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By Online Submission

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

**Re: Music Licensing Study Docket 2014-03**

Dear General Counsel Charlesworth:

Thank you for the opportunity to comment on the Copyright Office's excellent Music Licensing Round Tables and for posting the transcripts so promptly. Both are significant undertakings.

The following comment is submitted on my own behalf and is not written on behalf of any client. I will address the single issue of Section 115 repeal.

A. The Path to Section 115 Repeal

It seems inevitable that Section 115 will eventually be repealed. At this juncture, the question to me is both how to accomplish the job and how to accomplish the job gracefully without unduly disrupting the market. This would be a major undertaking if there were peace in the valley, a high degree of trust among the market participants, some degree of satisfaction that music users were able to license efficiently and music makers were getting a straight count.

Unfortunately, there is little trust among the participants and there is even less confidence that songwriters are getting a straight count if their songs are even licensed properly in the first place.

On the bright side, we who toil in the vineyard owe thanks to the Copyright Office for taking the time to conduct the Music Licensing Roundtables and for

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getting these objections into a formal record from which we can all operate. My one partisan criticism of the Office is that next time I'd like to see a round table in Austin, but that is a discussion for another time and place.

With repeal in mind, I have constructed a chart in Part B of this comment that I think of as a kind of high level issue spotting workflow for getting repeal done. I see the process as taking a few years to accomplish both from a legislative and implementation point of view. However, given the level of frustration and potential for litigation in the absence of some immediate relief, I've also proposed a handful of short term and relatively immediate fixes that I think would be helpful.

Accomplishing these short term fixes now will make it more likely that the long term fixes could be addressed in regular order and outside of the hostility of an otherwise inevitable litigation battlefield.

1. Lack of Recourse and Moral Hazard: The existing statutory license should be phased out over a multiyear period. Given the strong opposition to Section 115 compulsory licenses in the creative community, there will likely a robust push to abandon the compulsory altogether and immediately. My feeling is that we've waited 100 odd years to do this, so let's not rush it.

Without casting aspersions, there is an abiding belief in many sectors of the creative community that the digital retailers are taking advantage of obfuscation and confusion about compulsory licenses to create a "hack" around proper administration and payment. The Office got a flavor of this at the Round Tables based on the transcripts.

After discussing the issue with other lawyers, I have been persuaded that there is the potential for a significant number of lawsuits developing around the Section 115 compulsory license. This litigation may well take the form of the recent Aimee Mann case against MediaNet<sup>1</sup>, claims against CPAs certifying annual statements of account that songwriters give little credence, or significant underreporting by digital services. These issues can only be addressed through litigation by the more well-heeled plaintiffs as some services are only too quick to point out. This could easily result in a war of attrition to see who goes bankrupt first.

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<sup>1</sup> Aimee Mann v. MediaNet Digital Inc. et al, Case No. 2:13-cv-05269-GHK-FFM (July 22, 2013, Central Dist. Of Calif.)

While each particular case has its own factual basis, if I had to summarize the reason for the interest in litigation it is due to a lack of recourse under the compulsory license and the moral hazard thus created. For example, one commenter in the Copyright Office's Music Licensing Study public comments noted that a defaulter under the statutory license can lawfully continue sending NOIs for future licenses even if they have never paid a dime on past licenses—the only recourse a songwriter has in this case is termination and if that too is ignored, extraordinarily expensive federal copyright litigation.<sup>2</sup>

Songwriters and other copyright owners are also denied an industry standard audit right under the statutory license. Digital services have been a little too gleeful in pointing this out to songwriters and other copyright owners perhaps because the services can compel songwriters to license. One Round Table participant noted that YouTube routinely refuses an audit right to independent publishers even in direct licenses, no doubt inspired by the lack of an audit right in statutory licenses. That may not have been Congress's intent, and while YouTube's position is unfair, you can't really say it's crazy when they can point to the defective statutory license as precedent.<sup>3</sup>

Giving a compulsory license to litigious companies that already dwarf the entire music industry in market capitalization is probably not a long term solution. To paraphrase what one senior music executive pointed out at a recent meeting of the California Copyright Conference,<sup>4</sup> when dealing with Google there's no negotiation, you say please and thank you after they tell you your deal. Market power creates a compulsory license of its own so there's no reason to help further the problem.

2. Short Term Relief: The Copyright Office might wish to consider a relief valve for the palpable distrust of digital music services.

