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

In the Matter of:	
Music Licensing Study	Docket No. 2014-03

Reply Comments of the Digital Media Association ("DiMA")

The Digital Media Association ("DiMA") respectfully submits the following reply comments in response to the Copyright Office's second Notice of Inquiry, seeking additional written comments to the above-referenced Notice of Inquiry (the "Notice of Inquiry").

First, DiMA commends the Copyright Office for initiating this inquiry and for continuing the study. DiMA appreciates the opportunity to participate and is willing to continue to participate in the study going forward and to assist the Copyright Office in any way we can. As set forth in our first set of comments in response to the initial Notice of Inquiry, DiMA is the leading national trade organization dedicated to representing the interests of licensed digital media services, including many of the leading players in the digital music marketplace today. DiMA's members include Amazon.com, Apple, Google/YouTube, Microsoft, Pandora, Rhapsody, Slacker and others.

DiMA's members operate a broad array of different digital music service types and consumer offerings that span across the spectrum of music licensing concerns, from so-called "statutory, non-interactive internet radio" which utilizes the Section 114 license, to on-demand streaming services which have had to forge independent licenses in a free market, to digital download services which employ the Section 115 compulsory reproduction license (or some variation thereof). Many of DiMA's members provide a multitude of these services, for which they must seek a broad array of music licenses. As the premiere providers of copyrighted sound recordings and musical works through virtually every form of legitimate online music service, DiMA's members are directly affected by existing methods of licensing music, as well as the mechanisms for obtaining music licenses that are shaped by U.S. copyright law. DiMA has been actively involved in many of the legislative efforts, recent hearings, studies, analyses, public inquiries and roundtables conducted by the Copyright Office on various aspects of copyright law.

It is important to note that the interests of DiMA and its members are aligned with those of the rights owners in several significant respects. First, DiMA members share the belief that rights owners should be appropriately compensated for the use of copyrighted works. Second, DiMA members also share the desire to ensure the long-term survival of the music business, going forward. The legitimate music services represented by DiMA's members have collectively paid billions of dollars in ever-increasing royalty payments to content owners, recording artists and songwriters, even as the sale of physical products – long the content owners' primary source of revenue – has continued to decline year-over-year. The delivery of engaging, innovative music services offered by DiMA members is critical to the central public policy underlying our copyright system: affording the widest range of consumers' access to the widest range of creative works.

The complex process for music licensing in the digital landscape that exists today in the United States is unnecessarily fragmented and outdated and as a result, chills investment in legitimate music services and the continued development and expansion of innovative services that are essential to the

survival of the recorded music industry. We are pleased that the Copyright Office is continuing its examination of the music licensing landscape. We remain hopeful that, after evaluating the issues, the Copyright Office can formulate at least some basic recommendations that Congress will consider to modernize U.S. copyright law so that it assures consumers continued access to a vibrant marketplace for music products and services in the digital era.

As we made clear in our initial submission in this study, the process for music licensing in the United States, as it has been applied in the current digital landscape, threatens to chill investment in, and the continued development and expansion of innovative, legitimate music services that are essential to the survival of the recorded music industry. The most significant problems with the system are:

- Fragmentation of copyright rights and rights ownership. The rights in and to musical works under U.S. copyright law include multiple varied and distinct rights. Sound recordings, and the musical works embodied within them, are separate rights that are routinely owned by different copyright holders and indeed, often multiple copyright holders for just the musical compostion. This fragmentation with multiple "stacked" rights, which all must be cleared in order to exploit a final sound recording of a musical composition, was not disruptive to the historical business model for the making, distribution, promotion and sale of physical records, but it is a significant problem in the digital age, where retailers have effectively become the licensees.

- Shifted licensing responsibility. In contrast to the historical physical model, in the digital environment, music services are functionally equivalent to the distributors and retailers that sold music under the "brick and mortar" business model. Licensing responsibility has shifted to the digital services as the retailers – a first in the history of the music industry.

- The impact of rights fragmentation and the shifting of licensing responsibility onto digital music retailers. The rights fragmentation and shifting of licensing responsibility to service providers has created formidable challenges for digital music services for various reasons unique to music licensing in the digital environment, including:

    - New legal uncertainties. As a result of the shift in licensing responsibility and the development of new music delivery technologies of the digital era, digital music services are subjected to legal uncertainties around the precise rights implicated for particular activities, overlapping claims for royalty payments, and significant potential legal exposure.

    - The need for licensing ubiquity. As the music business has shifted from physical sales of individual records to the digital services – and as it seems to be moving from ownership models to access models - digital music services need to secure licenses from tens of thousands of rights holders, covering tens of millions of tracks, in order to offer consumers commercially viable services. Failing to secure the necessary licenses is not an option.

    - The "tug-of-war" over royalties. Because each negotiation and rate setting proceeding occurs individually, at different times, in different places and before different rate setting tribunals operating under different rate setting standards, each individual rights owner/administrating body seeks to increase its own royalty, generally without regard to the aggregate royalties that services have to pay to the totality of various rights owners. This dynamic has resulted in an upward spiral of costs to digital music service providers who have been thrust into the middle of this "tug-of-war" among multiple rights owners over multiple, individual royalties. The net result of this "tug-of-war" is royalty rates that

are (i) not presented to copyright users in a unified way such that digital music services can evaluate, forecast and understand their aggregate royalty expense for all of the copyright rights needed, and (ii) in the aggregate, are unjustifiably high and, ultimately, unsustainable.

The current music licensing mechanisms do not work well in the digital environment. The existing music licensing structures are not well-suited for the digital era, as they (i) lack necessary transparency, (ii) are not efficient, and (iii) do not provide a "level playing field" for competitors in terms of rate setting standards, royalty rates or functionality rules because of platform distinctions or historical anomalies. Nor do these structures often provide a suitable counter-balance to the market power of rights owners.

U.S. copyright law is in need of modernization for the digital environment, and, as noted above, a holistic view of the entire music licensing ecosystem should be taken. For modernization to be effective, the framework for the new digital era should be based on the following six essential pillars:

- **Continued Government Oversight and Regulation of Music Licensing Activities:** A music licensing framework that appropriately counter-balances the unique market power and negotiating leverage of copyright owners is necessary to a healthy and sustainable digital music marketplace.

- **Transparency and a centralized database:** The digital marketplace needs a publicly available, centralized and reliable database that contains information about rights ownership of musical works and sound recordings on a work-by-work level. Development of data standards, such as International Standard Recording Code ("ISRC") and International Standard Musical Work Code ("ISWC") need to be developed and employed with consistency. Experience with the stalled development of the Global Repertoire Database ("GRD") in Europe has shown, if left entirely to private industry without government oversight, these universal standards (and the centralized database itself) are unlikely to get implemented. The establishment of data standards and a database must be stimulated and maintained by governmental action.

- **Licensing Efficiencies and Reduced Transaction Costs:** The music licensing marketplace would benefit from a framework that promotes licensing efficiencies and reduced transaction costs for music licensing activities, implemented through vehicles such as the development of an accurate, comprehensive and reliable database of all musical works, compulsory blanket licenses and regulated common agents.

- **Clarification of Rights**: The music licensing framework should be established so that discrete rights owners are not able to drive up royalty rates based on legal uncertainties arising out of the convergence of reproduction, distribution and public performance rights in the digital environment. Certainty would foster growth and promote new entry into the digital music marketplace.

- **Reduction of Legal Risks Around Licensing Activities:** Immunity from infringement liability (including statutory damages and attorney's fees) for copyright users that have acted diligently and in good faith to negotiate licenses, would reduce risk and encourage further innovation.

