Before the
UNITED STATES COPYRIGHT OFFICE
Library of Congress
Washington, D.C.

In the Matter of **Music Licensing Study: Notice and Request for Public Comment**	**Docket No. 2014–03**

COMMENTS OF CTIA-THE WIRELESS ASSOCIATION®

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CTIA-The Wireless Association® offers these comments as its initial response to the Copyright Office's March 17, 2014 Notice of Inquiry on music licensing issues. 79 Fed. Reg. 14,739 (Mar. 17, 2014) (the "NOI"). CTIA appreciates the opportunity to comment in this important inquiry.

Introduction and Summary

CTIA offers the following thoughts:

- Any analysis of music licensing issues must be conducted in light of the public interest purpose of copyright law, with an eye towards maximizing the benefit to the public;

- The market for music performance rights is not competitive, is adversely affected by competition-destroying collectives and major publishers that abuse their extensive market power, and, as a result, must effectively be regulated;

- Music publishers successfully sought a firewall insulating music performance rights fees from consideration of sound recording performance rights fees and successfully urged (through their affiliated record companies) that sound recording rights are worth multiples of music rights, and should not now be heard to seek removal of that firewall;

- The law should be amended and streamlined to eliminate double-dip rights claims by making clear that streamed performances do not require a reproduction or distribution license, downloads do not require a public performance license, and server copies used only to make licensed or exempt public performances are exempt from liability; and

- The Copyright Office should ensure that the public performance right is not expanded in a way that threatens cloud computing.

CTIA elaborates on these points below.

CTIA is an international organization representing all sectors of wireless communications – cellular, personal communication services, and enhanced specialized mobile radio. A nonprofit membership organization founded in 1984, CTIA represents providers of commercial mobile radio services ("wireless telecommunications carriers"), mobile virtual network operators, aggregators of content provided over wireless telecommunications systems, equipment suppliers, wireless data and Internet companies, and other contributors to the wireless universe. A list of CTIA's members appears at http://www.ctia.org/membership/ctia_members/.

CTIA frequently participates in administrative proceedings and coordinates efforts to educate government agencies and the public about wireless issues. CTIA also has presented its views in testimony before Congress and has filed numerous amicus briefs in the federal courts on behalf of the wireless industry on a variety of issues, including copyright issues. *See, e.g.*, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

CTIA and its members have a substantial interest in the subject matter of the NOI. Wireless technology not only provides consumers with first-rate telecommunications service, but also provides a convenient and important means for wireless consumers to receive digital performances of music and to download a wide array of media products, including music, to their wireless devices. CTIA's members support the development of applications that enable users to discover new content. Among other things, CTIA's members have been instrumental in developing technologies and applications that enable their subscribers to store content in the "cloud" and access that content on a wide array of devices.

CTIA's members, either directly or through agreements with third-party service providers, offer interactive and non-interactive music streaming, access to satellite radio programming, permanent and limited music downloads, ringtone downloads, linear and on-demand video streaming, and access to games with full color graphics and embedded music. CTIA's members also transmit performances of recorded music to individuals placing calls to wireless customers in the form of "ringback tones"— sounds that replace the ringing that the caller hears when he or she calls a mobile telephone. Further, many of the media products and services that CTIA's members make available are available for preview using performances of short clip samples that are streamed over the Internet and wireless networks.

CTIA's members strive to provide their services to their customers at a reasonable cost. Thus, ready access to, and the cost of, music licenses are ongoing concerns. In light of these concerns, CTIA was an active participant in the Copyright Office's proceeding concerning whether streaming implicates the reproduction and distribution rights and may be subject to the section 115 compulsory license. Library of Congress, Copyright Office, Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, Docket No. RM 2000-7, 73 Fed. Reg. 66,173 (Nov. 7, 2008). CTIA also participated as an amicus before the ASCAP Rate Court and the Court of Appeals for the Second Circuit in the case deciding that music downloads did not implicate the public performance right. *United States v. ASCAP (Application Real Networks, Inc. & Yahoo! Inc.)*, 627 F.3d 64 (2d Cir. 2010) (hereinafter "*Yahoo!*").

Moreover, CTIA's members have been litigants before the ASCAP Rate Court, where they were instrumental in resisting ASCAP's efforts to demand public performance royalties for ringtone downloads. *See In re Cellco P'ship d/b/a Verizon Wireless*, 663 F. Supp. 2d 363 (S.D.N.Y. 2009) (hereinafter "*Verizon Wireless*") (holding that downloading a ringtone to a cell phone is a reproduction but not a public performance).[1] They also resisted ASCAP's attempts to discriminate in its royalty fees against new wireless means of transmitting video. *See ASCAP v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012) (rejecting ASCAP's discriminatory position and adopting rates consistent with past video licenses).[2]

CTIA members support protection of the legitimate rights of copyright owners. Indeed, CTIA members are among the leading legitimate performers and distributors of recorded music, and pay for the right to do both. Music publishers, and their songwriters, earn substantial performance royalties as compensation for CTIA members' public performance of musical compositions, and substantial mechanical royalties for CTIA members' offerings of downloadable music content, whether in the form of full track downloads or ringtones.

