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SUBMITTED ELECTRONICALLY

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United States Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000

Re: Music Licensing Study Notice and Request for Public Comment
[Docket No. 2014–03]

Dear General Counsel Charlesworth:

These comments are respectfully submitted in response to the Copyright Office's Notice of Request for Public Comment dated March 17, 2014 relating to music licensing as enumerated in the Notice.[1]

I write on my own behalf and not on behalf of any client. No one has suggested that I make any of these comments, and indeed I have written about some aspects of these issues before in the public media as well as to the Copyright Office in previous public comments.[2]

As I have practiced law in the music industry for some twenty-five years, I will necessarily draw on discussions I have had over the years with people about working under the laws and regulations made in Washington, experiences in my practice and my own thoughts as an observer of public policy. While I think most people would think of me as a music lawyer typically on the side of artists and independents, since 1998 I have also represented many "music tech" companies in negotiations that were, frankly, occasionally frustrating for a variety of

[1] 78 FR 14739 (March 17, 2014).
[2] Comment of Christian L. Castle, In the Matter of the Mechanical and Digital Phonorecord Delivery Compulsory License, Proposed Regulations for Reporting Monthly and Annual Statements of Account for the making and distribution of phonorecords, Docket No. 2012-7 (October 25, 2012).

reasons. In my work I have always sought to advance the music business--sometimes in spite of itself. I will try to do the same here.

I will address what I perceive as three themes running through the subtext of many of the excellent questions presented in the Notice of Request for Public Comment, especially those applicable to songs and songwriters[3]: The lack of reliability of royalty payments and accountings under statutory licenses, the continued utility of the Section 115 license and the declining utility of the consent decrees applicable to ASCAP and BMI.

1. Audit Right under Section 115 Compulsory Licenses

The statutory license under Section 115 has no audit right. This means that the government compels songwriters to license their works, sets the rate at which they must license, but does not provide an opportunity for the songwriter to determine if they got a straight count from the compulsory licensee.

There are three other comparable licenses in the Copyright Act—all give the copyright owner an audit right.

I fail to understand why songwriters are not allowed to "trust, but verify." Developing an audit provision for Section 115 need not be an onerous task as Section 114 already has a very serviceable audit right for sound recordings complete with regulations that could nearly be incorporated whole into Section 115 with suitable changes for the nature of the works concerned.

In the absence of an audit right, songwriters are expected to believe that the certified public accountant certifying their royalty statement using the required language 37 C.F.R. 201.19 has actually examined the preparation of the royalty statement concerned. Given that there are potentially millions of transactions to be certified in the statements for a service of any size, it should come as no surprise that I have yet to meet anyone who actually believes the certification.

This disbelief does not necessarily mean that the licensee's C.P.A. is misrepresenting their work. However, it does suggest that there may be some

[3] I will often refer to "songwriters" in this comment but do not intend to exclude the songwriter's publisher or administrator. As the rights start with the songwriter, I assume that the interests of the publishers and songwriters are aligned. This approach also avoids having to repeat "and publishers" or "and independent songwriters," etc.

liability avoidance shortcut being used by the C.P.A. and their employer in the background that may satisfy the C.P.A.'s ethical obligations and insurance requirements but that is not disclosed to the songwriter by means of the required certification language.

This could all be avoided if in addition to the certifications, a songwriter could demand a royalty examination in line with the rights granted to sound recording owners under applicable parts of Section 114.[4]

Some might argue that there could be a multiplicity of audits under Section 115 that might inconvenience the compulsory licensee. I would suggest that there is no greater likelihood of audits against digital services than there is against record companies. Being audited is a cost of doing business long borne by record companies and seems a fair requirement given the great benefits conferred on licensees by the compulsory license. Respectfully, I do not view this as a quid pro quo requiring the songwriter to give up something else in order to get a straight count. Rather, I would respectfully suggest that the exclusion of an audit right in Section 115 is an oversight that needs correcting.

