Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

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

ADDITIONAL COMMENTS OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC. AND THE HARRY FOX AGENCY, INC.
IN RESPONSE TO JULY 23, 2014 SECOND NOTICE OF INQUIRY

The National Music Publishers' Association ("NMPA") and its wholly owned licensing subsidiary, The Harry Fox Agency, Inc. ("HFA") (collectively "NMPA"), respectfully submit these Additional Comments pursuant to the Copyright Office's Notice of Inquiry requesting additional comments on Music Licensing issues dated July 23, 2014 (the "Notice"). 79 Fed. Reg. 42,833.

COMMENTS SUBMITTED IN FIRST COPYRIGHT OFFICE NOTICE OF INQUIRY

In comments submitted in response to the Copyright Office's first Notice of Inquiry regarding the Music Licensing Study ("Initial Comments"), NMPA asked the Copyright Office (the "Office") to (1) support immediate passage of the Songwriter Equity Act[1] ("SEA"), (2) work with stakeholders and Congress to assist in repealing and transitioning out of the Section 115 ("Sec. 115") compulsory license system, and (3) in the interim, support immediate passage other amendments to section Sec. 115, including introduction of a Sec. 115 audit right in addition to the pre-existing certification requirements[2] and elimination of the "pass-through" license.[3]

[1] Songwriter Equity Act of 2014, H.R. 4079, 113th Cong. 1st Sess. (2014).
[2] *See* 37 C.F.R. § 201.19.
[3] Comments of National Music Publishers' Association and The Harry Fox Agency in response to the Copyright Office's Notice and Request for Public Comment on Music Licensing. 79 Fed. Reg. 14, 739 (March 17, 2014)

The reply comments below provide (a) answers to the specific questions raised by the Office in its July 23, 2014 Second Notice of Inquiry; (b) a response to the RIAA written proposal and others promoting an expansion or continuation of the Sec. 115 compulsory license); and (c) additional comments explaining that understanding and treating copyright as a strong property interest exchanged in a free market, rather than a utilitarian economic theory, will maximize efficiency and the public welfare.

The short-term goals of seeking rate parity and meaningful collective audit rights are consistent with and complement the songwriters' and publishers' long term goal of transitioning out of the Sec. 115 compulsory license into a more efficient free market system.

None of the short-term proposals would prevent or inhibit a gradual transition out of the Sec. 115 compulsory license system. In fact, adjustments that would make the rate-setting process equitable via the SEA, and other changes like the introduction of collective auditing mechanisms, would better approximate a free market approach and therefore will help lessen transition pressures in the long run.

RESPONSE TO THE NOTICE

I. 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.

The NMPA Initial Comments submitted by the NMPA and HFA described the process of exchanging and matching data in order to license musical works, quantify music usage, identify ownership, calculate royalty payments and execute payment instructions.[4] Each step in the

("Initial Comments"), *available a*t http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/NMPA_HFA_MLS_2014.pdf.

[4] *Id.* at 8-12.

process requires establishing a relationship, obtaining, formatting and exchanging sound recording, publishing and usage data, generating a match, updating that data on a regular basis and then repeating the process. Even the song database is an ever-changing collection of information that requires constant data exchanges with copyright owners and others with claims to royalty payments. This constant process of exchange and harmonization will only be successful if all parties involved in providing and exchanging data have incentives to do so in a timely and accurate manner. In essence, data regarding recordings and song ownership is the music industry equivalent of the nuts, bolts and other parts used to assemble a car or any other physical product.

As set forth in more detail below and in the NMPA Initial Comments,[5] the best way to "incentivize private actors to gather, assimilate and share reliable data" and manage the parts necessary to assemble the final recording, performance or stream is to allow the free market to provide a profit motive. Deregulation of the airlines, trucking, railroads and shipping in the 1970s and 1980s is often cited as the impetus for companies to develop many of the widely used supply chain management strategies employed today.[6] Most industries have significant challenges managing input to their products and delivery of complete products to consumers. As a result, market forces have caused the development of supply chain management platforms that not only manage the sourcing of inputs and logistics related to delivering finished products, but also analyze large volumes of data associated with all aspects of companies' supply chains in order to improve efficiency and manage risks to the supply chain.[7] Similarly, where markets for

[5] *See* Response to Issue No. 7, *infra* pp. 9–10.
[6] *Supply chain management: A look back, a look ahead*, James R. Stock, Ph.D., SUPPLY CHAIN QUARTERLY (Quarter 2, 2013), *available at* http://www.supplychainquarterly.com/topics/Strategy/20130621-supply-chain-management-a-look-back-a-look-ahead/.
[7] *Id;*, *See also, Lifting the fog: Three steps to supply chain visibility*, Denis Hübner, Stephan M. Wagner and Boris Zaremba, SUPPLY CHAIN QUARTERLY (Quarter 2 2014), *available at*

creative works are unregulated and free of governmental price controls, transactional hubs, syndication platforms and other supply chain management platforms have developed to match buyers to sellers and allocate and distribute revenue.[8] NMPA believes the market would build upon these early service offerings if the constraints of government regulation were removed from the music marketplace.