- **"Level Playing Field":** A music licensing framework should include a truly "level playing field" where particular music services are not advantaged over others, in terms of royalty obligations, rate setting standards, royalty rates or functionality rules, based on technological platform distinctions or historical anomalies. Clear and unbiased rights and obligations, for all parties, would increase competition on the merits, thereby incentivizing innovation.

RESPONSES TO THE SPECIFIC QUESTIONS SET FORTH IN THE COPYRIGHT OFFICE'S SECOND REQUEST FOR COMMENTS

Data and Transparency:

1. Please address possible methods for ensuring the development and dissemination of comprehensive and authoritative public data related to the identity and ownership of musical works and sound recordings, including how best to incentivize private actors to gather, assimilate and share reliable data.

As DiMA has long advocated, and as recently as in our initial comments in response to the Copyright Office's commencement of this study, a comprehensive and authoritative database of musical works and sound recordings - a central registry of all current rights holder, sound recording and musical work metadata necessary to adequately identify, refer to, license and pay for the use of sound recordings and the musical works they embody - must be established and maintained in order for the continued existence and growth of a commercial music ecosystem in the digital age. Establishing such a database would not only facilitate direct licensing, lend transparency and hopefully reduce overall licensing costs, but the existence of such a reliable database would also alleviate many of the other problems that we currently see in the music copyright landscape (some of which are the subject of other discrete policy studies undertaken by the Copyright Office); concerns about compulsory licenses, lack of blanket coverage and certainty, orphan works and many other issues plaguing the music licensing marketplace today.

Accurate, timely and transparent data on what works are available, from whom and for what uses, would afford rights holders greater flexibility in licensing and greater information about the uses of their works and the revenue those uses generate. It would also provide music providers with the ability to engage in large-scale licensing much more efficiently. A reliable database would also help solve other concerns regarding musical works and copyright. It would allow the identification of the totality of works known and available for licensing, thereby moving us towards truly blanket coverage, certainty about licensed rights and concurrent reduction of concerns about liability, and it would also necessarily help reduce and potentially solve the orphan works problem, as it relates to musical works.

Ideally, such a database would include all information about all musical works - both compositions and sound recordings - available for any type of licensing, including not only all forms of public performance, reproduction and distribution, but also availability for licensing of uses that are currently non-statutory. A database which contains accurate and timely information about all works available for compulsory mechanical licensing, or for blanket performance licensing, or for statutory streaming, would not end its usefulness with that one statutory purpose. Properly established and populated, such a database would be useful to facilitate other, voluntary licenses for additional types of uses not covered by compulsory or blanket licenses that it may serve, initially.

The database should be in a flexible, scalable, machine-readable format and should be open to public review, to facilitate continuous licensing and the innovation and launch of licensed services. While the database should not be open to public editing, rules regarding the entry of data in the database should be crafted with ample latitude to allow the data to be updated and corrected by any legitimate party with up-to-date information on the contents of the database. The actual oversight of the musical works and sound recordings database - within the Copyright Office or other Government office, perhaps with assistance from the private sector – should likely follow the structure of a private non-profit body, operating within a charter that should include a Board or other governing division comprised of representatives from rights holders; including individual creators and aggregators from the music publishing, sound recording industries, and from music service provider constituencies.

The actual form of the database could take any number of contours, whether it be centrally located, co-located, distributed or some combination thereof. The most important aspect of a musical works and sound recordings database is that it be comprehensive, accurate and reliable. Ideally, the Copyright Office could be the central location for the database and for the input and maintenance of the data. That structure would afford the certainty of a single official database, maintained by a single, reliable entity, with clear authority over the contents and intended use of the database.

If the Copyright Office is unable or unwilling to take on the burden of establishing and maintaining a musical works database, for financial or other reasons, the Copyright Office could join with private sector providers to establish a database that is operated privately, with Copyright Office input and approval. The Copyright Office could even go so far as to simply establish a set of "best practices" that potential database operators would be obliged to adhere to, in order to be authorized to handle the database, or a portion of it.

Whether a musical works and sound recordings database is to be established and maintained by the Copyright Office or by a private entity or group of private entities, Congress and/or the Copyright Office could incentivize potential partners by allowing some measure of commercial benefit for participating in the database, such as designating a small portion of license fees/royalties generated to cover administrative costs of those private entities that participate in developing and maintaining the database.

The Copyright Office and/or Congress can best incentivize private actors to gather, assimilate and share reliable data within a musical works and sound recordings database a number of ways. In the first instance, the Copyright Office should first identify (with input from stakeholders) and publicize the data standard to be utilized. Placing the accepted data standard on copyright registration forms, the Copyright Office website, and any other public materials that the copyright office distributes would go a long way to informing creators in particular, and the public, in general, of the data points and standards necessary to maintain an effective licensing database.

Going further, the Copyright Office should make the submission of that data a pre-requisite for copyright registrations accepted by the Copyright Office, under the present Chapter 4. The properly identified data points and format should be enumerated and specifically made part of the requirements under Sections 402, and Sections 407 through 412, to secure copyright registration, to make claims thereunder and to seek remedies for infringement. Finally, the Copyright Office could further incentivize private actors to participate in developing and sharing reliable data by providing economic incentives, such as limited liability exposure, unrestricted access to the database, or perhaps reduced registration costs, to those who provide accurate and timely data and participate in the development and maintenance of the database.

2. What are the most widely embraced identifiers used in connection with musical works, sound recordings, songwriters, composers, and artists? How and by whom are they issued and managed? How might the government incentivize more universal availability and adoption?

While the most widely embraced identifiers are the International Standard Recording Code ("ISRC") and/or International Standard Musical Work Code ("ISWC"), these identifiers are hardly uniform or reliable in either their presence or their application. To be clear, the basic information necessary to be able to identify musical works and sound recordings for the purposes of licensing and payment include a few simple fields of information:

1) Song Title
2) Artist(s) (Featured Artist and Contributing Artist, if any)
3) Composer(s)
4) Album Title
5) Releasing Record Label
6) Musical Works Publisher(s)
7) PRO Affiliation

These data points, while few and relatively simple to organize and track, are only partially issued and managed by a myriad of uniquely interested parties, none of which have any interest in collecting, organizing or making available all of the identifying information necessary, for all uses. Neither ISRC Codes nor ISWC Codes are applied to all works, nor are they applied uniformly or correctly, even when they are attached to work. What is more, many services note that currently, not only ISRC, but also UPC - in addition to the information listed in items 1-4 above, are usually required in order to properly identify a work for commercial exploitation. In effect, services cannot rely solely on ISRC, but are required to use other criteria, in addition to ISRC, in order to properly identify a work, in today's marketplace.

Many parties with access to some or all of this data keep it in proprietary format (often to satisfy long-outdated legacy systems), and within proprietary databases that are not open for public review. Many parties not only collect limited information they specifically need as may bes necessary only to administer the particular right they might be concerned with, but they do it in unique formats, without regard to being able to distribute or allow others to use the data in any other context.