As repealing Section 115 will no doubt be a contentious undertaking, it is important not to have the immediate needs of songwriters obscured by the lobbying muscle of interested parties, particularly when there are five short term fixes immediately available that could be the subject of narrowly crafted legislation or regulations that might find less contentious support. If any of

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<sup>2</sup> Copyright Office Music Licensing Study, May 23, 2014, Comment of David Lowery, available at [http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014\\_3/David\\_Lowery\\_MLS\\_2014.pdf](http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/David_Lowery_MLS_2014.pdf)

<sup>3</sup> Notwithstanding the fact that the industry rarely used statutory licenses for 100 years, the statutory license is becoming more numerous since roughly 2002.

<sup>4</sup> Podcast of September 9, 2014 meeting to be available at <http://www.theccc.org>.

these suggestions were to become law I think it would ease tensions.

(a) Audit: There is a perception that resonated in the Round Table comments that there is an extraordinary number of unlicensed compositions on the big aggregators and digital music services. This is in no small part due to the massive numbers of notices of intention to use that have been served on copyright owners.

If those who are forced to license to retailers have no meaningful way to confirm accurate—or any—payment, they are in the position of being forced to participate blindly in a system that prevents them from getting a straight count on the uses of their works. This frustration arises in a variety of ways including getting a royalty report for the sound recording for which no composition payment is ever received.

As a number of Round Table participants observed, it is critical that songwriters and publishers be granted a meaningful right to audit under statutory licenses. I would suggest that the Office consider recommending an audit right that is similar to the Section 114 audit right that is working very well.

One point to keep in mind is that the term “audit” in the music industry is understood to mean a compliance examination, not a financial audit. The fact that a company has audited financials has nothing whatsoever to do with a royalty audit. I realize that this may seem like an absurd distinction, but taking the time to clarify the difference would be time well spent. I have had very well qualified CFOs who lack experience in the music industry assume that getting a SAS 70 certification (now SSAE 16) would solve the problem. As was noted in the Round Tables, references to “GAAP” in this context also is unhelpful and compounds the possibility of confusion.

(b) Opt Out: For a short period of time, the statutory license can be left in place as a default license. Given the strong opposition to the compulsory license and but licensors can opt out of the statutory framework by recording a simple one-page notice with the Copyright Office attaching a schedule of works covered by the opt out.

(c) Pending and Unmatched List: The Copyright Office should consider whether it has authority to require by regulation anyone relying on the Section 115 statutory license to publish a list of pending and unmatched songs and royalty payees, as well as an “unlicensed” list if a service for whatever reason. As the Section 115 compulsory license is to be paid monthly, the list should be updated monthly for uniformity.

This should not be burdensome on the service as they should already know which recordings are being played by users without a license for the song at a minimum since the recording payments and song payments would not match internally. All they would need to do is make this information public and use the songwriter community to help the services clean up their books—an example of the crowd sourcing that is so popular.

Based on at least one affidavit by a person with knowledge, the unlicensed report could include millions of songs for some large services.<sup>5</sup> This suggests the urgency of addressing the unlicensed problem and encouraging the market to develop the necessary information to facilitate licensing and increase payments to creators.

If services go out of business or are sold with unlicensed works of copyright, it is entirely possible that songwriters will never be paid. This creates a crossover question with other bodies of law in order to produce sufficient notification to creators and also to preserve assets to satisfy these claims. Otherwise, services can operate without a royalty examination, not carry the liability for the unlicensed works on their books, sell their companies and create a windfall to the seller, all without the songwriters ever knowing that they were owed royalties. Songwriters in this situation are not even able to take advantage of any protections that might be available to them under the Copyright Act or the bankruptcy law.

(d) Abandon a Minimum Amount for Payment: In the recent Notice for Proposed Rulemaking<sup>6</sup> on the Office's regulations<sup>7</sup> regarding Statements of Account, the Office proposed a Minimum Amount for Payment<sup>8</sup> under the compulsory license of \$50 per license. Respectfully, when measured against the background of licensing practices that are uneven at best and potentially massively under reporting at worst, the last thing that the Office should consider is making it even more difficult for a songwriter to get a straight count by

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<sup>5</sup> In Aimee Mann's litigation against Medianet, a declaration was produced that showed that 23% of songs available through Medianet were unlicensed and at one point had a "match rate of less than 55%" (Declaration of Stephen E. Grauberger, Esq. in Appalseed Productions, Inc. et al v. Medianet Digital, Inc. et al, currently available at <http://www.scribd.com/doc/155513456/grauberger-declaration>).

<sup>6</sup> Mechanical and Digital Phonorecord Delivery Compulsory License 77 FR 44179, Docket No. 2012-7 (July 27, 2012).