As the likelihood of being paid fairly increases due to free market royalties and the development of better usage tracking and reporting, the more likely owners of musical works and sound recordings will be to either invest in, or partner with third party providers of, transaction hubs, syndication platforms and other partner platforms that make usable information available to buyers. Of course, the greater likelihood of real consequences for failing to report and pay for the use of copyrighted works, the more likely a potential licensee is to invest in or participate in the process of generating, exchanging and updating data. In contrast to the unilateral ability of licensees to obtain authorization for the use of musical compositions under Sec. 115, the codependence created by the free market is far more likely to engender the cooperation and exchanges necessary to "gather, assimilate and share data."

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?*

NMPA has noted before that the Copyright Office has a unique and valuable role to play with respect to ownership data as the office of public record for copyright registrations and

http://www.supplychainquarterly.com/topics/Strategy/20140613-lifting-the-fog-three-steps-to-supply-chain-visibility/.

[8] *See* Response to Issue No. 7, *infra pp.* 15, for specific examples of such services.

transfers.[9] NMPA believes the Office should link its recordation and registration records and develop application programmer interfaces ("APIs") that interact with the relevant database(s) so that businesses, academics and others can interface with the data and documents maintained by the Office directly.[10] Linking registration records to document records and making them available through APIs enhances the public record function of the Office and would provide a foundation for transactions much like deeds provide the foundation for real estate transfers.

An additional enhancement to the registration and recordation databases would be the inclusion of unique identifiers to the extent available at the time of registration or recordation. NMPA views this as an enhancement because the registration and recordation databases will only be used by the industry if they are easily accessible by enterprise scale applications through an API (or similar technology). To the extent the Office's database are readily accessible and become integrated into the digital music business ecosystem, the value of supplying additional information such as unique identifiers will be apparent to market participants. Little other incentive would likely be necessary. One could speculate that, if the Office's database was easily accessible now, the Registration Number would be in wide use as the unique identifier of choice.

As noted in NMPA's Recordation Comments, HFA relies upon the International Standard Recording Code ("ISRC")[11] in linking sound recording records to musical compositions.[12] NMPA believes many businesses rely on ISRCs to some extent and that few other unique identifiers have been adopted widely across industry participants. Within the publishing

[9] Comments of the NMPA and HFA in response to Notice of Inquiry and Request for Comments regarding Reengineering of Recordation of Documents. 79 Fed. Reg. 2696 (January 15, 2014) ("Recordation Comments") at 7-9.
[10] *Id.*
[11] *See* https://www.usisrc.org/ for details regarding issuance and management of ISRC codes.
[12] Recordation Comments at 10-11.

community, ASCAP and BMI have previously discussed the unique identifiers available through CISAC.[13] To the extent the demands of the industry continue to point to the value of unique identifies, participation and encouragement of the Office in defining the relevant standards could be helpful.

> *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).*

As discussed in response to Issues No. 1, above, and No. 7 below, NMPA believes the best way to deal with transparency is to allow the marketplace to function. Not only will it provide a profit motive for improvement of data, it will also require actual business relations to develop between licensors and licensees, a key ingredient missing from the world of compulsory licenses.

To the extent songwriters and music publishers continue to be subject to the Section 115 compulsory license, however, NMPA has identified several areas in which transparency could be improved in connection with the Section 115 compulsory license in the NMPA Initial Comments,[14] joined with several industry participants to recommend revisions to the regulations governing statements of account under Section 115,[15] and recommended adoption of revised certification regulations in connection with the statements of account under Section 115.[16] We

[13] Comments of the American Society of Composers, Authors and Publishers and Broadcast Music, Inc. in response to Notice of Inquiry and Request for Comments regarding Reengineering of Recordation of Documents. 79 Fed. Reg. 2696 (January 15, 2014) at FN 5, *available at* http://www.copyright.gov/docs/recordation/comments/79fr2696/ASCAP_BMI.pdf.

[14] Initial Comments, *supra* note 3, at 12-15.

[15] Joint Reply Comments of the Digital Media Association, National Music Publishers' Association, Recording Industry Association of America, Inc., The Harry Fox Agency, and Music Reports, Inc. in Response to the Request for Additional Comments on the Mechanical and Digital Phonorecord Delivery Compulsory License. 77 Fed. Reg. 44179 (July 27, 2012), *available at* http://www.copyright.gov/docs/docket2012-7/comments/reply/nmpa_hfa.pdf.

[16] Reply Comments of the National Music Publishers' Association, The Harry Fox Agency, the Songwriters Guild, and the Nashville Songwriters Association International in Response to the Request for Additional Comments on the Mechanical and Digital Phonorecord Delivery Compulsory License. 77 Fed. Reg. 44179 (July 27, 2012), *available at* http://copyright.gov/rulemaking/docket2012-7/comments/reply/nmpa_fox.pdf.

believe these recommendations would dramatically improve transparency in connection with compulsory licensing. In particular, improved certification requirements and the addition of an audit right to Section 115 would address concerns about advances and equity shares by providing improved visibility into how compulsory licensees treat advances and equity grants under GAAP.

II. 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.

NMPA would like to reference and incorporate herein the positions in its comments in response to the Department of Justice's Solicitation of Public Comments regarding the Consent Decrees and Performance Rights Organizations.[17]

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

Please see Response to Issue No. 3.

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?

