels in their respective musical works and sound recordings and create a single, unified right for digital transmissions of recorded music. This "digital transmission right" would be a new right, not an additional right. It would subsume the parties' now-existing reproduction, distribution and public performance rights. These would

no longer have separate or independent existence for purposes of digital transmissions (though they would for all analog purposes).

Under the digital transmission right, the only act that would require a license would be a digital transmission, retransmission or further transmission of recorded music. Licenses would be made available without regard to whether particular transmissions resulted in sales, are more or less likely to promote sales, or may cause sales of recordings to be lost; whether recordings are transmitted for streaming, or downloading, or by some other means not yet devised; whether music programming is interactive or non-interactive, or contains this, that or another recording; whether the music service that provides the transmissions accepts or does not accept user-generated content; or whether it is advertiser supported, employs a subscription model, charges users on a per-listen or per-download basis, or has no revenue at all. The number of copies, if any, that are made in the course of transmissions (including any server copies, or ephemeral, transitory or buffer copies that are necessary to effect a transmission), the type of transmission technology used, and the file format in which recordings are transmitted would not be of concern. The presence or absence of any of these factors would not affect the availability of a license.

B. Ownership. Ownership of the digital transmission right in any particular recording would be held jointly by the composer(s), author(s), music publisher(s), recording artist(s) and record label with an interest in it. Each of these parties would be treated as a co-owner of the digital transmission right in the recording in question.

Regardless of the nature of their relationships to each other under pre-existing agreements, or to particular musical works or recordings under current law, under the digital transmission right each co-owner would have a non-exclusive right to grant non-exclusive licenses for digital transmissions of those recordings on any terms that they and their respective licensees find to be mutually acceptable. The only limitation on this authority would be the obligation to account to all co-owners for royalties earned.

C. Division of Royalties. The interests of composers, authors, music publishers, recording artists and record labels would each be allocated a 25% share of the total royalty earned from licensed digital transmissions of the recordings in which they are co-owners. In this way, singer-songwriters would receive 50% of all royalties earned from licensed

transmissions of their recordings, and 100% of those royalties if they also self-publish and produce their own recordings.

D. Voluntary Collective Management. The digital transmission right would be implemented through a combination of voluntary collective rights management and direct licenses.

In this regard, rights holders would be free to establish as many collectives as they wish; and, as a general matter, collectives would be permitted to operate in any manner they choose.

Individual composers, authors, music publishers, recording artists and record labels would be free to affiliate with a collective, or not to join any collective at all. Existing collectives to which rights holders may belong for administration of rights in their musical works or sound recordings under current law would not be permitted to interfere, either directly or indirectly, with their members' affiliation decisions under the newly-established digital transmission right.

Each party who joins a collective would grant it the non-exclusive right to license digital transmissions of all recordings in which that co-owner has an interest. This would include all recordings of musical works written by a composer or author, or owned by a music publisher; all recordings made by a recording artist; and all recordings in the catalog of a record label. Each collective's catalog would be composed of all these recordings, including those in which one or more co-owners had granted their rights to another collective. A license from a collective whose catalog contains a particular recording would be sufficient, standing alone, to authorize digital transmissions of that recording by any music service provider holding the license.

The operation of multiple collectives would be far from ideal. Because different collectives may license the digital transmission right in a particular recording, music service providers would find it difficult to determine with which collective(s) they must do business. Rights owners would also find it difficult to collect their full share of royalties if multiple collectives license recordings in which they have an interest. The added cost of overhead to operate multiple collectives to accomplish a single task would increase license fees for music service providers and decrease revenues available for distribution to rights holders.

A far better result would arise from the designation of a single collective management organization (the "Designated CMO") to administer the digital transmission right. The Designated CMO would operate on the basis of extended collective licensing and serve as a one-stop shop where licenses for the digital transmission right in all recordings could be secured in a single transaction at reasonable fees.

The Designated CMO would be authorized to represent not only the digital transmission right in recordings of which at least one co-owner was a member but also rights in recordings of which no co-owner was a member. The rights of co-owners who are not members of the Designated CMO would be protected. The Designated CMO would distribute royalties to non-member co-owners for licensed digital transmissions of their recordings if the non-member co-owners claim their royalties within three years after the royalties accrue. In instances where no co-owner of a recording is a member of the Designated CMO, the non-member co-owners would have the same three-year window in which to claim royalty payments.

In addition, in instances where no co-owner of a recording is a member of the Designated CMO, any co-owner of that recording may serve an opt-out notice on the Designated CMO. After that, the digital transmission right in the recordings specified in the notice would no longer be available through the Designated CMO.

In order to qualify as the Designated CMO, a collective would be required to demonstrate (either to the Copyright Office, the Copyright Royalty Board, or the Department of Justice) that, of all collectives vying for the designation, it is the most representative in terms of the number of composers, authors, music publishers, recording artists and record labels that it represents as well as the number of recordings in its catalog; that it has adequate financial capacity to operate on as large a scale as would be needed; and that is has adequate administrative capacity, including the technology and know-how necessary to license music service providers, monitor uses, and distribute royalties to entitled parties.

The Designated CMO would be required to operate in all respects on a transparent and non-discriminatory manner. It would be subject to government agency oversight or court supervision.

E. Parties Who Would Be Liable Under the Digital Transmission Right.

(i) Music Service Providers. The digital transmission right would be enforceable against those services that provide digital transmissions, retransmissions or further transmissions of recorded music.

Services that directly offer streaming, downloading or both would be engaged in transmissions of the recordings involved and would require a license.

Subject to the discussion of the treatment of Internet intermediaries in Part III.E.(iii) below, services that allow users to upload recorded music and that offer streaming or downloading of those recordings would be engaged in retransmissions of those. They would also be engaged in transmissions of any recorded music that the services provide on their own accord. In both instances, a license would be required.