<sup>7</sup> The current regulations are set forth at 37 C.F.R. 201.18 and 201.19.

<sup>8</sup> Id at 44183

mandating interest free loans to services that have no downside in keeping accurate books and records as no one will ever check.

(e) Publication of Attestation Agreements: If the Office adopts a new regulation allowing the use of attestation agreements by CPAs certifying annual statements of account, those attestation agreements should be published on the digital services website. Without this ray of sunlight, an already mysterious process is made even less transparent.

(f) Restrictions on Nondisclosure Agreements: If a music user enters into a direct agreement that replaces a statutory license and if the music user intends to or does use that direct license in a rate proceeding that sets statutory rates, that direct agreement should not be subject to a nondisclosure agreement.

I emphasize that I am addressing only a narrow but important category of direct licenses—those that are entered into *for the purpose* of creating a record to present to rate setters in hopes of bringing statutory rates in line with some terms of direct agreements. This is important because as we have seen, these secret instruments can be abused by selectively disclosing terms.

An example would be Service A and Publisher B negotiate a direct license under NDA for \$X million advance and a royalty of 80% of the current statutory rate. Publisher B accepts these terms because of the advance (which might include a nonrecoupable portion with a cute description). Service A then goes to Publishers C<sup>n</sup> and negotiates most favored nations deals at 80% of the statutory rate that are MFN with Publisher B on the *rate*, but with no or much lower advance. Remember, the advance to Publisher B is subject to NDA and is not disclosed. Service A then appears before the Office and the Copyright Royalty Judges and presents their deals with Publisher B and Publishers C<sup>n</sup> as evidence of market rates under protective order.

Publishers D<sup>n</sup> who didn't make the direct deal with Service A or are not big enough for Service A then may find themselves subject to 80% of the past statutory rate as their go-forward statutory rate (or PRO rate set in rate court), but have no knowledge of Publisher B's advance because of either the NDA or the protective order.

Publisher B's deal was made for the purpose of lowering the statutory rate and I suggest that it should not be permitted to be subject to an NDA. I accept the well-founded reluctance to impose restrictions on private contracts, but if the purpose of the private contract is to hack the rate setting process for compulsory

Jacqueline C. Charlesworth  
Music Licensing Study Docket 2014-03  
Page 7

licenses or rate courts, I feel a prohibition on NDAs should be considered because the intentions of the parties go beyond the four corners of the NDA.

B. Workflow Chart for Section 115 Repeal

The following chart necessarily uses short hand references to complex concepts. It is presented as a first attempt to organize the excellent points made by the Round Table participants regarding Section 115 repeal. Developing legislative solutions regarding the issues spotted in the workflow chart will be a complex process and hopefully the expertise of the participants can be drawn upon to assist the Office in developing recommendations.

	Year 1	Year 2	Year 3	Year 4
Grant of Rights Default	Statutory w/Opt Out at election of copyright owner	Statutory w/Opt Out at election of copyright owner	Direct licensing at election of copyright owner	Direct licensing at election of copyright owner
Opt Out Rights	Copyright owner can opt out of any blanket or statutory license for any copyright subdivision established by copyright owner	Copyright owner can opt out of any blanket or statutory license for any copyright subdivision established by copyright owner	Copyright owner can opt out of any blanket or statutory license for any copyright subdivision established by copyright owner	Copyright owner can opt out of any blanket or statutory license for any copyright subdivision established by copyright owner
Opt out notice	Copyright Office Recordation	Copyright Office Recordation	N/A	N/A
Existing compulsory licenses as of effective date	TBD	TBD	TBD	TBD
Licensee Rights to Consumer Data Profiling Exploitation	None on compulsory license, must have permission of copyright owner plus consent of users, privacy compliance	None on compulsory license, must have permission of copyright owner plus consent of users, privacy compliance	None on compulsory license, must have permission of copyright owner plus consent of users, privacy compliance	None on compulsory license, must have permission of copyright owner plus consent of users, privacy compliance
Rate for new licenses	CRB for statutory, free negotiation for opt out	CRB for statutory, free negotiation for opt out	Direct license free negotiation, including collective licensing	Direct license free negotiation, including collective licensing
Rate for existing statutory licenses	CRB	CRB	CRB, but rate set with reference to market prices with floor of highest statutory rate	CRB, but rate set with reference to market prices with floor of highest statutory rate
Legacy/Controlled Composition Rates	Floor of current statutory for 1965 going forward	Floor of current statutory going forward	N/A	N/A
Legacy Rate Audits	One-time audit right retroactively 36 months after each new rate takes effect	One-time audit right retroactively 36 months after each new rate takes effect	N/A	N/A