CTIA, however, strongly opposes duplicative compensation to music publishers (or to any copyright owner, for that matter) and redundant, burdensome rate-setting and administrative systems for the same economic transaction. Public performances are subject to the performance right; any copies that may be implicated in such performances should not also be subject to licensing under the reproduction or distribution rights (*e.g.*, mechanical licensing). Copyright Office DMCA Section 104 Report at 142-46 (Aug. 2001)**.** Similarly, downloads are digital phonorecord deliveries ("DPDs"), subject to the mechanical license; they should not also be subject to performance licensing. *Id.* at 146-48 ("It is our view that no liability should result under U.S. law from a technical 'performance' that takes place in the course of a download.") It makes no sense to make formalistic distinctions based on the technicalities of new transmission systems or to burden those wishing to provide legitimate, licensed music services with overlapping claims by different agents of the same copyright owner or multiple, expensive litigation processes in rate court and before the Copyright Royalty Board.

CTIA also supports the development of cloud-based computing services. CTIA members have invested heavily to provide such services, which offer the public

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[1] CTIA members Verizon Wireless and AT&T Mobility were parties in that case. CTIA filed an amicus brief.

[2] CTIA members Verizon Wireless and AT&T Mobility were parties in related cases that were set to be tried shortly after the MobiTV case. Those cases settled after the MobiTV decision. Verizon Wireless filed an amicus brief before the Second Circuit in ASCAP's unsuccessful appeal of the MobiTV decision.

convenient, efficient, and powerful computing and storage resources. Once an individual has lawfully acquired content, that content should be available to the individual on all of the user's devices and remotely. Moreover, individuals should be free to handle and manipulate their content as they see fit. The law should not place obstacles in the way of such uses or make the providers of cloud services the police or guarantors of user conduct.

In sum, CTIA has a direct interest in the issues raised by the NOI. Those issues will have significant ramifications for the public, the wireless industry, and CTIA's members.

I. Background: The Public Interest Purpose of Copyright

It is important for the Copyright Office to conduct its review of copyright law in light of the public interest purpose assigned to copyright law by the Constitution. The courts have made clear that copyright law does not exist to benefit authors and publishers. The law exists to benefit the public. Moreover, the Supreme Court has emphasized that dissemination of copyrighted works is as important as creation to fulfilling the constitutional goal. The interest of the public and the interest of fostering dissemination should be paramount in any report and recommendation made by the Register.

Article I, section 8, clause 8 of the Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.* (emphasis added). Thus, the power to enact copyright laws exists for a specific purpose – "to promote the Progress of Science."

The Supreme Court consistently has emphasized that the ultimate goal of copyright is to serve the public interest, not the author's private interest: "The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (emphasis added); *accord Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994) ("[T]he monopoly privileges that Congress has authorized ... must ultimately serve the public good."). "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration." *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948); *accord Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (observing that "[t]he primary objective of copyright is not to reward the labor of authors").

Copyright rights are granted to authors to induce them to create and to disseminate their creations. *See*, *e.g.*, *Paramount Pictures*, 334 U.S. at 158 ("[R]eward to the author or artist serves to induce release to the public of the products of his creative genius."); *Fogerty*, 510 U.S. at 526 (copyright is "intended to motivate the creative activity of authors"). "But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken,* 422

U.S. 151, 156 (1975). Moreover, "[e]vidence from the founding . . . suggests that inducing dissemination – as opposed to creation – was viewed as an appropriate means to promote science." *Golan v. Holder*, 132 S. Ct. 873, 888 (2012) (emphasis in original).

Copyright rights are not absolute property rights but statutory creations subject to important limitations that further the constitutional goal. *E.g.*, 17 U.S.C. §§ 102(b), 107-122. "The limited scope of the copyright holder's statutory monopoly ... reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature." *Aiken*, 422 U.S. at 156.

From the beginning, the Supreme Court consistently has held that copyright is not grounded in any theory of the author's natural right. It is solely a creature of statute, and the scope of the right is strictly limited by the statutory grant. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 659-64, 667-68 (1834); *Sony Corp.*, 464 U.S. at 429 n.10 (observing that copyright law "is not based upon any natural right" of the author and describing the balance between the public benefit from "stimulat[ing] the producer" and the public detriment from "the evils of the temporary monopoly" (quoting H.R. Rep. No. 2222 (1909)). The Courts of Appeals have agreed, observing that "copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public." *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (quoting Pierre Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1107 (1990)); *accord*, *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1262-63 (11th Cir. 2001) ("The copyright is not a natural right inherent in authorship."). In other words, claims by copyright owners that "we created it, so it is ours" are inconsistent with law and the Constitution and should not be given weight.

Further, the goal of copyright law is not to maximize the revenues of copyright owners or the return to authors. Rather, the goal is to provide an appropriate level of incentive to induce the creation and dissemination of an amount of creative work that maximizes the overall welfare of society, taking into account other uses to which productive resources could be put. Among other things, the law should recognize that once a copyrighted work is created, maximizing consumption of the work maximizes society's welfare. Unlike tangible property, where consumption by one limits consumption by others, uses of copyrighted works do not deprive others of the ability to enjoy the work.[3]

In other words, broad use and dissemination of copyrighted works is central to the constitutional scheme. Promoting use and dissemination should lie at the core of the Copyright Office's recommendations.

[3] In economic terms, consumption is non-rivalrous.