For instance, performing rights organizations ASCAP, BMI and SESAC collect and maintain only the information they need to administer public performance licenses for their members. ISWC codes are only applied by each of them, respectively, only to the songs within their respective repertories. Their databases are only searchable manually, on an individual song-by-song basis and are explicitly disclaimed as incomplete and unreliable, with prohibitions on using the data for any other purpose other than licensing works within their repertory, for public performance uses.[1]

[1] BMI Terms of Use: *"The information contained in the database has been provided to BMI from a variety of sources, and BMI makes no warranties or representations whatsoever with respect to its accuracy. In some cases, the writer or publisher information shown may not reflect actual copyright ownership of a work as registered with the U.S. Copyright Office. In addition, writers or publishers for whom BMI does not license a work are not listed. Any use of this information for purposes other than to determine what musical compositions are contained in the BMI Repertoire through the last update is solely at the risk of the user. …BMI specifically disclaims any and all liability for any loss or damages which may be incurred, directly or indirectly, as a result of the use of the information in this database, or for any omissions or errors contained in the database."*

ASCAP Terms of Use: *"The information contained in the ACE Database is updated weekly. The information contained has been supplied to ASCAP by various sources and ASCAP makes no representations as to its 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."*

The inefficiency of these databases was explicitly observed in the most recent rate-setting proceeding between Pandora and ASCAP. Despite the fact that ASCAP's Consent Decree mandates that ASCAP make its repertory available, specifically to "enable users to make more informed licensing decisions and can facilitate substitution of music from one PRO for music from another or direct licensing from rights holders,"[2] the structure and form of ASCAP's current database does not and cannot fulfill that purpose. As Judge Cote noted in her ruling: "Although ASCAP attempted at trial to show that Pandora could have used public sources of information to identify the Sony catalog, it failed to show that such an effort would have produced a reliable, comprehensive list, even if Pandora had made the extraordinary commitment necessary to try to compile such a list from public data."[3]

The government can incentivize more universal availability and adoption of data and data standards by again, identifying the requisite data points that all stakeholders require and codifying how those points should be reported, and further making those data points a requirement for Federal Registration in Chapter 4, a part of all Federal Records, and an absolute requirement for bringing an action for copyright infringement.

In addition, the Government could further incentivize private actors to participate in developing and sharing reliable data by also including an obligation for authors and copyright owners to identify all entities to which those authors have authorized to license works on their behalf, as a pre-requisite to any claims for remedies for infringement. While it would seem that authors and other rights holders should be incentivized by the potential commerce alone to identify any agencies, aggregators or other collectives whom they have empowered to license their works, sometimes they unfortunately fail to recognize the advantage. Obligating authors and rights holders to identify those who they empower as their agents would go further to eliciting that important information, and making it known.

As an adjunct to requiring authors and rights holders to identify the agencies that they authorize to license their works, the Government could also require the inverse; that all collectives or aggregators of copyrights, such as music publishing companies, record companies, performing rights organizations, mechanical licensing agencies, royalty collection and/or processing agencies and the like, must make publicly available the proper data, in the proper format, in order to be authorized to represent any third-party author/artists' interests, or to make claims for infringement on behalf of any author or artist.

SESAC Terms of Use*: "The SESAC repertory database contains works in the SESAC repertory for which SESAC, Inc. has compiled information from various sources. The database lists songs or compositions, titles, composers, authors and publisher information on musical compositions, including copyrighted arrangements of public domain works. The information is updated regularly and may change on a daily basis.*

SESAC, Inc. makes no representations and/or warranties with respect to the accuracy or completeness of the information. There are no representations and warranties contained herein and SESAC, Inc. specifically disclaims any direct or indirect liability for any losses or risks of any kind, including but not limited to incidental, special, exemplary, punitive or consequential damages, arising or which may arise out of the use, application or omission of any of the information in the database.

The following information provided by SESAC in response to specific requests may not be copied, sold or distributed by any method including electronic, magnetic or print without prior written consent from SESAC.

This is proprietary material and your cooperation is expected."

[2] United States of America v. American Society of Composers Authors and Publishers, Second Amended Final Judgment "AFJ2," Sec X; Department of Justice Memorandum in Support of AFJ2, at page 37.

[3] In Re Petition of Pandora Media, Inc. , __ F.Supp.2d __, 2014 WL 1088101 (S.D.N.Y. Mar. 14, 2014) at page 68-69.

Finally, as we suggested above, the Government could further incentivize private actors to participate in developing and sharing reliable data by providing economic incentives, such as limited liability exposure, unrestricted access to the database, or perhaps reduced registration costs, to those who provide accurate and timely data and participate in the development and maintenance of the database.

3. Please address possible methods for enhancing transparency in the reporting of usage, payment, and distribution data by licensees, record labels, music publishers, and collective licensing entities, including disclosure of non-usage-based forms of compensation (*e.g.*, advances against future royalty payments and equity shares).

Again, the most effective method of enhancing transparency in the reporting of usage, payment, and distribution data by licensees, record labels, music publishers, and collective licensing entities would be to require all rights-owners and licensing agents – record labels, music publishers, performing rights organizations, mechanical licensing agents and individual rights holders, as well – to establish and maintain timely, accurate, public machine-readable databases of all works that they own, control or excercise licensing rights for.

The Government could establish a requirement that any entity seeking to operate as a collective or aggregator of music copyright licensing rights, such as music publishing companies, record companies, performing rights organizations, mechanical licensing agencies and royalty collection and/or processing agencies, must make publicly available a comprehensive, machine-readable database of all works they claim to represent, in order to be recognized as authorized to represent third-party authors and artists' interests, and specifically to make claims for infringement or claims on behalf of any author or artist.

It is a necessary component of the business of any collective or aggregator of these rights for exploitation, as part of a business endeavor, to identify and catalog the rights they have accumulated to represent, and the parties from whom (and the terms on which) those acquisitions have been made. It is a simple task for these businesses to make that information, which they must maintain in order to run and value their businesses, available to the general public. It should be a requirement that such collectives and aggregators adequately identify the catalogs they claim to represent.

Transparency in the reporting of usage of and payment for works can be accomplished by requiring those agencies and collectives to report timely and accurate data of all uses of works that have been reported to them, along with accurate and timely accountings of all forms of payment received for such uses. In the first instance, direct payment for discrete usage should always be reported to the author or rights holder with the least amount of obfuscation. Any entity that seeks the authority to operate as an agent on behalf of individual authors or copyright holders should be required to make available, to each and every author or other rights holder they represent, an accurate, comprehensive, machine-readable database of all uses and payments made therefore that have been made to the agent, in order for the agent to be authorized to represent third-party authors and artists' interests, and specifically to make claims for infringement or claims on behalf of any author or artist.

Any entity that purports to operate as an agent on behalf of individual authors or copyright holders which does not make available, to each and every author or other rights holder they represent, an accurate, machine-readable database of all uses and payments made therefore that have been reported to the agent, should, at the least, be prohibited from making any claims for infringement or other claims on behalf of any authors, artists or other rights holders.

We understand the concerns regarding the disclosure of non-usage-based forms of compensation, such as pre-paid advances and equity ownership. There has been a good deal of public discussion regarding these transactions and how they affect overall artist compensation. While concerns over these issues may be legitimate, these transactions are often extremely complex and subject to (and therefore tailored to) a myriad of accounting, finance, tax and other concerns. As a result, it may be likely that any attempt to require disclosure of these types of remuneration in a broad policy directive will actually result in very little being reported back to authors or rights holders, as "compensation" or other recognizable benefit, in practice. In light of the complex nature of this topic, DiMA does not have a specific recommendation with respect to a requirement to disclose particular transactions or business arrangements.

Musical Works

4. Please provide your views on the logistics and consequences of potential publisher withdrawals from ASCAP and/or BMI, including how such withdrawals would be governed by the PROs; whether such withdrawals are compatible with existing publisher agreements with songwriters and composers; whether the PROs might still play a role in administering licenses issued directly by the publishers, and if so, how; the effect of any such withdrawals on PRO cost structures and commissions; licensees' access to definitive data concerning individual works subject to withdrawal; and related issues.