As noted in our Initial Comments, the physical marketplace continues to be displaced by the digital marketplace, which has not matured sufficiently to replace the income from lost physical sales. In addition, within the digital market, a shift away from the sale of downloads

[17] Comments of the National Music Publishers' Association in Response to the Department of Justice's Antitrust Division Solicitation of Public Comments Regarding Review of the ASCAP and BMI Consent Decrees, *available at* http://www.justice.gov/atr/cases/ascapbmi/comments/307900.pdf.

towards subscription and ad-supported streaming services is taking place. As a result, public performance royalties are increasing in importance while mechanical income has diminished. Almost all musical work owners are in agreement that this is the most challenging aspect of the new digital marketplace. NMPA data supports this conclusion.[18] Although a small group of songwriters continues to earn substantial income, the middle class of songwriters has been severely impacted.

Reinforcing this trend is the fact that fewer artists are signed to major labels, and the number of major label releases per year has decreased. This means a smaller number of songwriters account for a larger percentage of the income earned from the larger commercial releases.

Other factors are also contributing to the loss of income for middle class songwriters. Piracy is still a major drag against sales, increased competition has driven down synch fees, and governmental price controls limit the value of streaming royalties. All of these factors contribute to this downturn in songwriter revenue for those not involved in hit releases. Reinforcing this drop in income for the large middle class of songwriters is the fact that the number of major label releases per year has decreased as lost revenue has inhibited labels' ability to invest in artists. As a result, a smaller number of songwriters account for a larger percentage of the income earned from the larger commercial releases.

NMPA believes the Office will find the submissions from the other trade associations representing songwriters and composers informative regarding this point.

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[18] *Compare NMPA's David Israelite to Congress: A More Efficient Mechanical Licensing System*, Ed Christman, BILLBOARD (June 13, 2012), available at http://www.billboard.com/biz/articles/news/publishing/1093490/nmpas-david-israelite-to-congress-a-more-efficient-mechanical (reported mechanical revenue as 36% of total income) *with NMPA Puts U.S. Publishing Revenues at $2.2 Billion Annually*, Ed Christman, BILLBOARD (June 11, 2014), available at http://www.billboard.com/biz/articles/news/publishing/6114215/nmpa-puts-us-publishing-revenues-at-22-billion-annually (reported mechanical revenue as 23% of total income).

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 Section 115, such as music videos and lyric displays be accommodated?*

Our Initial Comments expressed support for phasing out the Sec. 115 Statutory License so that licensing can occur in the free market.[19] Such a transition would require building a consensus regarding how long compulsory licenses and licenses incorporating the statutory rate will remain in effect. Eventually all such license should expire and the free market should take over.

Further transition to the free market would require the continued development of mechanisms to execute transactions for the use of musical compositions and related administrative support, addressing record keeping, payment, collections and royalty disbursement.[20] Because songwriters and music publishers have been subject to governmental price controls for over 100 years, the exact contours of this emerging market are difficult to predict. However, understanding how unregulated markets for musical compositions, related sound recordings and other intellectual property rights function provide guidance.

A review of the synchronization ("synch") market and other markets for intellectual property suggest that as Sec. 115 sunsets, it will be replaced by a dynamic, competitive, worldwide market that will develop technological solutions to license all rights necessary for a variety of uses of musical compositions at a wide range of prices. Independent artists, songwriters, labels, publishers, stock music companies and amateurs will create a never ending

[19] Initial Comments, *supra* note 3, at 8.
[20] *See* Initial Comments, *supra* note 3, at 8-15 for a discussion of the types of administrative support required.

supply of music. The rights to that music will be administered by sophisticated service providers that offer transactional hubs, syndication platforms and other supply chain management applications to disseminate music and manage information necessary to operate digital music services. With few, if any barriers to recording music and distributing it online, a massive supply of music will be (and already is) available or can be created by any company that finds it necessary for creative or economic reasons.

The Synch Market

The market for synch licenses, licenses that authorize the use of music in timed relation to a visual image, is the only free market in which songwriters and music publishers operate. The synch fees charged for use of compositions vary depending on whether the licensed song is obscure or well-known and the usage type. Synch fees, therefore, vary depending on (1) the media type, such as motion pictures, television commercials, television shows and video games, (2) whether the license is for "broad rights" or limited rights and whether out-of-context uses are included (*i.e.* the song is used differently than it is used in the film). Typically, production companies hire a music supervisor to help them navigate the synch licensing market.

A music supervisor oversees the use of music in a project. This includes collaborating with the producers and editors on creative decisions, clearing songs used in a project, managing delivery schedules if composers and original recordings are involved, and tracking the cost of all music related expenses to make sure the production does not go over budget.[21] Music supervisors manage budgets in a variety of ways depending on the needs of the particular project.

[21] *See The Benefits of a Music Supervisor: Interview with Carrie Hughes*, http://www.ifp.org/resources/the-benefits-of-a-music-supervisor-interview-with-carrie-hughes/#.U9FvM-NdWCc; *Music Supervisor Profile: Liza Richardson*, http://www.rollograd y.com/music-supervisor-profile-liza-richardson/ (describing the different approaches for obtaining synch license for hits in Parenthood and Friday Night Lights: "First of all, the Parenthood music budget is really good. On Friday Night Lights, we did two-year terms, which is hardly anything in the world of licensing. If we had licensed songs for perpetuity, we would never have been able to afford all that music. The two-year term covers the broadcast on NBC and Direct TV and I think that's it. All of the music gets replaced after the two-year term, so anything that lives on beyond two years – like on DVD, gets replaced").