II. Music Performance Rights: The Law Should Ensure that the PROs' Collective Market Power Is Constrained and Provide Protection Against the Comparable Market Power of the Major Publishers. [NOI Questions 5, 6, and 7]

Questions 5, 6 and 7 of the NOI ask about the effectiveness of the current process for licensing the public performance of music generally, and about the ASCAP and BMI consent decrees specifically. The NOI specifically notes that the ASCAP and BMI decrees "were last amended well before the proliferation of digital music," and asks if the consent decrees are still justified. *See* NOI at 14,741 & Question 7. The recent decisions of the ASCAP and BMI Rate Court judges, who have extensive experience with the PROs' behavior, and the recent experience of CTIA's members in their dealings with the PROs, confirm that the decrees remain essential to foster competitive market pricing for music performance rights.

Due to the nature of the markets, SESAC and the major publishers also exercise substantial supra-competitive market power. That market power should also be controlled.

A. The Market for Music Performance Rights Is Not Competitive.

Copyright law principles and market structure coalesce to eliminate any truly competitive marketplace for music performance rights. These combined factors give the PROs enormous market power insulated from competitive forces.

First, ASCAP, BMI and SESAC aggregate enormous numbers of musical works, which would, in a competitive market, compete for use. Second, the large music publishers have been allowed to merge to the point that the publishing industry is now highly concentrated. Three major publishers control the vast majority of musical works.

Third, copyright law allows rights to be licensed separately. Thus, when programs or commercials that are intended for public performance are produced, the producers obtain only reproduction and distribution rights and need not obtain public performance rights. Indeed, the PROs typically will not grant public performance rights to program producers because they do not actually perform the programs they produce. Thus, it falls to the entity making the performance to clear the performance right.

Unfortunately, however, once a program or ad is produced, or "in the can," the entity making the performance is unable to engender competition among possible suppliers of the performance right. The performing entity must take the program as is and cannot alter it. This gives the licensor of the performance right the ability to exercise "hold up" power – the licensor can seek to charge up to the full value of the entire program or ad, unconstrained by the actual value contributed to that program or ad by the licensor's music.

Fourth, the PROs typically offer only licenses to their entire repertory. Thus, they effectively eliminate any competition that may exist among their members, among the

PROs, between the PROs and their members, or, for that matter, between the use of music and other programming matter.

Fifth, these problems are compounded by the near-impossibility of identifying the potential licensors of any particular performance right. Although the PROs offer on-line searches of their databases, they do not provide a reliable or effective means of identifying the content of each PRO's repertory. As the Magistrate Judge considering a preliminary injunction against SESAC found, SESAC's online search tool "does not provide a reliable means for determining what is SESAC's repertory." Report and Recommendation at 15, *Radio Music License Committee v. SESAC Inc.*, No. 12-cv-5807 (E.D. Pa. Dec. 23, 2013). The court noted that the tool "expressly disclaims that it is accurate, advises stations that it could change on a daily basis, and limits the user to 100 searches per session." *Id.* at 15 n.13. ASCAP's search tool contains a similar disclaimer, stating that "ASCAP makes no representations as to its [search tool's] accuracy. ASCAP specifically disclaims any liability for any loss or risk which may be incurred as a consequence, directly or indirectly, of the use or application of any information provided in the Database, or for any omission in the Database." All of the search tools limit searches to one work at a time, making searches for numerous works impractical.

As a result, it is effectively necessary for an entity engaging in substantial numbers of public performances, such as a wireless carrier or a service making streamed performances, to obtain licenses from all three PROs. The major publishers, of course, understand the anticompetitive effects of the same behavior. Even where they seek to license their catalogs directly, they strategically withhold information about their content. *See In re Pandora Media, Inc.*, No. 12 Civ. 8035 (DLC), 2014 WL 1088101 at *35, *36, *38 (S.D.N.Y. 2014) (describing significance of publisher refusals to provide Pandora with usable lists of their catalogs).

The judges that oversee the PROs' conduct have continued to recognize the PROs' market power and to curb their abuses, long after "the proliferation of digital music," which the NOI implied, without explanation, cast doubt upon the continued validity of the ASCAP and BMI consent decrees. NOI at 14,741. In 2005, the United States Court of Appeals for the Second Circuit, which oversees the rate courts that oversee the consent decrees, recognized that the "rate-setting courts must take seriously the fact that they exist as a result of monopolists exercising disproportionate power over the market for music rights." *United States v. BMI (Application of Music Choice)*, 426 F.3d 91, 96 (2d Cir. 2005). As recently as 2012, that same court stated that "ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music." *ASCAP v. MobiTV, Inc.*, 681 F.3d 76, 82 (2d Cir. 2012); *see Yahoo!*, 627 F.3d at 76.

Courts examining SESAC's market power also have concluded that SESAC functions as a monopolist and that there is evidence that SESAC has acted unlawfully. *See*, *e.g.*, *Meredith Corp. v. SESAC, LLC*, No. 09 Civ. 9177(PAE), 2014 WL 812795 at *36 (S.D.N.Y. 2014) ("In sum, there is sufficient evidence upon which a jury could find that SESAC took action to maintain and fortify its monopoly over licensing of its affiliates' work, by adopting licensing practices that eliminated all realistic competition with its blanket license."); *Radio Music License Committee v. SESAC Inc.*, Report and Recommendation at 31-33 (finding that Plaintiffs had made a prima facie case of a violation of Sherman Act sections 1 and 2, and noting that "SESAC has 100% of the market power over the unique collection of works in their repertory and there are no 'real' alternatives to SESAC's blanket license").