Potential publisher withdrawals from ASCAP and/or BMI, should not be allowed on a selective, "partial" basis. Music Publishers wishing to have their works licensed outside of the collectives of ASCAP or BMI, for any uses, should not be able to reap the benefits that are only available as a result of participating in collective licensing. Benefits of collective licensing, such as lower administrative costs, sharing of enforcement costs, etc., should not be available to parties who seek to circumvent the very controls which have proven necessary to keep such collective oligopolies in check. Music publishers should have to decide to either work within a collective, which is necessarily subject to some oversight, or to engage in entirely self-administered licensing. As DiMA made clear in our filing with the Department of Justice in response to their inquiry on this issue, to afford music publishers all or most of the benefits of these collectives, while allowing them to selectively circumvent only the clearly-necessary controls the collectives must adhere to, is antithetical to both basic notions of anti-competitive behavior and to the specific purpose of the Consent Decrees, themselves.

In the event of complete withdrawal of all rights, licensees must have access to definitive data concerning the repertory administered by the performing rights organization in question and any individual works subject to withdrawal as the Pandora and ASCAP case made painfully clear. The "blanket licensing" system that exists currently between the three main PROs; ASCAP, BMI and SESAC, establishes a marketplace that operates on the premise that, as long as a music service has licenses from all three PROs, the extent of any specific repertory or catalog (or change thereto) is inconsequential. If licensed by all three PROs that cover the marketplace, the net effect is that licensee music services have "blanket coverage" and need not worry about specifics of which works are affiliated with any particular PRO. Obviously, this approach is only effective when the licensing landscape is so-covered by a complete "blanket."

If the blanket nature of the license market is compromised in any way, then it becomes imperative for licensees to know precisely which works are licensed through the collectives and which works are subject to direct licensing, through individual music publishers. Anything short of complete disclosure of accurate information regarding the repertory gives rise to potential infringement.

The need for clear data on what repertory is available through the PROs versus which repertory is available directly from music publishers, in the event of publisher withdrawals, is absolutely critical to public performance licensees. This is something that ASCAP apparently counted on quite effectively, as a bargaining chip in their negotiations with Pandora. As Judge Cote noted in her decision in Pandora vs. ASCAP: "That same day, Pandora also asked ASCAP for the list of Sony works in ASCAP's repertoire. It would have taken ASCAP about a day to respond to Pandora's request with an accurate list of the Sony works. But, ASCAP, like Sony, stonewalled Pandora and refused to provide the list" … "By withholding the list [of its repertory], Sony deprived Pandora of significant leverage in their negotiations. Pandora was faced with three options: shut down its business, face crippling copyright infringement liability. …Sony's determined refusal to provide the list despite repeated requests over the license negotiation period is testament to the importance Sony itself placed on this bargaining chip."[4]

It is clear that even now, with the public disclosure requirements which are part of the current ASCAP Consent Decree, the information regarding PRO repertory and how any publisher withdrawals would affect the repertory fall far short of the explicitly-stated goal of "enabling users to make more informed licensing decisions and facilitating substitution of music from one PRO for music from another or direct licensing from rights holders." The need for timely, accurate and easily-accessible data regarding PROs' repertory is essential to maintaining a truly competitive licensing marketplace for the performances of musical works. This is true even when that marketplace is effectively covered by a "blanket," resulting from PRO licenses. That information becomes absolutely necessary, in the event of publisher withdrawals from those PROs.

Publisher withdrawals from the PROs are likely incompatible with existing publisher agreements with songwriters and composers, as well, and would require, at the least, significant modification of each of those agreements, or the performance licensing business, at large. The musical work publishing business literally relies on the historical and continuing assumption that music publishers will have the performance rights for the works in their catalogs administered by a PRO, who in turn, have direct relationships and outstanding fiduciary duties to their songwriter affiliates.

The overwhelming majority of publishing and administration agreements that songwriters have entered into over the last 70 years are premised on the presumption that the music publisher, with whom the songwriter enters into the agreement, will coordinate with that songwriter's Performing Rights Organization with respect to the administration of the public performance rights to those compositions the songwriter delivers under the agreement. Songwriters - and their publishing and administration agreements, by their very terms - assume the publisher and songwriter's continued affiliation with the Performing Rights Organizations as a basic element of the contractual bargain and relationship. Songwriters would be immeasurably damaged by the ability of their music publishers to claim that certain compositions, or certain rights and uses of certain compositions, were not subject to the administration of the PRO, an assumption that underlies virtually every songwriter's music publishing and/or administration agreement entered into over the last 70 years.

[4] *In Re Petition of Pandora Media, Inc. , __ F.Supp.2d __, 2014 WL 1088101 (S.D.N.Y. Mar. 14, 2014) at page 101; fn 68*

If music publishers simply withdraw an artist's works from administration by the artist's chosen PRO, doing so would effectively change the very terms of those agreements, to the detriment of the songwriters.[5] Indeed, PROs that even allow such withdrawals may be subject to claims by individual songwriters of a breach of the PRO's fiduciary duty to the songwriter members.

The economics of virtually every publishing, co-publishing and administration agreement entered into over the last 70 years were negotiated with full and complete reliance on the "splits" between songwriters and publishers being administered by the PROs. A typical publishing agreement that refers to a 75/25% split between the songwriter and publisher on "publisher income" necessarily assumes a greater payout the songwriter on the overall income, since, by virtue of the PRO's administration of the public performance income, the "publisher income" includes only half of the total income generated by public performances, with the other half of the income generated by those public performances being paid directly to the songwriter, and never counted among the "publisher income" subject to the subsequent split.

Songwriters would no longer be able to rely on their PROs and the statements they receive from them, to determine uses of their compositions. Songwriters would be left only to look to their music publishers for that information.

5. Are there ways in which the current PRO distribution methodologies could or should be improved?

The current PRO distribution methodologies can and should be improved. Artists have virtually no information regarding how the PRO income is allocated, how plays are reported or how payments are calculated. Even major music publishers are unhappy with the way ASCAP and BMI account to artist and publishers, and are seeking more detail in their payments to writers and accountings to publishers, the ability to monitor payments and conduct audits.

As Sony/ATV said in their comments in response to the pending Department of Justice inquiry into the Consent Decrees that govern ASCAP and BMI:

"…in reality, the methods used by ASCAP and BMI to allocate payments to the various music publishers and writers are complicated and often opaque. The "transparency" of which some writers and writer associations speak is typically the division of royalties between publisher members and songwriter members; however, this division is only a small piece of the transparency equation."[6]

ASCAP's payment calculation system is laid out in no less than a 20 page document that includes an acknowledgement that they rely on sample reporting, apply "song credits" through a "weighting formula" and then apply those through separate formulas for writer and publisher payments, and two and a half pages of "defined terms" that must be referred to, to even try to figure out the formula.[7] Similarly, BMI also weighs performances based on a number of loosely defined factors. Additionally, BMI builds in

[5] Songwriter's Guild Comments Submitted to the Department of Justice in Connection with its Review of the ASCAP and BMI Consent Decrees http://www.justice.gov/atr/cases/ascapbmi/comments/307845.pdf

[6] Sony/ATV, LLC Comments Submitted to the Department of Justice in Connection with its Review of the ASCAP and BMI Consent Decrees, at page 18. http://www.justice.gov/atr/cases/ascapbmi/comments/307983.pdf

[7] http://www.ascap.com/~/media/files/pdf/members/payment/drd.pdf

several different "bonuses" to their payout structure, including a "Hit Song Bonus," a "Standards Bonus," a "Super Usage Payment" which is tied to television uses and a "Music Payment Bonus."[8]

These sampling, calculation and payout schemes are not easily understandable, result in varied payouts that have little relationship to actual performances, are virtually impossible to audit and clearly favor bigger, established artists and their music publishers over smaller artists.