Options include reducing the number of songs used in the project, using cheaper music, rescoring the project for syndication as iTunes downloads or Netflix streams, or even having music composed specifically for the project.

For example, a music supervisor may use pop hits for the initial broadcast release of a televisions series and then replace the pop hits with library and alternative music for syndication, DVDs or other distribution channels. This is how Carrie Hughes handled a budget issue for *The Hills*. "That is what we did with the Hills, they used all major label pop songs in the main broadcast version and then I had to rescore everything with cheaper alternative songs for the DVD's . . ."[22] More common, music from independent labels may be used instead of major label hits. As Ms. Hughes notes "there is so much great indie music that works just as well as major label pop music but can be licensed for significantly less. Certain shows can't get away with that like Dance Crew, Sing Off, Fashion Star, those are big stage shows that people want to hear big recognizable pop songs in but we use all indie stuff in Real L Word and it works very well. So there is always a way to work with a small budget - it's just a matter of prioritizing."[23] Moreover, a never ending flow of music from new bands, licensing companies, record labels and music publishers is provided to music supervisors directly or is available through

[22] Carrie Hughes, *supra* note 21, http://www.ifp.org/resources/the-benefits-of-a-music-supervisor-interview-with-carrie-hughes/#.U9FvM-NdWCc; *see also, Interview with Music Supervisor Liza Richardson*, http://www.aimp.org/aimpArticles/18/Interview_with_Music_Supervisor_Liza_Richardson ("The music supervisor brings the horse to water and can supply options for whatever the problem is, like if we need songs to fit a certain budget, no problem, we have to know song prices pretty well, and where to find great music for different budgets. It's hard for producers to know how much songs cost and who owns recordings and publishing, we help navigate that for them*."); Music Supervisor Profile: Michelle Kuznetsky*, http://www.rollograd y.com/music-supervisor-profile-michelle-kuznetsky/ ("Let's say somebody falls in love with U2, but their music costs a lot of money and instead we have a very little amount of money. I have to find something that creatively works for the scene and is in our price range, but also that everyone loves and hasn't heard before.").

[23] Carrie Hughes, *supra* note 21; *see also, Music Supervisor Profile :: Joe Rudge*, http://www.rollograd y.com/music-supervisor-profile-joe-rudge/ ("It's understanding the complexities of licensing; you understand really the value, why a major publisher quotes so much on one song and why an indie rock band from Indiana will quote something else.").

intermediaries.[24] Indeed, the Internet has greatly expanded the volume of music available to music supervisors.[25] As music supervisor Barry Cole put it, "I used to go and dig in record stores, thrift stores, flea markets. Now we're in this digital age and it's interesting as a music supervisor looking for these resources because digging is now on the Internet. And there's tons of stuff out there."[26] Moreover, independent artists, songwriters and producers can produce professional quality recordings that meet the requirement for film and television.[27]

Finally, music may be composed specifically for a placement where budgets are limited.[28] One New York music supervisor has even suggested that with music budgets for film decreasing, music supervisors may partner with composers to offer supervision and composition

[24] Michelle Kuznetsky, *supra* note 22 ("There are so many new ways that artists can get out their music now. Of course they can put up a song on iTunes, but I also get sent packages every day, and receive emails probably once every 20 minutes, each from a new band, with a new link to new music. I look through everything to try to find music that sounds good."); *see also*, Joe Rudge, *supra* note 23 ("There are so many music licensing companies, record labels, and music publishers who push me music. It's great if the ones I trust send me music. I always know to go there. It's important establishing working relationships and knowing that if they're pitching me music, then, okay, this is 100% signed off on; I can go ahead and pitch it. I check maybe 10 music blogs per day. I also still listen to radio. NYU and Fordham's radio station and Columbia's radio station are excellent; they're such amazing resources to listen to new music. I also, believe it or not, read music magazines. It's a collage: all of these resources help me understand what kinds of music people are listening to."); *Music Supervisor Ron Proulx*, http://www.musicsupervisorguide.com/interview/music-supervisor-ron-proulx ("There are a lot of music publishers, brokers, and song pluggers out there that might handle 100 or 200 independent artists. We often contact these with a project brief and outline specific requirements, such as "we need a female vocal that is reminiscent of KT Tunstall" or something like that. From that we receive a link to a selection of 3 specific ideas from their roster of hundreds of artists. So it's sort of a filter process. We supervise quite a number of projects for independent producers so we seek a lot of independent music. We usually don't do a lot of work for major label or publisher licensing at the moment.").

[25] *Music Supervisor Ron Proulx*, http://www.musicsupervisorguide.com/interview/music-supervisor-ron-proulx ("In the last few years, of course, with the birth of MySpace particularly and other sites like it, it's a lot easier for artists to get their music out there and therefore easier for us to hear and discover them. Because of technology more artists are able to make their own records, which is both good and bad. The good is more artists get to make their records that are independent.").

[26] *Music Licensing for Film, TV, Video Games w/ Barry Cole – Shadetek Creative Strategies*, http://blog.dubspot.com/music-licensing-for-film-tv-video-games-w-barry-cole-shadetek-creative-strategies/.

[27] *Id.* ("Today, indie artists and producers can make tracks on their own that sound as good as major label productions, and those tracks are just as eligible to go into a big film or television show as any other track.").