The only protection that users have against ASCAP's and BMI's monopoly power is the protection provided by the consent decrees. Those should be retained and, as discussed below, strengthened.

B. The Recent Experience of CTIA's Members Demonstrates that the Consent Decrees Continue to Provide an Essential Check on the PROs' Abuse of Their Collective Market Power.

CTIA members have experienced first-hand the abuses of market power that the PROs continue to perpetrate. In one case, the PROs asserted the right to collect fees for activities that did not implicate the performance right. In another, they sought to impose hugely discriminatory fees on wireless service providers for the music included in video programming. In both cases, the rate courts were essential in protecting the performing entities and the public.

1. The PROs' Over-Reaching Claims Relating to Music Downloads

The PROs asserted for years that downloads of music files, including ringtones, implicated the public performance right. In other words, according to ASCAP and BMI, downloads for which music publishers were fully compensated under the section 115 mechanical license, also required a further payment for a public performance license, due to various theories, including the PROs' construction of the "transmit clause" found in the definition of "to perform or display a work 'publicly.'" 17 U.S.C. § 101.

The PROs used their market power to parlay those claims into millions of dollars of ill-gotten gain. These claims for double-dip compensation were ultimately challenged in the ASCAP Rate Court by services that offered music and ringtone downloads. *See Yahoo!*, 627 F.3d 64 (full downloads); *Verizon Wireless*, 663 F. Supp. 2d 363 (ringtones).

The rate court, and then the Second Circuit, consistently held that downloads do not implicate the public performance right. See *Yahoo!*, 627 F.3d at 71 (downloads do not implicate the public performance right); *Verizon Wireless*, 663 F. Supp. 2d at 378 (ringtones do not implicate the public performance right). In other words, the rate court process established by the consent decrees served as an essential check on the PROs' abuse of their market power.

2. ASCAP's Efforts to Discriminate Against Mobile Video Services

CTIA's members also faced ASCAP's abuse of its monopoly power when they sought a reasonable license for their mobile video services. In response to the request, ASCAP sought a radical change to its longstanding, consistent paradigm for licensing music in video programming. ASCAP eschewed the fee structure that it had long applied in the cable and broadcast television industry, where license fees varied depending on music intensity of the programming between 0.9% and 0.1375% of the programming service's revenue (which does not include the revenue of the entity distributing the content to the public). Instead, ASCAP sought to nearly triple its rates.[4]

Moreover, ASCAP sought to apply those inflated rates to the revenue earned for both the programming and its public distribution. In other words, ASCAP attempted to use its monopoly power to leverage itself into a share of revenues that were earned for the wireless carriers' technical advances and huge capital expenditures in developing and maintaining their networks, revenues that were not reasonably attributable to the music in video programming.

The combined effect of the higher rate and inflated revenue base was that ASCAP sought fees from the wireless industry that were many multiples of the fees it obtains for the same audiovisual performances in other media. ASCAP's attempt to discriminate was particularly egregious given that its cable licenses (and at least one major network broadcast license) encompassed performances of identical content over identical wireless media.

Fortunately, the ASCAP Rate Court and Second Circuit rejected ASCAP's unprecedented attempt to discriminate among media. *In re Application of MobiTV, Inc.*, 712 F. Supp. 2d 206 (S.D.N.Y. 2010), *aff'd sub nom. ASCAP v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012). The district court found that ASCAP's witnesses were not credible, 712 F. Supp. 2d at 224 n.35, and that its case lacked an "explanation of guiding economic principles or any coherent theory," *id.* at 239.

ASCAP's efforts to discriminate against mobile video services shows the lengths to which the PROs will go to exercise their collective monopoly power and the continuing need for the consent decrees and rate courts to rein in that power.

C. SESAC's Licensing Practices Provide an Example of What Music Licensing Would Be Without the Consent Decrees.

The SESAC experience provides an example of what the world would look like without the ASCAP and BMI consent decrees – unconstrained price increases charging

[4] ASCAP sought to apply a rate of 2.5% to revenue that had been adjusted by a "music use adjustment factor," which was determined by the ratio of ASCAP's traditional cable TV rate for a type of programming to 0.9%. Thus, each applicable rate equaled the corresponding cable rate multiplied by 2.5/0.9 (2.78).

disproportionate amounts for the limited music that is performed. As a result of its behavior, SESAC has been sued for antitrust violations by both the Television and Radio Music License Committees. As discussed above, early decisions in both cases confirm that SESAC possesses collective market power, takes steps to eliminate competitive licensing by its affiliated publishers, and acts to ensure that it is able to extract supra-competitive license fees. These abuses should be curbed, and SESAC should be subjected to effective regulation comparable to that imposed on ASCAP and BMI.

D. While Direct Licensing Remains an Important Check on PRO Abuses, It Cannot Replace the Consent Decrees Due to the Lack of Competition Among Major Publishers. [NOI Question 14]

NOI question 14 asks about direct performance licensing by music publishers. As the rate courts found in the DMX cases, direct licensing, particularly by smaller independent publishers, provides an important check on the PROs' market power and offers some competition. Unfortunately, however, the major publishers have been allowed to merge under the cover of the ASCAP and BMI consent decrees to the point that the industry is highly concentrated. Moreover, due to this consolidation in the industry, the major publishers offer catalogs that every user must license, so they are no longer substitutes. Thus, the major publishers do not compete with each other. Rather, as the ASCAP Rate Court found in the recent Pandora case, the major publishers exercise extraordinary market power and are willing to abuse that market power to extract supra-competitive license fees.