6. In recent years, PROs have announced record-high revenues and distributions. At the same time, many songwriters report significant declines in income. What marketplace developments have led to this result, and what implications does it have for the music licensing system?

The PROs have announced record-high revenues and distributions over the last 10 years, during a time period in which the overall recorded music industry has seen declines. Both ASCAP and BMI have seen their membership double between 2003 and 2013[9] and their respective revenues and royalty distributions increased similarly.[10] SESAC's annual revenue has averaged 30 % yearly growth, growing by a factor of 19 times over a 20 year period, from $9 million per year in 1992 to an estimated $167 million in 2013.[11]

Neither DiMA nor any of its individual members are in a position to assess whether - despite the proudly-reported clear increases in both revenues AND royalty payments to songwriter members by each of the PROs - any individual or class of songwriters have actually suffered any declines in income, whether "significant" or not. We are not aware of any songwriters providing verified income statements, tax returns or other proof to support claims that they have suffered declines in income from their PROs.

Nevertheless, even assuming - only for the sake of argument - that some songwriters have experienced declines in their payments from their PROs, there are likely many possible factors that could explain that occurrence. In the first place, individual songwriters, like all other artists and performers, eventually fall out of fashion and their works become less commercially popular, over time. It is to be expected that, like the income generated by any product or service that has passed its peak of commercial demand, particular songs will receive less airplay and therefore generate less income. This natural decline in revenues for particular songwriters is something that has always occurred, should be expected and is not a result of any development in the music licensing system.

Beyond the obvious acknowledgment that composers and their musical works are timely and necessarily subject to declining popularity and revenue over time, the lack of transparency in the way that the PROs' distribute royalties to their affiliates and high administrative costs within ASCAP and BMI certainly contribute to the limited payments that some songwriters receive. Songwriters who know their songs have been played complain that they receive no payment, at all, for those plays, while more popular artist receive "bonus" payments, beyond what plays they had were actually reported.

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[8] http://www.makingitinmusic.net/publishing-2/performing-rights-organizations-2-how-does-bmi-and-ascap-calculate-payouts.html

[9] 2003 ASCAP Membership = 150,000 v. 2013 = 500,000, 2003 BMI Membership = 300,000 v. 2103 = 600,000 – ASCAP and BMI Press Releases, 2003 and 2013.

[10] http://www.billboard.com/biz/articles/news/1445452/ascap-revenues-hit-record-high-in-2003
http://www.billboard.com/biz/articles/news/publishing/5901249/ascaps-2013-revenues-distributions-rise-in-2013
http://www.bmi.com/news/entry/20031021_bmi_reports_revenue_increase
http://www.bmi.com/press/entry/563077

[11] http://www.billboard.com/biz/articles/news/legal-and-management/6203855/sesac-gets-new-leadership-plans-to-greatly-expand

Marketplace developments that may have contributed to the alleged reduction in songwriter income necessarily include first and foremost the advent of the internet and services such as those of DiMA members, which provide consumers access to a much wider selection of music, produced by a broader array of artists, than what was traditionally exposed by the limited terrestrial radio and major record company system of marketing music. DiMA's services allow consumers to be exposed to, and then go on to delve deeply into, independent and non-mainstream areas of music that were historically largely, if not completely, unavailable through traditional, mainstream media outlets.

Self-produced and marketed artists, special-interest "niche" artists and others that would never have found an audience through the limited exposure provided by major record companies and terrestrial radio can now participate in a virtually unlimited marketplace for music. These developments have clearly led to a "democratization" of the music business, in which many participants can find a specific audience, as opposed to the traditional system, in which only a few, select, big stars are selected to be mass-marketed to a passive public. Accordingly, more artists are making some income form the performance of their works, while a select few artists that managed to dominate the narrower avenues previously available might be making less.

This democratization of the music business demands further efficiencies in music licensing, as more and more individual artists eschew the traditional major record company route and instead run their entire careers individually. Those millions and millions of smaller, self-promoting artists need an efficient licensing system that affords all artists – not just major artists that have the advantage of major music publisher and record company backing – the same ability to enter the marketplace and claim their part of it.

7. If the Section 115 license were to be eliminated, how would the transition work? In the absence of a statutory regime, how would digital service providers obtain licenses for the millions of songs they seem to believe are required to meet consumer expectations? What percentage of these works could be directly licensed without undue transaction costs and would some type of collective licensing remain necessary to facilitate licensing of the remainder? If so, would such collective(s) require government oversight? How might uses now outside of Section 115, such as music videos and lyric displays, be accommodated?

DiMA takes exception to the characterization, set forth in the Second Request for Comments that "many stakeholders appear to be of the view that the Section 115 statutory license for the reproduction and distribution of musical works should either be eliminated or significantly modified to reflect the realities of the digital marketplace"[12] and to the implicit assumption in this inquiry, that the inquiry should be focused only on the potential elimination of the compulsory license, specifically. In the first place, it is not clear that "many stakeholders" appear to be of the view that Section 115 should be eliminated or significantly modified. Of the 85 comments received and published by the Copyright Office, it appears that a small minority specifically seek elimination or significant modification of the Section 115 statutory license. The vast majority of comments do not even address the question, at all. Of the remaining comments that do address efficacy of the Section 115 compulsory license, a significant number of those remaining comments either support the retention of the Section 115 compulsory license and/or seek to expand and enhance the license.

Significantly, A2IM, which represents a broad coalition of over 325 independently owned U.S. music labels, which collectively, represent the largest music label industry segment (according to

[12] Federal Register, Vol. 79, No. 141,Wednesday, July 23, 2014, at page 42833

Billboard Magazine and Neilsen-Soundscan, 34.6% of the U.S. recorded music sales market in 2013 and approximately 40% of digital recorded music revenues) submitted comments which explicitly stated:

"The Section 115 Compulsory mechanical license is part of a music licensing framework that appropriately counter-balances the unique market power and negotiating leverage of copyright owners with certain controls on the marketplace."[13] This position was also publicly re-iterated at the New York Round Table discussion that the Copyright Office conducted.

Similarly, Brigham Young University's submission said, unequivocally:

"Section 115 is working wonderfully for our needs at the University. We love the predictable, statutory rate and the compulsory provision. It's the only part of the law (outside Section 107) where the user has some refreshing leverage in the music licensing world."[14] Again, that position that was also explicitly re-stated, in person, at the Nashville roundtable session conducted by the Copyright Office.

The Future of Music Coalition ("FMC"), a non-profit collaboration between members of the music, technology, public policy and intellectual property law communities, which described themselves as being "comprised of performing artists, composers, independent label owners, music publishers and advocates that have paid close attention over the past 14 years to developments in the technology space and their impact on music creators," filed comments that included the following, regarding the Section 115 compulsory license, in their submission:

"The 115 statutory license aids a functional music marketplace in numerous ways. Without an efficient means for sound recording owners to obtain permission to reproduce and distribute songs to which they do not retain underlying composition rights, the delivery of catalog to services and consumers would be impeded.