[28] *The Music Supervisor*, https://musicclout.com/contents/article-339-the-music-supervisor.aspx ("Most of the work I've done on commercials have been using custom music. Sometimes there is a budget to license a known track; usually there is not.").

as a single package to address budget issues.[29] This, of course, mirrors the approach of large advertising agencies that often have in house composers on staff.[30]

The synch market, therefore, is characterized by limited barriers to entry. An endless stream of music is constantly generated by independent artists, songwriters, labels, publishers, online stock music companies and, when budget or creative sensibilities call for it, composers are available to create original music. In addition, all rights necessary—broad, limited, reproduction, distribution, and performance—are available to the licensee when music is being selected for the project. Moreover, synch licensees have a variety of tools available to select music based on creative and budgetary imperatives, including a choice of pre-existing songs, music sources (e.g. major publisher, independent publishers, freelance composer, production music) and performers (e.g. major artists or studio musicians). Paul Greco and his colleague, Dan Burt, of the ad agency JWT describe the licensing process as follows:

> "If the client needs something immediately for a spot that's otherwise finished, we'll look into licensing a track," Burt says. "More often now clients are looking for original music, but they want it to sound like a track off an artist's album. And yet another approach is to license the publishing, but re-record the master, which is something we did last year with Amber Music for Royal Caribbean."
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> . . .
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> "There are a lot of times where we're just licensing the publishing of a song, and then putting a different spin on it," Greco adds. "You might get the publishing for a Beatles song, and do a string quartet arrangement of that, for example. That way, you take something that people know, but now it gets

[29] Joe Rudge, *supra* note 23 ("Moving forward, I think music supervisors are going to have to offer something extra. I think they're going to have to bring a catalogue to the table. It's not good enough to go ahead and find great music; I think you also have to somehow bring content as part of a package deal. Everybody's looking to cut corners. Maybe you come and work in tandem with a composer and you offer your services as a one-two punch. I think that down the road music is no longer looked at as, 'Okay, this is music licensing, this is music composition, etc.").

[30] *Inside JWT: Music Supervision and Production at a Large Advertising Agency*, http://www.sonicscoop.com/tag/music-production-at-advertising-agencies/. ("Adding on to the options available to JWT's music team, virtually all of their needs can be handled with dedicated in-house facilities at JWTwo. Composing, mixing, sound design, and radio can all be expedited by an experienced staff that's available exclusively for JWT's clients. - See more at: http://www.sonicscoop.com/tag/music-production-at-advertising-agencies/#sthash.VpTzrcbt.dpuf.").

> associated specifically with the spot and the brand. We did that recently for Smirnoff, when we used a completely different indie rock arrangement of the 1987 KISS song 'Crazy, Crazy Nights' with Big Foote Music and indie artist Sun for Moon."
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> . . .
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> Seemingly every day, a new online-enabled service launches with the business model of directing music supervisors to ready-to-license tracks. At JWT, these resources have their advantages and disadvantages. "When I started here 10 years ago, stock music was terrible," Burt says bluntly, "but now you can find good stuff. People like Jingle Punks, Sir Groovy, and Music Dealers are working with real artists. They're not stock – they're more like indie labels with legit bands, but they're one-stop shops for publishing and master licensing."[31]

Indeed, their concern is how to manage the overwhelming amount of music available for synch placements.[32] As PJ Bloom, music supervisor for *The Americans,* put it "there's not one song for one spot."[33] Instead, a massive supply of music is available and, when needed, plenty of songwriters are available for hire at a wide range of price points.

The role of music supervisors, discussed above, is also an important feature of the synch market. They function as intermediaries who provide artistic, business and administrative services to licensees. Sometimes they deal directly with publishers and, in other instances, with other intermediaries such as licensing companies that provide access to music for synch placements.[34] In addition, and as noted in NMPA's and HFA's initial comments, many companies compete to offer synch rights through web-based licensing platforms.[35] These

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[31] *Inside JWT: Music Supervision and Production at a Large Advertising Agency*, http://www.sonicscoop.com/tag/music-production-at-advertising-agencies/ .

[32] *Id*. ("But as with all good things, the cup can runneth over. Some synch services have thousands of tracks to choose from in their sophisticated search engines, resulting in an overload of options that ironically reduces their usefulness. "You have to whittle it down," Greco says. "They all have their own search engines, but we don't have the time to use them. They have pretty good music supervisors, so it's easier for us to call them and say, 'Here's the brief.'").

[33] *Listen Closely: FX's "The Americans" Will Send You Straight Back To 1982*, http://www.fastcompany.com/3026610/most-creative-people/listen-closely-fxs-the-americans-soundtrack-will-send-you-straight-back.

[34] *See, e.g.*, Joe Rudge, *supra* note 23 ("There are so many music licensing companies, record labels, and music publishers who push me music.").