Some might say that while there is no express audit right in the statute, there is nothing that prohibits an audit and therefor an audit is permissible. Experience suggests that this argument will fall on deaf ears and will be summarily rejected by licensees. Respectfully, silence is not golden in this case.

While it is important that an audit right under Section 115 be granted to the individual owner of the work in question, songwriters could assign their audit rights to their publisher or to a collective administrator including an ad hoc collective formed for the purpose of the audit.

Having been compelled by the government to license their songs to strangers, it seems only fair that the songwriter at least be able to confirm to their reasonable satisfaction that they are getting a straight count.

2. **Opting Out of the Compulsory License Under Section 115**

A Nashville hit songwriter and session musician told me long ago that he was mystified. "Why can I get double scale when I play on the hits, but I can't get double stat when I write the hits?" An excellent question.

[4] Including the regulations at 37 C.F.R. Sec. 380.4(b) et seq.

Nearly 10 years ago, former Register of Copyright Marybeth Peters told the Congress[5] that abandoning the compulsory may be an idea whose time has come:

> [T]oday all...countries, except for the United States and Australia, have eliminated such compulsory licenses from their copyright laws. A fundamental principle of copyright is that the author should have the exclusive right to exploit the market for his work, except where this would conflict with the public interest. A compulsory license limits an author's bargaining power. It deprives the author of determining with whom and on what terms he wishes to do business. In fact, the Register of Copyrights' 1961 Report on the General Revision of the U.S. Copyright Law favored elimination of this compulsory license.
>
> I believe that the time has come to again consider whether there is really a need for such a compulsory license. Since most of the world functions without such a license, why should one be needed in the United States?

If the Congress were to abandon the compulsory license, this would potentially derail over 100 years of commerce that relies on that structure. I think that ultimately this is the direction that the Congress should steer. However, short of abandoning the compulsory license altogether there is a middle ground and potential fix that would be relatively easy (emphasis on “relatively”).

Why keep Section 115? Just as we have uniform statutes like the Uniform Partnership Act or Uniform Commercial Code, there is a value to having certain terms of a mechanical license set in the Copyright Act. The standard negotiated mechanical license is a private contract that typically starts with "this license incorporates by reference the mechanical license in the Copyright Act except as set forth herein" or words of similar import.

The problem is not that there is a uniform set of mechanical license terms that copyright licensees and licensors can easily reference. The problem is that the terms are compulsory and essentially deny songwriters the ability to bargain—as

[5] Statement of Marybeth Peters, The Register of Copyrights, before the Subcommittee on Courts, The Internet and Intellectual Property of the House Committee on the Judiciary, United States House of Representatives, 108th Congress, 2d Session, March 11, 2004 available at http://www.copyright.gov/docs/regstat031104.html

my Nashville friend bemoaned. This is especially true of the so-called "minimum" statutory rate. I respectfully suggest that in practice the "minimum" rate is essentially a *maximum* primarily because the songwriter lacks the ability to opt out and withhold their song from the market. Why would any licensee ever pay more than the "minimum" if they are not compelled to accept a higher rate?

This is yet another problem plaguing songwriters. One fix would be to establish a decision point that would allow songwriters either to opt in to the existing statutory license terms or to opt out of it. My view is that the better route might be to phase in an "opt out" so the newly free market could develop more gradually, and implement the "opt in" a few years after the market got used to the idea of the "opt out."

Either way, the change would probably best be implemented prospectively--there are a host of statutory licenses in use, either stand alone or private agreements granted by artist-songwriters in record deals that rely on the statutory license. Simply eliminating these existing licenses entirely would likely be extraordinarily disruptive and maintaining an optional "uniform mechanical license" in the Copyright Act seems to make good commercial sense.

How would this "opt out" procedure work as a practical matter? A songwriter could communicate her decision to opt out of the statutory license in the document repository of the Copyright Office.