Current debates about the efficacy of the compulsory mechanical license tend to obscure its benefits. While it isn't hard to understand why the major publishers would want the licensing of musical compositions to be subject to direct negotiation — as is the case with sound copyright owners and services — consolidation in the publishing sector means that under such a scenario, a small handful of publishers would be able to leverage their valuable and vast catalogs to the potential detriment of competition. Besides limiting opportunity for independents, this would also frustrate the ability for sound recording owners to bring their products to the marketplace, exacerbating tensions between labels, recording artists, and publishers. It could even lead to a lowering of rates as some publishers cut bargain - basement deals to remain competitive."

The FMC submission went on to actually consider the additional benefits that would come from expanding Section 115, converting it to a full blanket license.[15]

Beyond the considered, explicit support for the Section 115 compulsory license in many of the comments, of those few comments that did call for an elimination of the Section 115 compulsory license (which, not surprisingly, includes comments of the NMPA and also several of its members and other music publishers, who also filed individually) most did so without citing any "realities of the digital marketplace." The NMPA comments, and several of the others, such as those of GEAR Music

[13] http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/American_Association_of_Independent_Music_MLS_2014.pdf

[14] http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Brigham_Young_University_Copyright_Licensing_Office_MLS_2014.pdf

[15] http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Future_of_Music_Coalition_MLS_2014.pdf

Publishing, plainly seek a repeal of the Section 115 compulsory license with a request for a free market, entirely, with respect to ALL mechanical reproduction licenses, whether for more traditional physical goods or digital uses. Comments seeking the abolishment of the Section 115 compulsory license based on the assertion that the 115 compulsory is and always has been an improper burden on songwriters and their collectives are not made any more urgent or current by suggesting that the request is made now, only in response to the alleged "realities of the digital marketplace."

DiMA does not support the elimination of the Section 115 compulsory license. As we made clear in our initial comments, DIMA member companies occupy an uncomfortable middle ground in a multi-rights owner "tug-of-war" over royalty rates between several, independent right holders, which has driven up overall royalty costs to levels that are virtually unsustainable, under the present system. Any relaxation of the existing controls on that marketplace would effectively decimate any hope for a healthy and sustainable digital music marketplace, going forward.

As imperfect as it is - with no obligation for musical work copyright holders to identify themselves, on one hand, yet the requirement on the part of potential licensees to locate and notify those unknown rights holders of an intent to make mechanical reproductions, on the other - the music licensing marketplace still benefits from the Section 115 compulsory license framework that promotes licensing efficiencies and reduces transaction costs. The Section 115 mechanical license should remain, and should be made more effective and efficient, by establishing a comprehensive and authoritative public database of the identity and ownership of musical works (and sound recordings), as discussed more fully, above.

When considering even the possibility of eliminating the Section 115 compulsory license today, it is important to note that the massive consolidation that has occurred in the recording and music publishing businesses over the last 25 years (much of it occurring in just the last 5 – 10 years), which has resulted in the establishment of significant market-dominating corporations, was approved largely because the existence of the Section 115 compulsory license. As these marketplace consolidations were proposed and subsequently reviewed for regulatory approval, the review occurred entirely within the context that the Section 115 compulsory license was, and would continue to be, in effect as a significant check on the resulting consolidated market power. Accordingly, any consideration of eliminating or curtailing the compulsory license going forward would necessarily require re-examining the entire marketplace, which has only been permitted to develop into the present state - of only a handful of participants, each of which wields market-shaping power - as a result of the compulsory license being in place.

The current Section 115 compulsory license is really only effective as a means of guaranteeing music users - that is, record companies and digital music services - access to a large number of musical works, in return for defined payments and terms. While it is a statutory license, it is not a fully functional blanket license. The Section 115 license does not guarantee complete licensing of all compositions that may be in existence and otherwise capable of reproduction and distribution, nor does it provide for licensing of potential new or alternate uses that might not fit within an interpretation of a "phonorecord." As such, the current Section 115 compulsory license falls short of a full blanket license, which would afford complete coverage for all mechanical reproductions and distributions.

If the Section 115 statutory compulsory license is to be eliminated, it should be replaced by a blanket licensing system, similar to the performing rights market, where all musical works are available for licensing, from a limited number of licensors, which licensors are subject to governmental oversight and controlled rate-setting, and in which timely, accurate and easily-accessible data regarding the licensed work, and the terms upon which it can be licensed, is readily available to potential licensees. The ability to identify and license all works, comprehensively, and to make accurate payment for the use

of those works is absolutely essential to maintaining a truly competitive licensing marketplace for musical works. The efficiencies afforded by the establishment of such a concentrated marketplace, must naturally also be accompanied by significant governmental oversight of the licensing entity(ies) empowered with that unique collective licensing authority. Statutorily-created monopolies beg for concomitant supervision of their significant pricing and other market-shaping behavior.

In addition to the continued need for some type of regulated, blanket license system for licensing of musical works for reproduction and distribution of musical works, any transition from the compulsory license market to a more uniform, blanket license market for musical works that might even be considered must be carried out in a very deliberate, controlled set of phases, all of which would necessarily be subject to oversight of a disinterested mediating entity. Simply abolishing the long-standing compulsory license is quite literally not an option. Any potential change in the system should be carefully monitored, with an explicit understanding that any change that produces a significant upset of the existing marketplace would be considered evidence that the change being undertaken is ill-advised and likely should be abandoned.

Digital service providers and record companies do, in fact, need to obtain licenses for millions of songs in order to meet consumer expectations and be commercially viable. While it is possible for digital music distribution services to be successful without an absolute complete catalog of all works, the allowable margin of unlicensed works is clearly quite thin. The unfortunate results within the market over the last 5 to 10 years have proven that without a significant majority of the works available, services cannot effectively compete. The historical landscape is littered with digital music delivery companies that were unable to sustain themselves without licenses for the majority of musical works. At present, there are no digital distribution services operating in the United States without at least every major music publisher licensed. Those that could not acquire licenses from all majors either closed or did not enter the U.S. market, at all.

While it would seem that a significant percentage of those millions of works which are necessary to launch and maintain a viable music delivery service works could be directly licensed without undue transaction costs, some type of collective licensing remains necessary to facilitate licensing of the remainder. The licensing costs for large catalogs are essentially fixed. A single license, for the entire catalog of millions and millions of songs takes only incrementally increased time, energy and cost to execute over a single license for a single composition. Pursuing individual licenses for each of hundreds of thousands or even millions of individual musical works that are not a part of larger catalogs is not a viable proposition. This is true for both digital music service providers on the licensee side and also for independent artists who are not part of a significant catalog, on the songwriter/licensor side.

Digital music delivery services, who need to offer as many titles as possible to remain competitive and require business certainty about the availability and the cost of those millions of titles, would require some type of centralized licensing system, in order to ensure that they have properly licensed as many musical works as possible. On the other side of the equation, small independent artists would need a licensing scheme that would ensure that they could easily get their works placed on these services at a competitive rate, so that they could effectively participate in the wider market now presented by digital services, a market that previously afforded independent artists little or no exposure.

As discussed above and elsewhere, such collectives require government oversight. As has been historically recognized by Congress and the Department of Justice - and as the federal judges retaining jurisdiction over certain Consent Decrees have, as recently as this year, found to be the case - the natural behavior for collectives and monopolies is to instinctively leverage their position and attempt to extract supra-competitive rates and terms. We should not need to point to the recent evidence of this behavior, specifically in the context of music licensing (as convenient as it may be), to make the point. It is a plain

economic fact which requires no supporting citation that left unchecked, monopolies and oligopolies will unfailingly exploit the market power they accrue. Accordingly, the efficiencies that inure from a concentrated marketplace require significant governmental oversight of the few licensing entity(ies) authorized to operate without natural marketplace competition.