In the recent Pandora case, the ASCAP Rate Court found in no uncertain terms that "Sony and UMPG each exercised their considerable market power to extract supra-competitive prices" in their negotiations with Pandora. *Pandora Media*, 2014 WL 1088101 at *35. The court found that the negotiations were conducted in a manner that left Pandora with no alternative: "it could shut down its service, infringe Sony's rights, or execute an agreement with Sony on Sony's terms." *Id*. According to the court, "ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their negotiations with Pandora. Because their interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified." *Id.* at *35-36.

As further evidence of the flaws in a direct-license only regime, when the major publishers tried to withdraw their digital rights from ASCAP and BMI and license them directly, they found it virtually impossible to administer their own rights. Instead, they turned back to ASCAP and BMI to administer the withdrawn rights for the vast majority of users. *See id.* at *17-18. This showed the withdrawal for what it was: an effort by the major publishers to exercise enormous market power free from the constraints of the consent decrees. Accordingly, while direct licensing is an important alternative to the PRO blanket licenses under the consent, direct licensing cannot be a substitute for the consent decrees.

E. The Proposed Change to the Section 114(i) "Firewall" Is Inappropriate and Should Be Rejected. [NOI Question 6]

NOI Question 6 asks specifically about the impact on rate setting under the ASCAP and BMI consent decrees of section 114(i), which prohibits the courts from taking into account the license fees payable for sound recordings under section 106(6). The NOI refers to this preclusion as "significant," NOI at 14,741 n.7, but fails to describe the reason this provision is in the law or to provide any evidence supporting its significance.

In fact, the provision was sought by the music industry, which was concerned that (i) that the new sound recording public performance rights fees would be seen by the rate court judges as reducing the pool of money available to pay publishers, and (ii) the sound recording fees might be less than existing musical works fees, thus leading to a reduction of musical works fees. Now that the publishing industry has seen how much the recording industry has been awarded by the Copyright Royalty Board, it is questioning its prior judgment.

Unfortunately, while the ASCAP and BMI Rate Court Judges recently have performed their function well and reined in the collective market power of ASCAP and BMI, the Copyright Royalty Judges have been less successful in controlling the market power of the major record companies, allowing the rates for sound recording licenses to reach supracompetitive levels. Moreover, the digital sound recording performance right for interactive streaming is not subject to any rate regulation. Rather, the record companies are entitled to charge whatever they can. As the FTC recently found in approving the merger of Universal and EMI, "Commission staff found considerable evidence that each leading interactive streaming service must carry the music of each Major to be competitive. Because each Major currently controls recorded music necessary for these streaming services, the music is more complementary than substitutable in this context, leading to limited direct competition between Universal and EMI." Statement of FTC Bureau of Competition Director Richard A. Feinstein, In the Matter of Vivendi, S.A. and EMI Recorded Music, September 21, 2012. In other words, the major record companies do not compete with each other to license interactive services. Accordingly, sound recording performance rights are not a reasonable proxy for competitive market rates.

The publishers' new-found concern about the disparity between musical work and sound recording rates is particularly ironic because the disparity exists only because of positions taken within the music industry. From the beginning, services subject to the new sound recording performance right argued that sound recording rights fees should be roughly equivalent to the fees set by the ASCAP and BMI Rate Courts for musical work rights.[5] The recording industry opposed this position vigorously, arguing that record

[5] *See* Library of Congress, Copyright Office, *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, Final Rule and Order, 67 Fed. Reg. 45,240, 45,242 (July 8, 2002) ("*Webcasting I*"); *See* Copyright Royalty Board, *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Final Rule and

companies invested more resources at higher risk than music publishers and should reap performance rights fees that were many times musical works rights fees.[6] Virtually all of the record companies making these arguments had publisher affiliates, who are now the very entities objecting to the result upon which their own affiliates had insisted.

The publishers' objections to the existing rate disparity has led some in Congress to introduce a bill misleadingly named the "Songwriter Equity Act," H.R. 4079, 113th Cong. (2d Sess. 2014). That bill would eliminate the preclusion set forth in section 114(i), allowing publishers to argue that their fees should be related in some way to sound recording rights fees. The bill, however, would do so in a one-sided manner, expressing the "intent of Congress" that sound recording rights "not diminishing in any respect" the fees payable for musical works. H.R. 4079, § 2. The bill would go further, by prohibiting the Copyright Royalty Board, when setting sound recording rights fees, to construe the enactment of the bill as a Congressional recognition that the level of musical works fees should be taken into account in setting sound recording fees. *Id.*, § 3.

In other words, the publishers want it both ways – they want the higher sound recording fees to be relevant in setting their fees, but they want to protect their affiliate record companies and ensure that sound recording fees are not dragged down by much lower musical works fees. That makes no sense. If musical works fees and sound recording rights fees are to be related to each other, the relationship logically must flow both ways. Moreover, if sound recording rights fees are relevant in setting musical works fees, Congress should not pre-determine that the direction of relevance is to increase the fees.