As you know, the U.S. Copyright Office has a well-developed document repository that has been in place for decades.[6] For a modest fee, anyone can register a document and "to encourage document recordation, the law confers certain legal advantages, including priority between conflicting transfers and "constructive notice"...if certain requirements are met."[7]

So an "opt out" notice could easily be recorded in the Copyright Office and take advantage of the existing jurisprudence around document recording. The services that often "carpet bomb" notifications of intention to use under Section 115 could just as easily look up the songwriter or work in the Copyright Office recordation database to determine if the particular work is available for compulsory licensing and act accordingly.

[6] United States Copyright Office, Circular 12 "Recordation of Transfers and Other Documents" available at http://www.copyright.gov/circs/circ12.pdf
[7] Id., at p. 1.

The "opt out" notice could be very simple in language and structure and its format could be established by equally simple statutory language. Songwriters could assign these rights to their publishers or administrators.

While the U.S. may eventually abandon compulsory licensing altogether as Register Peters suggested a decade ago, a serviceable repair to the system may be an "opt out" structure. This would allow songwriters who were satisfied with the status quo to continue with the compulsory and those who were not could recover their bargaining rights. In the absence of a recorded "opt out" notice, a service or record company could rely on the compulsory license and rate.

If the goal of the statutory license is to approximate a market rate, an "opt out" system will provide many good data points for a rate setting proceeding.

I respectfully suggest that under this structure, there would not be a gap in rights, songwriters and publishers would be able to bargain freely and the market would produce sufficient information for licensees to know what rights were available and who to pay.

3. The Declining Utility of the ASCAP and BMI Consent Decrees

Songwriters also have the government's boot on their necks in the form of the ASCAP and BMI consent decrees regarding the public performance right for songs. Established decades ago, the consent decrees have been running longer than *Phantom of the Opera* but, I would suggest, to very poor notices especially recently.

Again, it is hard for songwriters to understand why the government permits companies like Google largely to escape antitrust regulation, but decides that the American people must be protected from those songwriters. (Companies like Google seem to escape scrutiny even when Google uses the dominant market position that the government allows them to enjoy to cram down take-it-or-leave-it terms on songwriters and indie labels.[8])

The consent decrees undermine songwriters in three important ways: confusion surrounding withdrawal and direct licensing; use of consent decrees as a club for

[8] See, e.g., Dredge, "YouTube Subscription Music Licensing Strikes Wrong Notes With Indie Labels", The Guardian (May 22, 2014) available at http://www.theguardian.com/technology/2014/may/22/indie-labels-youtube-subscription-music

well-heeled licensees against songwriters in an inefficient manner that prevents the formation of alternative dispute resolution mechanisms; and creates inefficiencies in licensing that are burdensome to both licensees and songwriters.

After the last Pandora rate court decision,[9] it appears that the consent decree requires that publishers withdraw from ASCAP altogether in order to enjoy their rights, although the court did not address what happens to the ASCAP songwriter whose publisher is forced to withdraw but who likes their PRO and wants to keep their PRO.

There is also no assurance that even if a publisher withdrew from ASCAP to pursue agreements in the free market that the government would not pursue claims against the publisher for doing something wrong. Given the disproportionate lobbying and public relations expenditures of songwriters and the "Gang of Four" cartel,[10] one could easily imagine that Amazon, Apple, Facebook and Google would have a strong interest in keeping songwriters weak. It would be expected that Google would side with Pandora, for example, if for no other reason than because Pandora uses Google's Doubleclick affiliate for its advertising sales. Pandora acknowledges that its agreement with Doubleclick exerts considerable influence on their business.[11]

The consent decree also inhibits the market from developing robust alternative dispute resolution mechanisms that will reduce transaction costs for all concerned. My office has conducted an ad hoc review of recent rate court decisions and my preliminary view is that there certainly seem to be a lot of the same names on the playbill. I respectfully suggest that it might be a good use of Copyright Office resources to conduct a formal study of the consent decree process with an eye toward determining if it is beneficial to all concerned or

[9] In re Petition of Pandora Media Inc., 12-cv-08035, U.S. District Court, Southern District of New York (Manhattan).