Potential uses now outside of Section 115, such as music videos and lyric displays, could easily be accommodated on a voluntary basis, by licensors. One of the additional significant ancillary benefits to establishing an efficient licensing regime that would be built around a comprehensive and authoritative public database of musical works and sound recordings, beyond going great lengths in resolving issues such as realizing a truly blanket licensing result, affording certainty about licensed rights and reducing liability, and helping accurately identify orphaned works, is that once the database is established and a licensing system utilizing it is in place, for even a single type of use, that database can easily be extended to support licensing for any number of other uses. A database initially constructed specifically to support compulsory licensing of Section 115 mechanical rights could easily be extended by rights holders to facilitate licensing of the works represented in the database for any number of additional uses. The availability of voluntary licenses for any type of use could be made available through the database. Similarly, rights users, such as record labels, digital music services and audio visual producers could solicit licenses for those additional uses directly to the rights holders identified in the database.

Much discussion at the round table meetings surrounded the so-called "RIAA Proposal," which was also specifically mentioned by the Copyright Office in your solicitation for these Reply Comments.[16] Briefly, the proposal would apparently allow music publishers and sound recording owners to collectively negotiate, among themselves, an industrywide revenue-sharing arrangement as between them, with a fixed percentage of licensing fees for use of a recorded song allocated to the musical work and the remainder to the sound recording owner. Record labels would thereafter be permitted to bundle musical work licenses with their sound recording licenses, with the third-party licensees making payments for the musical work, in accordance with the previously established ratio, directly to music publishers and the balance to the record companies owning the sound recordings, according to the agreed industry percentages. We further understand that the end result of the "RIAA Proposal" assumes that the Section 115 compulsory license would be eliminated and free market rates would apply, and further that such an arrangement would extend to certain audiovisual uses not currently covered by the Section 115 license, such as music videos and lyric display.

The proposal was rather forcefully and consistently rejected by many of the music publisher participants at the round table discussions, and certainly by all of the representatives of major music publishing concerns. Accordingly, we are not convinced that the proposal warrants detailed consideration. A proposal that is predicated upon coordination between record labels and music publishers, which has been rejected out-of-hand by the music publishers, may not be very viable, regardless of its potential merits.

For what it is worth, some of the basic elements of the RIAA Proposal at least address some issues that would necessarily lead to a much more efficient music licensing marketplace. The proposal includes the concept of bundling two distinct rights necessary to effectively license a sound recording; the rights to a) the sound recording, and also b) the underlying musical composition, into a single transaction, which transaction would supposedly be ultimately negotiated on economically reasonable and viable terms. The concepts of establishing "one-stop-shopping" to acquire both of those two important rights, as well as the concept resulting in a single transaction for the total "content costs" should be considered more closely.

[16] Federal Register, Vol. 79, No. 141,Wednesday, July 23, 2014, at page 42835

Reducing the number of licensors that need to be dealt with by providing a single licensor entity that passes through other included rights would reduce the number of transactions necessary and the transaction costs, greatly. Additionally, combining both of the rights necessary to engage in music distribution into one transaction, as opposed to having them addressed in multiple discrete transactions, none of which incorporate or take into account other rights licensing costs or terms, would help alleviate a significant facet of the "tug-of-war" over rights and royalties music distributors face, and presumably result in total transaction costs that would come within economically sustainable levels. These are admirable goals that should be pursued, in whatever context rights holders can find comfortable accommodating.

Sound Recordings

8. Are there ways in which Section 112 and 114 (or other) CRB rate setting proceedings could be streamlined or otherwise improved from a procedural standpoint?

There are several ways in which Section 112 and 114 and or other CRB rate setting proceedings could be streamlined. In the first instance, the Section 112 "ephemeral" license should be, at the least, updated to reflect the realities of the transmission of performances of sound recordings in today's day and age. Requirements such as that the ephemeral recordings, necessary to engage in transmissions, must be "destroyed within six months from the date the transmission program was first transmitted," or that the transmitting entity "make no more than 1 phonorecord of the sound recording" are archaic and serve no real purpose in modern broadcasting. Similarly, the need to have a distinct rate-setting process, that results in a separate rate specifically attributable to the 112 ephemeral license (as distinct from the Section 114 license rate) is a procedural redundancy that serves no actual purpose. The basic concerns addressed by the 112 license can and should be incorporated into the 114 license, as a component of the process of making transmissions under section 114.

Moving on, several improvements could and should be made to the statutory rate setting procedures. For example, all rate setting could occur under dedicated federal judges and under standard Federal litigation rules. As the 70 year history of ASCAP and BMI Consent Decrees indicates, such rate setting procedures conducted in that context are not unduly burdensome, and they do not produce significantly unforeseen results. Moreover, by making such a change policymakers would eliminate questions that some have raised regarding the constitutionality of the Copyright Royalty Board and guarantee that complex music licensing disputes would be resolved by judges with increased experienced and tenure. Properly appointed, sitting federal judges, with years of practice before them, have proven astute at grasping the nuances of music licensing and particularly adept at applying standards and arriving at fair rates under those standards.

The rate setting process itself could be significantly streamlined by allowing for discovery before presentation of the parties' direct cases, and combining the direct and rebuttal phases of the ratesetting hearings into a single integrated trial, in ordinary civil litigation. In addition, more should and could be done to encourage settlements. Adoption of settlements is currently painfully slow and labored. The Copyright Royalty Judges seem overly concerned with details of settlements, particularly as the adoption of those settlements may impact the awkward division (and overlap) of jurisdiction between the Copyright Royalty Board and the Copyright Office. Encouraging swift adoption of settlements, allowing settlements to be treated as non-precedential, and perhaps allowing non-precedential interim settlements (i.e. in between the 5 year rate setting intervals) are just some of the ways that the current process could be modified to engender more settlements.

International Music Licensing Models

9. International licensing models for the reproduction, distribution, and public performance of musical works differ from the current regimes for licensing musical works in the United States. Are there international music licensing models the Office should look to as it continues to review the U.S. system?

While it may seem initially as though international licensing models for the reproduction, distribution, and public performance of musical works might offer viable alternatives to consider, contemplation of adopting these regimes should be considered carefully, and in full context. There may be certain aspects of foreign licensing systems that we can learn from and perhaps even incorporate. For instance, a closer harmonization of U.S. licensing systems with international systems would facilitate the inevitable move towards a global marketplace.

It is important to take note however, that several of the models developed in earnest throughout Europe, Asia and Latin America recently have failed in actual practice. In addition, these regions often have entirely different copyright schemes, such as "author's rights" being superlative to so-called "neighboring rights" (which vary widely in scope between different countries and collections of states) and "broadcast mechanical rights" which make the adoption of certain standards very difficult, if not impossible under the U.S. system.

Other Issues

10. Please identify any other pertinent issues that the Copyright Office may wish to consider in evaluating the music licensing landscape.