	Year 1	Year 2	Year 3	Year 4
Termination of Pass Through Licensing	Direct licenses paid directly to licensees or collectives	Direct licenses paid directly to licensees or collectives	Direct licenses paid directly to licensees or collectives	Direct licenses paid directly to licensees or collectives
New Fixation Rate Agreements	Prohibited	Prohibited	Prohibited	Prohibited
Direct and Collective Licensing	Yes, any direct license for subdivision or free collectives	Yes, any direct license for subdivision or free collectives	Yes, any direct license for subdivision or free collectives	Yes, any direct license for subdivision or free collectives
License default	Direct license at direction of copyright owner	Direct license at direction of copyright owner	Direct license at direction of copyright owner	Direct license at direction of copyright owner
Annual Statements of Account Certifications for periods prior to audit rights	Licensees will post all attestation agreements, all CPAs will post all documents used to certify annual statements of account	Licensees will post all attestation agreements, all CPAs will post all documents used to certify annual statements of account	For existing compulsory licenses, licensees will post all attestation agreements, all CPAs will post all documents used to certify annual statements of account	For existing compulsory licenses, licensees will post all attestation agreements, all CPAs will post all documents used to certify annual statements of account
Public Disclosures of Systemic Errors in Compulsory Licenses and Prior Periods	CPAs will be required to publicly disclose any systemic computational errors discovered by either CPA or Company during certification	CPAs will be required to publicly disclose any systemic computational errors discovered by either CPA or Company during certification	CPAs will be required to publicly disclose any systemic computational errors discovered by either CPA or Company during certification	CPAs will be required to publicly disclose any systemic computational errors discovered by either CPA or Company during certification
Certification of Monthly and Annual Statements of Accounts	Continues as is for both direct and statutory licenses	Continues as is for both direct and statutory licenses	Continues as is for direct licenses to inform audit decisions	Continues as is for both direct and statutory licenses
Disclosure of unlicensed works	Certifying CPA has affirmative obligation to publicly disclose all unlicensed works and post on licensee website	Certifying CPA has affirmative obligation to publicly disclose all unlicensed works and post on licensee website	Certifying CPA has affirmative obligation to publicly disclose all unlicensed works and post on licensee website	Certifying CPA has affirmative obligation to publicly disclose all unlicensed works and post on licensee website

	Year 1	Year 2	Year 3	Year 4
PRO License for Corresponding Mechanicals	PROs continue to license performance, but can issue corresponding streaming mechanicals where applicable, rates set by CRB or copyright owner	PROs continue to license performance, but can issue corresponding streaming mechanicals where applicable, rates set by CRB or copyright owner	PROs continue to license performance, but can issue corresponding streaming mechanicals where applicable, rates set by CRB or copyright owner	PROs continue to license performance, but can issue corresponding streaming mechanicals where applicable, rates set by CRB or copyright owner
Sync Licenses	No blanket, direct license by copyright owner (no change)	No blanket, direct license by copyright owner (no change)	No blanket, direct license by copyright owner (no change)	No blanket, direct license by copyright owner (no change)
Record keeping for Digital Retailers	Transaction files, usage files			
Auditor	Experienced royalty examiner, not only a CPA			
Audit right	Applicable to all rights owners or any group of rights owners formed voluntarily	Applicable to all rights owners or any group of rights owners formed voluntarily	Applicable to all rights owners or any group of rights owners formed voluntarily	Applicable to all rights owners or any group of rights owners formed voluntarily
Dispute resolution	Mandatory binding arbitration	Mandatory binding arbitration	Mandatory binding arbitration	Mandatory binding arbitration
Nondisclosure agreements	Financial terms must be disclosed to songwriters or artists (royalty rates, advances, non recoupable payments and any things of value)	Financial terms must be disclosed to songwriters or artists (royalty rates, advances, non recoupable payments and any things of value)	Financial terms must be disclosed to songwriters or artists (royalty rates, advances, non recoupable payments and any things of value)	Financial terms must be disclosed to songwriters or artists (royalty rates, advances, non recoupable payments and any things of value)
Minimum payments for statutory licenses	Prohibited	Prohibited	Prohibited	Prohibited



Jacqueline C. Charlesworth  
Music Licensing Study Docket 2014-03  
Page 11

I appreciate the Office's interest in listening to the practical concerns of all involved in the process.

Very truly yours,

*Chris Castle /s/*

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