There are certain transmissions for which more than a single service would be liable. These include, for example, the further transmission of recorded music through services that use linking and framing technology to incorporate content from a third-party service and that make it appear as if the content were part of the first service's overall offering. Insofar as the service that is framed transmits recorded music, it would need authorization under the digital transmission right without regard to the fact that it is being framed by another service. The service that frames transmissions of recorded music that originate from a third-party service would need authorization for that further transmission whether or not the service that is being framed has a license in its own right. However, while both services would need a license, each would pay a license fee based only on the benefit it realized from the transmissions in question.

Similarly, when an audio player that is resident on one service becomes embedded in a third-party service such that the transmissions of recorded music that originate from the first service are further transmitted to users of the third-party service, both services would need authorization under the digital transmission right. Again, however, each service would pay a license fee based only on the benefit it realized from the transmissions in question.

(ii) Internet Users. Internet users as transmission recipients would not incur any liability under the digital transmission right. Copying for personal use also would not require authorization. Users still may be required to pay network operators for Internet access, and to

pay music service providers for their activities in connection with particular services. But whether users listen to streams or download recordings; make one or many copies of a recording for personal use; or use recordings on one or several playback devices would have no effect on their obligation to music industry rights holders. None of this conduct would require users to obtain licenses or pay license fees under the digital transmission right.

In addition, Internet users would be exempt from liability even when they are the source of transmissions provided that they are not acting in the course of employment and that they do not otherwise derive a direct or indirect financial benefit from the transmission. The exemption would apply, for example, when users upload recordings to services that accept user generated content, or when they allow others to access their computers for purposes of P2P file- or stream-sharing or similar conduct. The transmissions themselves would not be authorized; but the users responsible for them would be exempt from copyright infringement liability.

(iii) Internet Intermediaries. Internet intermediaries have no general obligation to monitor their services for the purpose of discovering unauthorized uses of copyrighted content by their users. Instead, by complying with the notice and take down provisions of the DMCA, they enjoy safe harbor protection from secondary copyright liability for actions of their users. The safe harbor regime provides Internet intermediaries with the opportunity to make money from the unauthorized use of copyrighted content while avoiding both the high cost of defending against copyright infringement claims and the potentially devastating cost of copyright infringement damages.

Content owners complain that the notice and take down regime is unfair, in part, because it allows users to upload new and additional copies of works that were previously removed from the service. Content owners recently proposed an alternative to notice and take down that they call “notice and stay down.” This would require Internet intermediaries not only to remove the particular files designated in the take down notice but also to prevent the works in question from ever again being uploaded by a user of the service.

“Take down and stay down” goes too far. It will lead inexorably to imposition on Internet intermediaries of a general obligation to monitor the entirety of their services. If “take down and stay down” were implemented, major copyright owners – including the major record labels and

music publishers – would soon demand removal of all the works they represent. Internet intermediaries would be faced with a dilemma: Either monitor the billions of files uploaded by users in an ongoing effort to keep the content that is subject to the notice from again appearing on the service; risk infringement liability; or pay whatever license fees content owners may demand in the "free market."

I suggest this alternative that would apply only to categories of content that are available either through a compulsory license or through an extended collective license (as recorded music would be under the digital transmission right): Safe harbor protection would be limited to Internet intermediaries who are licensed by the Designated CMO discussed in Part III.D above. The safe harbor would only be needed with respect to recordings for which no co-owner was a member of the Designated CMO and for which an opt-out notice had been served. In all likelihood, this will apply to very few recordings, if any. The Internet intermediary would only ever be required to take down recordings that were subject to the opt-out notice.

In this way, the prohibition against generally requiring Internet intermediaries to monitor their services would be preserved; and Internet intermediaries would continue to be protected from potential liability for unauthorized uses of recorded music by users of their services.

F. Copyright Infringement Would Not Significantly Impair The Market for the Digital Transmission right. Unlike the market for sale of individual recordings which can be compromised in a matter of moments by a single unlicensed entity, whether or not particular transmissions are licensed would not significantly diminish the market for the digital transmission right over all. The Internet has become an indispensible and irresistible destination to which end users will return again and again to obtain access to music even if their personal music libraries contain copies of every recording ever made. The digital transmission right would be all but impervious to copyright infringement. Therefore, instead of seeking to throttle Internet transmissions of recorded music, the industry should actively promote the most widespread uses of music possible.

G. License Fees. I do not have a specific proposal for how license fees should be calculated under the digital transmission right, nor how much they should be. The setting of license fees is quintessentially the proper subject of negotiations between the interested parties. However, I suggest that license fees should reflect the full economic benefit realized

by licensed entities from their transmissions of recorded music. In addition, in the event that fees cannot be mutually agreed upon by the parties, they should be set either by the Copyright Royalty Board or a federal judge sitting as a rate court.

III. Conclusion.

The music industry is in free fall and it is dragging down other stakeholders with it. To date, all that the industry has accomplished through its brute force efforts is to waste time, lose money, and squander goodwill. If anything, the industry's efforts have resulted in fewer licensed transmissions of fewer recordings and slowed the growth of royalties that composers, authors, music publishers, recording artists and record labels otherwise may have earned.

The digital transmission right, administered as I have suggested, will bring about change that is directly and proportionately responsive to the challenges presented by the Internet; change that creates a new and fair balance between the rights of creators and music users; change that is technologically neutral; change that meets the needs of all the many competing stakeholders in the digital music marketplace. The digital transmission right will foster a legal marketplace for digital transmissions of recorded music with rules that are as simple, straightforward and clear as the context will allow; rules that are sufficiently flexible to adapt to the continually changing economic and technological environment of the global digital network.

Respectfully submitted

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