During the course of the public round table discussions the Copyright Office seemed to embrace the perspective, perhaps fostered by some commenters, that the 801 (b) rate-setting standard is somehow inherently geared to result in "below market rates" which rates are only intended to provide a "subsidy" to assist fledgling start-up businesses. With a further assumption that "mature" businesses should be able to "age out of" the 801(b) standard[17] and into the willing buyer-willing seller rate-setting standard, which people think are "rates that are closer to what would come about in the free market."[18]

As we tried to make clear in our comments at the round table, it does not seem that many of the commenters believe that 801(b) is somehow a less-preferred rate-setting standard that should only be applied temporarily. There were at least 6 participants at the New York Public Round Table, where the issue was discussed, that took the opportunity to explicitly announce support for the 801(b) standard over willing buyer-willing seller.[19]

Beyond the fact that there does not appear to be any agreement - or even majority - on the issue, there is an absence of historical or factual support for the assertion on the part of commenters, or an assumption on the part of the Copyright Office, that 801(b) is somehow inappropriate or has only been adopted as an interim standard that companies or industries should "mature out of." The 801(b) standard

[17] Music Licensing Public Roundtable, Monday, June 23, 2014, transcript, at pages 327-329.

[18] Id at 334.

[19] Myself, Willard Hoyt of the Television Music License Committee, LLC, at page 45; Paul Fakler, representing the National Association of Broadcasters and Music Choice, at page 309-311; Cynthia Greer of Sirius XM Radio Inc., at 326; William Malone, of the Intercollegiate Broadcasting System, Inc. at 349; and Jodie Griffin, of Public Knowledge, at 318.

has been in effect and employed to set a variety of music licensing rates, both for mechanical licenses and for public performances of sound recordings, since 1976. It has been applied to numerous rate-setting proceedings, none of which resulted in so much as a request for Congressional intervention, much less actual intervention occurring. Many of the rate-setting proceedings conducted under the 801(b) standard did not even result in an appeal of the rate set, in the initial proceeding.

In sharp contrast, the willing buyer-willing seller standard for rate setting is only employed with respect to setting the rate for statutory uses of sound recordings in non-interactive digital radio, and only since 1998. Congress only applied a similar "fair market value" standard to a non-existent market once prior, in the context of the satellite television industry. As some may recall, the rate determination under that statute resulted in rates and terms that were seen as so unfair and problematic that it set off years of debate in Congress, ultimately resulting in Congress not only reversing the result, but additionally going out of its way to discourage any further use of the standard for the satellite television industry, with the Satellite Home Viewer Act of 1999.[20] Not surprisingly, almost every application of the willing buyer-willing seller standard to non-interactive internet radio has also resulted in Congressional intervention, and virtually all applications of the standard have resulted in lengthy appeals.

A fundamental flaw with "constructed fair market value" standards such as the willing buyer-willing seller standard, is that the "market" the standard seeks to construct or emulate does not exist and often has never existed. There is no market, nor has there even been a historical model, to inform the judges what the fictional "willing buyer" would ask for, or more importantly, be able to actually get, or what the fictional "willing buyer" might be truly willing to pay, in a marketplace that would not incorporate the terms of the statutory license environment.

The 801(b) standard, as opposed to trying to emulate a market that, by its very terms does not and cannot exist, simply announces four objectives to be sought, when setting rates under the standard:

(A) To maximize the availability of creative works to the public;

(B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

The wisdom behind § 801(b) rests in these four extremely important, flexible objectives. The first objective essentially re-states the Constitutional purpose of copyright law. The second objective is to assure that, under existing conditions, royalty payments will foster the continued existence and growth of

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[20] "Applying the new marketplace value standard as it was required to do, the CARP not surprisingly raised the rates considerably. The satellite industry, with less than 10 million subscribers, was required to pay more in statutory royalty fees than the cable industry, which had nine times the number of subscribers. The satellite industry and its customers were irate."

"In reaction to complaints about the outcome of the 1997 CARP proceeding that raised the section 119 royalty rates, Congress abandoned the concept of marketplace value royalty rates and reduced the CARP-established royalty fee for network stations by 45 percent and the royalty fee for superstations by 30 percent." Statement of David O. Carson, General Counsel, United States Copyright Office, before the Committee on the Judiciary United States Senate,108th Congress, 2nd Session, May 12, 2004.

the market, by equitably compensating creators and also providing fair income to those services that utilize the works. The third objective is to assess the relative value of contributions of both the copyright owner and the copyright user, in the market. The fourth objective is focused on minimizing disruption, for each industry involved in the overall bargain, and the need for rates that do not upset those industries or their prevailing practices.

The application of these objectives comprising the 801(b) standard does not result in inherently "below market rates." Indeed, in one of the most consistent applications of the standard – the statutory rate for mechanical licenses under Section 115 – the 801(b) standard has virtually uniformly resulted in what are unequivocally ABOVE market rates. The vast majority of recording agreements over at least the last 40 years, all of which are entered into in a completely unregulated, free market, include provisions under which recording artists and songwriters freely agree to a marketplace rate for the reproduction of the musical works to be reproduced under the agreement, at a rate which is typically a full 25% below the statutory rate, which has been set pursuant to the 801(b) standard, since 1976.

The willing buyer-willing seller standard is not only clearly NOT the preferred rate setting-standard of a majority of the commenters who have submitted thoughts on it to the Copyright Office, it is in fact a relatively novel approach to the important task of statutory rate setting, and one that has proved both far more problematic and far less predictable than the 801(b) standard, in the short tenure of its tumultuous application. Discussions regarding the standard that should be applied to important rate-setting proceedings resulting in rates that will effectively determine the survival of significant participants in the music ecosystem should consider these facts, seriously.

CONCLUSION

In making its recommendations to Congress regarding potential areas for the modernization of U.S. copyright law in the area of music licensing, DiMA continues to urge the Copyright Office to take a holistic view of the entire music licensing landscape, beginning with consideration of the true intent and purpose of Copyright. Copyright is not intended to benefit authors and artists first and the public second, as some have erroneously proposed. It is, explicitly, intended to promote the public good that comes from a wide dissemination of creative works, and to ensure that primary public benefit is promoted, through the means of securing exclusive rights to authors for limited times. As the Constitutional framers, Congress and the United States Supreme Court have all observed, the goal should be to strike the proper balance between the principal concerns of the public at large, with the appropriate incentives to stimulate individual creators.[21]

In addition, in policy debates regarding copyrights, we must maintain an appreciation of the unique nature and monopoly that is inherent in each copyrighted work. Individual copyright owners enjoy a limited set of rights, for a limited period of time, specifically in recognition of the unique, intrinsically monopolistic charachter of copyrights. Copyrighted works are not commodities that compete directly with each other. Just as a novel will not serve as a suitable replacement for a textbook, any particular song is a unique "good," for which no other market replacement readily exists. As such, while copyright owners are given great flexibility in the rights to exploit the works they create, the collective licensing of musical works is inherently anticompetitive, as the license for any particular musical work cannot be a substitution for another specific musical work.

[21] "The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served. . . . Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. . . ." H.R. Rep. No. 60-2222, at 7 (1909); "The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.' Art. I, 8, cl. 8." Feist Publications, Inc. v. Rural Tel. Service Co., 499 U.S. 340 (1991).

Accordingly, we urge the Copyright Office to consider the six essential pillars outlined in our initial response to the Copyright Office's original Notice of Inquiry on this topic, as you continue to study the state of music licensing in the United States. In respect of both the importance and the technical complexity of the various issue involved, we respectfully suggest that the Copyright Office continue to conduct further analysis of music licensing issues and the significant problems that have plagued the marketplace which have been discussed in this and other responses and replies, the round table discussions and elsewhere, as part of the Copyright Office's ongoing assessment of the music licensing aspects of the Copyright law, which may ultimately be included in recommendations for appropriate legislative changes.

Dated: September 12, 2014

By: _____

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