[10] Kafka, "Eric Schmidt's Gang of Four Cartel Doesn't Have Room for Microsoft", All Things D (May 31, 2011) discussion by Google Chairman Eric Schmidt of Amazon, Apple, Facebook and Google as dominating consumer technology, available at http://allthingsd.com/20110531/eric-schmidts-gang-of-four-doesnt-have-room-for-microsoft/

[11] "***We rely upon an agreement with DoubleClick, which is owned by Google, for delivering and monitoring our ads. Failure to renew the agreement on favorable terms, or termination of the agreement, could adversely affect our business."*** 2014 Annual Report of Pandora Media, Inc. (Form 10k) at p. 24, available at http://investor.pandora.com/phoenix.zhtml?c=227956&p=proxy

whether it actually produces an expensive slugfest only affordable to the rich and unduly costly to songwriters and publishers.[12]

Such a study could identify the parties, the lawyers, the rates before and after and the decision and an estimate of the transaction costs involved including legal fees. There is a view in the songwriter community among those I speak to who are familiar with the process that the rate court process is so expensive that songwriters are actually worse off by far for engaging in it—a fact not lost on those who view negotiation as a road bump along the way to litigation. However—and this is where Franz Kafka comes in—songwriters did not ask for it, cannot escape it, and are forced to participate.

It would be helpful if the Copyright Office could produce a review that would either demonstrate that these perceptions are cynical and unwarranted, or that they are exactly on point and that the consent decree process has become yet another club that well-heeled corporate opponents can use against creators in a rush by public companies to commoditize art.[13] As Radiohead's Thom Yorke told The Guardian[14]:

> "[Big Tech] have to keep commodifying things to keep the share price up, but in doing so they have made all content, including music and newspapers, worthless, in order to make their billions. And this is what we want? I still think it will be undermined in some way. It doesn't make sense to me. Anyway, *All Watched Over by Machines of Loving Grace*. The commodification of human relationships through social networks. Amazing!"

In fairness to the digital retailer, the current consent decree process prohibits songwriters from allowing ASCAP or BMI to license both the performance and mechanical rights for interactive streaming. This is an undue and another rather Kafka-esque burden on the digital service. The service must acquire licenses and produce statements for the identical uses from two different sources. What is

[12] See, e.g., Corton, "Did Pandora Win the ASCAP Battle or Open a Box of Namesake Trouble?" available at http://www.popmatters.com/tools/print/181116/

[13] "Thom Yorke on Google the Commoditizer," available at http://musictechpolicy.wordpress.com/2013/02/27/thom-yorke-on-google-the-commoditizer/

[14] "Thom Yorke: If I can't enjoy this now, when can I start?" The Guardian/The Observer (February 23, 2013) available at http://www.theguardian.com/music/2013/feb/23/thom-yorke-radiohead-interview

the principled reason why ASCAP and BMI cannot license the bundle of rights that the service needs to operate with one statement for all the uses involved?

Consent decrees may have made sense in 1941, but I would respectfully suggest that those who toil in the vineyard have lost the page as to the contemporary justification.

We should also be aware that publishers, particularly major publishers, can take advantage of the economy of scale and grant these rights themselves—if it weren't for the uncertainty that the consent decrees induce in the market.

At the end of the day, not only do songwriters and publishers have to bear the rather staggering legal costs of the rate court process, but they also have to pay administration fees to third parties on licenses that some could easily administer themselves if they were allowed to do so.

It is difficult to imagine an argument for maintaining the rate court procedure that does not also ignore the progress in the market since 1941. I respectfully suggest that rate courts are an idea whose time has passed, and it is high time to do all we can to convince the relevant government authorities to terminate them and return to the free market.

If it works for Google, it can surely work for songwriters.

Thank you for the opportunity to participate in this effort by the Copyright Office and I commend your consistent dedication to the difficult task of "modernizing" our copyright law. That is an enterprise that is easy to describe but hard to undertake and I think I speak for many in saying that your good work is greatly appreciated.

Respectfully submitted,

Chris Castle /s/

Christian L. Castle

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