[35] Initial Comments, *supra* note 3, at 32-33.

include companies such as Greenlight, Dashbox, Cue Songs, and Rumblefish among others.[36] In addition, a number of companies active in the stock photo and video markets, such as Getty Images, Shutterstock and iStockPhoto, discussed further below, offer music for synch, background and other uses.[37] Lastly, some companies focus on monetizing music used through YouTube. AdRev, for example, not only administers production music libraries and master recording from major publishers and well known artists, but also places premium advertisements in videos created by its partners or its multichannel network. Those premium advertisements result in increased revenue when compared to standard YouTube advertisements. Similar to Audiam, it also administers copyrights used on YouTube and assists with the collection of royalties on behalf of publishers and labels.[38]

The Market for Re-use of Written Works

Other markets for intellectual property also rely upon intermediaries and web-based platforms to facilitate access to and the licensing of copyrighted works. For example, Copyright Clearance Center ("CCC") offers a variety of a la carte and subscription services, along with administrative tools to publishers, creators and licensees of in- and out-of-print books, journals, newspapers, magazines, movies, television shows, images, blogs and ebooks. CCC licenses the use of creative works worldwide, and works with more than 35,000 companies and over 12,000 publishers.[39] Perhaps best known for its domestic and multinational subscription licenses,[40] CCC also offers an online platform to its partners and customers that connects potential licensees to

[36] Initial Comments, *supra* note 3, at 32-33.
[37] http://www.gettyimages.com/music; http://www.shutterstock.com/music/; http://www.istockphoto.com/music-clips.
[38] *Giant YouTube Music Monetizer AdRev Names New President*, Glenn Peoples and Phil Gallo, BILLBOARD BULLETIN, August 27, 2014 at 1-2.
[39] *See* http://www.copyright.com/content/cc3/en/toolbar/aboutUs.html.
[40] CCC's various product and service offerings are identified at: http://www.copyright.com/content/cc3/en/toolbar/productsAndSolutions.html.

the works available through CCC, either on a pay-per-use basis or through the licensees' existing subscriptions.[41]

Stock and Microstock Photography Market

Similar to CCC, premium stock photography and microstock photography companies, such as Getty Images, Corbis, Shutterstock, iStockPhoto and others, now act as intermediaries or libraries that enable the licensing of millions of pre-shot photographs for use all over the Web.[42] Even National Geographic makes its photos available for purchase.[43] Pricing depends on, among other things, the source of the photo (e.g. professional or amateur photographer), the use, exclusivity and licensing program selected. Almost all of these companies offer subscriptions and pay-per-use options.[44] Moreover, some offer APIs that integrate creative and editorial photographic content into publishing workflows, allow partners to resell images and enable printing of images on customizable products.[45]

Video and Film Licensing

Stock photo companies have also entered the video market. Shutterstock, Getty Images and iStockPhoto all offer licenses for stock video footage and compete against boutiques such as Dissolve and VideoBlocks.[46] Videos from these companies may be incorporated into derivative works for advertisements, educational productions, web sites, presentation and broadcasting

[41] http://www.copyright.com/content/dam/cc3/marketing/documents/pdfs/DirectPath_FAQ_alt.pdf.
[42] *See In an Era of Cheap Photography, the Professional Eye Is Faltering,* Stephanie Clifford, N.Y. TIMES (March 31, 2010), *available at* http://query.nytimes.com/gst/fullpage.html?res=9C07E0D61F31F932A05750C0A9669D8B63 (describing changes in the stock photography business and the increased availability of digital photographs); *see also,* www.gettyimages.com, www.corbisimages.com, www.shutterstock.com, and www.istockphoto.com for descriptions of their businesses.
[43] http://natgeocreative.com/ngs/photography/.
[44] *See, e.g.,* http://www.gettyimages.com/creativeimages/rightsmanaged (describing pay-per-use licensing and linking to iStock subscriptions.).
[45] *See, e.g.,* http://api.gettyimages.com/?isource=foot_Services_ConnectAPI.
[46] http://www.shutterstock.com/video/?language=en; http://www.gettyimages.com/footage; http://www.istockphoto.com/footage; http://www.dissolve.com/; http://www.videoblocks.com/.

along with other uses.[47] Licenses often vary depending on whether the use is creative or editorial and the volume of impressions or units related to the use.[48] Typically, video footage can be purchased as part of a subscription or *a la carte*, on a limited scale or at an enterprise level.[49] A review of the stock video offerings mentioned above demonstrates a wide variety of pricing and quality. Dissolve, in particular, markets itself as a high quality, high definition video provider for professional use.[50] Even film clips from major studios are made available through third parties that provide content management, delivery and administration services.[51]

Syndication of Written Works and Video

Even more complicated services exist to provide targeted written and video content over the Web. Newstex, for example, aggregates and syndicates text and video from media sites, online magazines and other publishers.[52] iCopyright, operates an online platform that allows publishers to syndicate their work for republication and reuse throughout the Web.[53] Other companies provide infrastructure solutions to creators and publishers of web content. In essence, such companies provide the supply chain management software that links buyers, sellers and partners over the web. Among the better know are TIE Kinetix, Zift Solutions and Webcollage.[54]

Online marketplaces and syndication services are also available for premium video. Companies such as Ooyala, Brightcove, GrabMedia and others make premium video content

[47] *See, e.g.,* http://www.shutterstock.com/video/faq#VIDEO_FAQ_Q_WHAT_ARE_THE_LIMITS_ON_SUBSCRIPTION_DOWNLOADS_.
[48] *See, e.g.,* http://www.istockphoto.com/help/licenses.
[49] *Compare,* http://www.shutterstock.com/video/?language=en targeted at individual users with http://premier.shutterstock.com/ intended for larger commercial users.
[50] http://www.dissolve.com/about.
[51] *See, e.g.,* https://www.sonypicturesstockfootage.com/ and http://www.t3licensing.com/license/home/sony.do.
[52] http://newstex.com/about/.
[53] http://info.icopyright.com/toolbar-overview-digital-copyright-syndicated-content; *see also,* http://offers.icopyright.com/repubhubabout-0.
[54] http://tiekinetix.com/en-us/5-steps-to-content-syndication-for-the-channel; http://www.ziftsolutions.com/products/content-syndication/; http://www.webcollage.com/how-it-works/.