CTIA submits that the rate setting process of the ASCAP and BMI Rate Courts has led to license fees that are far closer to the competitive market goal than the sound recording fees set in the past by the Copyright Royalty Board. If there is a relationship between sound recording fees and musical works fees, the law should be amended to ensure that the CRB takes musical works fees into account rather than to take the opposite approach sought by the publishing industry.

Order, 72 Fed. Reg. 24,084, 24,092 (May 1, 2007) ("*Webcasting II*").

[6] *See Webcasting I*, Proposed Findings of Fact and Conclusions of Law of the Recording Indus. Ass'n of Am., Inc., at 270-309 (Dec. 21, 2001); *Webcasting II*, 72 Fed. Reg. at 24,094.

III. The Law Should Be Amended to Simplify and Streamline Digital Rights. [Related to NOI Questions 4, 8, and 24]

The law relevant to music licensing is an incoherent mess, particularly as it applies to the digital environment. Music licensors claim that public performances implicate the reproduction and distribution rights. As CTIA's members discovered, agents of those same music licensors assert that distributions implicate the public performance right. A longstanding exemption that should allow reproductions to be made when they are used solely to effectuate permitted public performances is outmoded and riddled with limitations that create substantial risk.

The problems of duplicative license claims are compounded because different representatives of the same copyright owners typically license the reproduction and the public performance rights. Moreover, virtually all participants in the market have recognized that the licensing regime for the reproduction and distribution rights, which requires specific monthly reporting and payment, is complex and burdensome.

NOI question 4 asks "[f]or 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?" That asks the wrong question and suggests the wrong answer.

Rather, the law should be revised to eliminate these complexities. Public performances should not require a mechanical license. Distributions should not require a public performance license and should be licensed under a blanket mechanical license that is priced in a way that fosters competitive market alternatives. The server copies used for both types of transmissions should be permitted without further need for a license. To the extent that these issues are not covered in questions raised in the NOI, they should be. *See* NOI Question 24.

A. Streamed Performances Do Not and Should Not Require a Reproduction or Distribution License. [NOI Questions 4, and 24]

When a service makes digital public performances over the Internet or over wireless networks, it is required to pay the copyright owner of the musical composition and of the sound recording for the exploitation of their respective works under the public performance right. The public performance of the musical work is typically licensed by the applicable PRO. The ASCAP and BMI Rate Courts recently have done an excellent job ensuring that the licenses are priced at a level that approximates the fees that would be charged in a competitive market, taking into account the economic value of the performance. As discussed above, the sound recording copyright owners are paid license fees that far exceed the rates that would exist in a competitive market.

In other words, the copyright owners are already paid fees at or above a level that accounts for the economic value of the performance. It makes no economic sense for a service making such performances to have to pay even more for reproductions that occur simply as an artifact of the transmission technology that is used. Any such additional payment will create a disincentive for distribution that will necessarily result in fewer transmissions being made, to the detriment of the public.

The Copyright Office recognized this reality when it wrote its 2001 Report to Congress in response to section 104 of the Digital Millennium Copyright Act. The Office stated in clear and certain terms that "Temporary copies incidental to a licensed digital performance should result in no liability." DMCA Section 104 Report at 142. As the Office recognized:

> [t]he economic value of licensed streaming is in the public performances of the musical work and the sound recording, both of which are paid for. The buffer copies have no independent economic significance. They are made solely to enable the performance. The same copyright owners appear to be seeking a second compensation for the same activity merely because of the happenstance that the transmission technology implicates the reproduction right, and the reproduction right of songwriters and music publishers is administered by a different collective than the public performance right. The uncertainty of the present law potentially allows those who administer the reproduction right in musical works to prevent webcasting from taking place – to the detriment of copyright owners, webcasters, and consumers alike – or to extract an additional payment that is not justified by the economic value of the copies at issue.

Id. at 143. The Section 104 Report was correct.[7]

Moreover, there is a strong argument under current law that buffers created as an artifact of a transmission technology used to make a performance are not cognizable reproductions within the meaning of the Copyright Act. *See*, *e.g.*, *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008) (buffers used to effectuate a performance are not fixed and do not implicate the reproduction right); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550-51 (4th Cir. 2004) (RAM buffers used to effectuate a digital transmission are not fixed). To the extent that they may be considered copies under current law, Congress should clarify the law to make clear that buffers are not cognizable copies or are exempt from copyright liability, not to find a means to double charge for an activity whose economic value is in the performance.

Unfortunately, the NOI neglects the reasoning and finding of the Section 104 Report and instead misleadingly asserts that "[t]he Copyright Office has thus interpreted

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[7] Indeed, the recommendation of the Section 104 Report in this regard did not go far enough. The same reasoning applies to performances that are exempt from liability under specific exemptions adopted by Congress. Where the primary economic activity at issue is a public performance, and Congress determined that there should be no liability for that performance, it makes no sense to undermine Congress' determination by requiring the user to obtain a license under one of the other rights that may be incidental to the technology used to make the performance.

the Section 115 [mechanical] license to cover . . . the server and other reproductions necessary to engage in streaming activities." NOI at 5. Actually, the Office declined to find that a stream was, in fact, a DPD subject to the reproduction and distribution rights. Library of Congress, Copyright Office, Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries (Docket No. RM 2000–7), Interim rule, 73 Fed. Reg. 66,173, 66,174 (Nov. 7, 2008) ("The Office is not currently prepared to issue a regulation that definitively addresses whether such copies are within the scope of the compulsory license. . . . As such, the interim regulation takes no position on whether . . . and when it is necessary to obtain a license to cover the reproduction or distribution of a musical work in order to engage in activities such as streaming."). Rather, the Office held only that, <u>if</u> a stream resulted in a DPD, the mechanical license would cover the server and other reproductions necessary to engage in the activity.