from a wide variety of sources available to thousands of websites through web-based applications. These services recommend video based on defined criteria and deliver such video for use by web publishers and broadcasters. [55] Although the business models vary, the goal of these platforms is to optimize and automate video programming and syndication so targeted advertising can be placed in the videos with a resulting increase in advertising revenue.[56] Such companies, therefore, operate highly sophisticated content management and delivery platforms with associated analytic tools.

As can be seen from the discussion above, every free market for intellectual property rights has developed companies offering Web-based marketplaces that compete to provide:

1. access to large libraries of creative works,
2. coverage for a variety of uses,
3. multiple pricing plans such as subscription and pay-per-play, and
4. a wide range of options at various price-points.

Many of these markets are transactional hubs that provide a library of works, standard licenses and prices that bring buyers and sellers together. Others are significantly more dynamic and data-driven. They syndicate works throughout the Web by relying on sophisticated analytics integrated with the ad serving services to target video content and related advertisement for increased revenue opportunities. For both the transactional hubs and syndication models, third parties offer outsourced solutions to manage content and transactions associated with the dissemination of written works, music and video.

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[55] http://www.grab-media.com/; www.ooyala.com; www.brightcove.com.

[56] *The Video Ecosystem: Ooyala On The Cloud, Consolidation and TV's Digital Future*, by Kelly Liyaksa, http://www.adexchanger.com/digital-tv/the-video-ecosystem-ooyala-on-the-cloud-consolidation-and-tvs-digital-future/; *See also, Ad Support: Real Time Bidding*, Susan Butler, MUSIC CONFIDENTIAL, Issue 37, (Oct. 19, 2012), (explaining the relationship between real-time bidding for advertising and content delivery systems).

The above review of the synch market and other markets for intellectual property suggest that as Section 115 sunsets, it will be replaced by a dynamic, competitive, worldwide market that will not be limited to mechanical rights, but instead will develop solutions to license all rights necessary for a variety of uses of musical compositions at a wide range of prices covering a wide range of music. Independent artists, songwriters, labels, publishers, stock music companies and amateurs will create a never-ending supply of music. Such a market is likely to develop sophisticated, service providers that offer applications to disseminate music and the information necessary to operate digital music services. Competition in this area is already underway as several companies offer outsourced solutions for administering rights related to sound recordings and music publishing rights, including HFA, MRI, RoyaltyShare, MediaNet, Backlash Solutions, and ClearThis Entertainment.[57] Similarly, transactional and syndication platforms will develop to match sellers and buyers and build upon the early synch libraries and transaction hubs discussed above. Moreover, if potential licensees do not like the price being charged by large music publishers, they will have the ability, as they do now, to license music from independent labels, artists and publishers or commission the composition and recording of music on their own. Indeed, Google is already investing in alternate sources of recording, having reportedly invested $5 million in Lyor Cohen's 300 record label.[58] With few, if any, barriers to recording music and distributing it online, a massive supply of music will be (and already is) available[59] and, when needed, plenty of songwriters for hire at a wide range of price points.

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[57] http://hfaslingshot.com/, http://crunchdigital.com/, http://www.musicreports.com/, http://royaltyshare.com/, http://www.mndigital.com/, http://www.backlashsolutions.com/, http://www.clearthisent.com.

[58] *Lyor Cohen Unveils 300, New 'Content Company' with Atlantic Deal, Google Backing and Ex-Warner Brass (From the Magazine)*, Yinka Adegoke, BILLBOARD (November 1, 2013), *available at* http://www.billboard.com/biz/articles/news/record-labels/5778094/lyor-cohen-unveils-300-new-content-company-with-atlantic.

[59] *See*,*Serving Alt-Artists, a Proud 'Antilabel,'* Larry Rohter, THE NEW YORK TIMES (August 12, 2014), available at http://www.nytimes.com/2014/08/13/arts/music/cd-baby-a-company-for-the-niche-musician.html?_r=2 (noting CD Baby distributes more that 325,000 recording artists and one-in-six songs on iTunes); TODAY'S DIGITAL

Opposition to the Free Market is Unfounded

Opponents of allowing songwriters and music publishers to operate in a free, unregulated market generally raise three concerns. First, they argue that the assumption of licensing responsibility by digital music retailers and the fragmentation of ownership of music copyright interests make it too complex and inefficient to allow the marketplace to develop a solution on its own.[60] Second, they argue that digital music services must have licenses to every musical composition in existence or the services will not be commercially viable.[61] Lastly, opponents of the free market argue that companies that control rights to music have undue market power that hinders competition because "there are not good substitutes reasonably available to the users of intellectual property rights in the marketplace."[62]

This dialectic construct, of course, establishes a heads, I win, tails, you lose scenario. Opponents of the free market posit that licensing musical compositions is too difficult to expect a market solution, particularly when digital music services claim they need almost every work available. As a result, opponents of the free market demand a blanket license to "solve" the transactional cost problem. Then, they argue that the collective, blanket license (*i.e.* the very solution they propose) leads to an anti-competitive market. So, of course, government price controls (e.g. compulsory licensing and/or governmental oversight) are required to limit the impact of the blanket license they sought in the first place. In other words, digital music