CTIA understands that the Office was considering adopting a rule that streaming results in DPDs in order to fill a hole in the law – there is no clear exemption or means to license the server copies used by streaming services to make their performances. The Copyright Office was constrained in 2008 by the terms of existing law. Unfortunately, the solution being considered by the Copyright Office, if adopted, would have destroyed the longstanding distinction in the law among distributions, reproductions, and public performances and would have created major inconsistencies in other contexts. For example, section 114 includes a statutory license for certain non-interactive digital sound recording performances. Section 112(e) includes a statutory license for server copies used to make those licensed performances as long as no copies are made from those copies. There is, however, no license for buffer or other downstream "phonorecords" that might be created in the course of the performance, and any such copies could vitiate the section 112(e) statutory license. In other words, if the Office had decided that streaming results in the distribution of copies of musical works, it would necessarily also result in the distribution of phonorecords of sound recordings, effectively converting Congress's two sound recording statutory licenses into an absolute right to license the downstream incidental phonorecords. That would have made no sense and would have destroyed the statutory license system Congress created.

Fortunately, the NOI seeks recommendations to improve the law and is not constrained by the limitations and ambiguities of the law as it now exists. There is a better way to fix the music server copy hole, which CTIA discusses below in Part III.C.

For the reasons set forth in the Section 104 Report, the Office was right when it refused to establish the principle that streaming implicates the reproduction and distribution rights. It should recommend that Congress clarify the law to ensure that reproductions that are incidental to a licensed or exempt public performance (and that serve no other purpose) do not create liability under the Copyright Act.

B. Downloads Do Not and Should Not Require a Public Performance License.

As discussed above, it was only when challenged in the rate courts that the music PROs were forced to drop their claims for double-dip compensation for downloads under the guise of the public performance right. These claims resulted from the arguable lack of clarity in the drafting of the transmit clause defining when a performance was public.

The inappropriateness of these claims, like the inappropriate claims relating to buffers discussed above, was addressed by the Copyright Office in its DMCA Section 104 Report. As the Copyright Office clearly stated in its heading on page 146 "[p]ublic performances incidental to licensed music downloads should result in no liability." The Office recognized that this was "symmetrical" to the difficulty of the double-dip claims relating to buffers:

> We view this issue as the mirror image of the question regarding buffer copies. We recognize that the proposition that a digital download constitutes a public performance even when no contemporaneous performance takes place is an unsettled point of law that is subject to debate. However, to the extent that such a download can be considered a public performance, the performance is merely a technical by-product of the transmission process that has no value separate from the value of the download. If it is a public performance, then, we believe that arguments concerning fair use and the making of buffer copies apply to that performance. In any case, for the reasons articulated above, it is our view that no liability should result under U.S. law from a technical "performance" that takes place in the course of a download.

DMCA Section 104 Report at 147-48.

Here, too, the Office got it right in 2001. Any revision to the definition of public performances should make clear that downloads do not implicate the public performance right to prevent abusive double-dip claims in the future.

C. Server Copies Used to Make Licensed or Exempt Performances Should Be Exempt, and Archaic Conditions on the Relevant Exemptions Should Be Removed.

Source copies that are used for no purpose other than to make a licensed or exempt performance have, traditionally, been exempt from copyright liability under a provision called the "ephemeral recording" exemption. It is contained in section 112(a) of the Copyright Act and applies both to sound recordings and the musical works contained in the sound recordings. Unfortunately, the exemption is subject to limitations that do not reflect modern realities.[8] Thus, entities making permitted public performances remain at risk for claims of copyright infringement. Both the recording industry and music publishing industry have used claims of violations of the terms of the

[8] The exemption was created during the 1976 revision of the Copyright Act and was crafted to reflect the technology of the time – namely, the use of program tapes by radio and television stations to facilitate their performances. *See* H.R. Rep. No. 94-1476, at 101 (1976) (noting that "the need for a limited exemption [for ephemeral recordings] because of the practical exigencies of broadcasting has been generally recognized.").

exemption and statutory license in litigation and legislative efforts to obtain inappropriate leverage. *See*, *e.g.*, *Atlantic Recording Corp. v. XM Satellite Radio*, Complaint Count IV (S.D.N.Y. May 16, 2006) (asserting willful infringement based on ephemeral recordings used for licensed performances as leverage for complaint against receiver with recording function)**;** RIAA Demand Letter to Webcasters, June 1998 (asserting liability for reproductions used for nonsubscription webcasting, leading in part to DMCA expansion of sound recording performance right).[9]

The existing exemption fails in a number of important respects:

- First, the section 112(a) exemption is limited to a single copy. Digital services often require multiple copies. Notably, the section 112(e) statutory license permits multiple copies of sound recordings (but does not apply to musical works).

- Second, the 112(a) exemption (and the 112(e) statutory license) prohibit the making of copies from the exempt copy. Modern transmission technologies often require the making of buffers or caches, which may or may not be cognizable "copies" under existing law.

- Third, section 112 limits the performances for which the exempt ephemeral recordings are used to performances made "within the local service area" of the transmitter. It has been argued that this limitation excludes Internet streaming. Notably, the section 112(e) statutory license removes this condition with respect to ephemeral phonorecords of sound recordings, but there arguably is no similar exemption or license for musical works.

- Fourth, both the exemption in section 112(a) and the statutory license in section 112(e) require the server copy to be destroyed within six months of the first performance. That condition makes no sense in a world of digital music servers and likely is being honored in the breach, creating a substantial risk of claims of copyright infringement.

- Fifth, section 112(a) applies to "transmission programs," a confusing term that may or may not apply to digital servers storing individual sound recordings. Again, that limitation makes no sense in today's world and is not part of section 112(e).

When the recording industry and the Digital Media Association (DiMA) negotiated the expansion of the sound recording performance right in 1998, they also created a statutory license for source/server copies of sound recordings used in licensed performances in section 112(e). The Copyright Office opposed this statutory license in

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[9] Available at https://web.archive.org/web/19980703045450/http://www.mp3.com/news/058.html.

1998 and restated its opposition and its belief that an exemption should be enacted in the DMCA Section 104 Report. In that report, the Copyright Office commented that the Section 112(e) ephemeral recording license "can best be viewed as an aberration." *See* DMCA Section 104 Report at 144 n.434. The Office went on to say that it did not "see any justification for the imposition of a royalty obligation under a statutory license to make copies that have no independent economic value and are made solely to enable another use that is permitted under a separate compulsory license. Our views have not changed in the interim, and we would favor repeal of section 112(e) and the adoption of an appropriately-crafted ephemeral recording exemption." There is no reason that a service making a licensed (or exempt) performance should have to pay additional compensation for server copies that have no purpose other than to facilitate the performance. In other words, an exemption makes sense; a statutory license does not.

Moreover, even on its own terms, the section 112(e) statutory license fails in several respects:

- First, although the statutory license is broader than the exemption, it is still subject to some of the unreasonable limitations of the section 112(a) exemption, including the prohibition on copies from copies and the six month destruction requirement; and

- Second, Congress did not create a statutory license applicable to musical works or expand the exemption to cover server copies of musical works, leaving a gap that publishers have exploited.

Copies or phonorecords that are used solely to facilitate a licensed or exempt performance should not bear copyright liability. The copyright owner either is paid for the performance, or Congress has decided it should not be paid for the performance. <u>Thus, the ephemeral recording exemption in section 112(a) should be broadened for both musical works and sound recordings, and the statutory license in section 112(e) should be eliminated</u>.

The ephemeral recording exemption is designed to ensure that transmitting entities that are providing performances to the public can operate efficiently and without uncertainty and risk. These performances are already fully compensated or have been deemed exempt from copyright liability. There should be no further payment needed to make copies used only to facilitate the permitted performance.

IV. The Office Should Ensure that Unreasonable Expansions of the Public Performance Right Do Not Threaten Cloud Computing. [NOI Question 24]

CTIA members have invested heavily in cloud computing. Cloud computing refers to the practice of accessing a network of remote computers on the Internet or wireless networks to store, manage, and process data. Cloud computing unlocks enormous new value for businesses, consumers, and the economy as a whole, by making computing and storage resources available in an efficient, flexible, and secure manner. It also gives people the ability to access their own documents, email, music collections, and other data across multiple wired and wireless devices, remotely and seamlessly.

Cloud computing depends on the proper limitation of copyright rights, most notably the public performance right. Constructions of the law that discriminate against remote activities threaten cloud computing services with potentially massive liability and would chill investment in this exciting new sector of the economy.

Cloud computing, by its nature, allows users to store content remotely and then transmit it back to themselves on demand. Under a proper construction of the law, such transmissions should be considered private performances that do not implicate the public performance right. If such transmissions do implicate the public performance right, cloud computing would be subject to the whim of an unknowable and uncountable array of copyright owners.

The following principles relating to the performance right are essential to protect the continued growth and vitality of cloud computing.

- When a user directs a computer to store a personal copy of a work, a subsequent transmission of that copy back to the same user is a private performance, not a public performance;

- In assessing whether a performance is public or private, the physical location of the devices involved is irrelevant;

- The fact that multiple users may store or transmit the same work does not transform a number of otherwise individual private performances into a single public one;

- Volitional conduct is a necessary element of direct liability.

CTIA is aware that the Supreme Court is considering the scope of the performance right in the *Aereo* case. The amicus brief in which CTIA participated in that case expands on these principles. Brief Amici Curiae of Center for Democracy and Technology, CTIA-The Wireless Association at 9-20, *ABC v. Aereo, Inc.*, No. 13-461, (U.S. Mar. 3, 2014).

The Copyright Office should be vigilant to ensure that the public performance right is not expanded in a way that threatens cloud computing. If needed, the Copyright Office should recommend to Congress that the right be clarified to protect and encourage the use of cloud computing technology. If, the right continues to be construed in a way that does not threaten cloud computing, the Copyright Office should resist calls to expand the right in ways that do.

CTIA appreciates the Copyright Office's consideration of its comments and looks forward to working with the Copyright Office on these important issues.

Respectfully submitted,

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