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DISTRIBUTORS (Part 1): THE ORCHARD, Susan Butler, Music Confidential Issue 32, (Sept. 13, 2012); *TuneCore: A Game Changer*, Susan Butler, MUSIC CONFIDENTIAL Issue 7 (Feb. 17, 2012); *New service lets musicians sell through iTunes for cheap*, Natalie Robehmed, FORBES (July 3, 2013), *available at* http://www.forbes.com/sites/natalierobehmed/2013/07/03/new-service-lets-musicians-sell-through-itunes-for-cheap/ (discussing the launch of a low-cost service for artist to provide their music to digital retailers); *Who needs a record label? Not Kendall Schmidt and here's why*, Teresa Novellino, UPSTART BUSINESS JOURNAL, *available at* http://upstart.bizjournals.com/entrepreneurs/hot-shots/2014/04/25/why-kendall-schmidt-skipped-record-label.html (discussing how Kendal Schmidt of Nickelodeon's "Big Time Rush" uses TuneCore to distribute his music).

[60] *See, e.g.*, DiMA Initial Comments at 6-8.

[61] *See, e.g.*, DiMA Initial Comments at 9.

[62] DiMA Initial Comments at 15.

licensees do not want to incur any costs associated with operating administrative systems for the licenses they seek and demand a solution that they argue requires the imposition of governmental price controls on songwriters and music publishers.

The very foundation of this argument is unsupported. Other than the categorical, "it's too complex" in some combination with "the data isn't readily available" commentators have not provided either audited financial statements detailing the cost of their supply chain management as it relates to musical compositions or detailed usage information demonstrating the number of tracks digital music services offer as compared to the amount of usage related to those tracks. Although administering the licensing and royalty reporting associate with musical compositions and related sound recordings may be challenging, without financial and usage information, the Office simply cannot reach a conclusion that the challenge is unreasonable from a cost or technical perspective. Similarly, the fact that digital music services have chosen not to invest enough of their resources in the skills, processes and data required to manage rights to musical works effectively, does not lead to the conclusion that legislation is needed. Mechanical and performance licensing has taken place in a regulated market for over 100 years. A more rational conclusion is that government regulation has hindered the development of effective market solutions.

As described above, sophisticated, web-based transactional hubs and syndication platforms that manage a variety of works, including, textual works, photographic works, music and videos exist in every unregulated market requiring the administration of copyright interests.[63] These solutions are essentially targeted supply chain management applications.[64] No commentator has explained why these existing supply chain management solutions would not

[63] *See*, Response to Issue No. 7, *infra* pp. 11-20.
[64] *See, What is Supply Chain Management?*, Robert Handfield, Jan, 11, 2011, *available at* http://scm.ncsu.edu/scm-articles/article/what-is-supply-chain-management.

become more robust and new solutions would not develop in the digital music market as they have in most other industries. As discussed in our Initial Comments, YouTube is already working in conjunction with record labels, music publishers and video producers, among others, to monetize and track audiovisual uses in a free market[65], and several companies compete to provide such solutions to digital music services now.[66] Finally, those who suggest that the maintenance of governmental regulation and price controls is necessary to make the digital music market efficient, ignore the inefficiencies created by disparate regulatory regimes when markets, such as digital music, operate on a world-wide basis through world-wide platforms such as the Web.

Opponents of the free market seek to "fix" administrative challenges by creating a blanket entitlement for digital music services to all music available at a single price. They argue that only digital music services offering all music available can succeed. This suggestion ignores a century of retail history in which large records stores co-existed with boutiques. By the 1990s, large record stores such as Tower Records and FYE carried a complete range of records covering a wide variety of genres, artists and labels. Independent record stores, in contrast, tended to provide expertise whether they focused on a particular genre or carried a broader selection of music. In addition to music expertise, such stores focused on being culturally relevant to their local community and often had a lifestyle marketing component.[67] Although fewer independent

[65] Initial Comments, *supra* note 3, at 7.
[66] *See* Response to Issue No. 7, *infra* at 24.
[67] *See, e.g.*, Independent Records and Video: Colorado Springs, Colorado, http://www.vinylives.com/interviews.html#independent ("As long as we remain culturally relevant to our communities, then we're gonna be fine.").

record stores exist today, many still thrive, often focusing on vinyl, collectible recordings or specific genres.[68]

Considering this history, it is not surprising that independent labels and others are opening digital music services that are more focused than the all-you-can eat streaming services. For example, Drip.fm has partnered with several independent record labels to provide digital music services that allow the label to connect with fans through "exclusive music, a sense of community and an intimate connection with bands and artists."[69] The Sub Pop Records (known for breaking Nirvana and the Shins) subscription service offered through Drip.fm will charge $10 per month for music from the label and hopes to capitalize on the brand loyalty the label has developed.[70] Similarly, artists without mainstream appeal may turn to Other People, a subscription service operated by Nicolas Jaar, an electronic music artist, that offers music by Mr. Jaar's friends and collaborator and is breaking even.[71] Although such services are relatively new and intentionally do not compete with the large digital music providers, it seems than an independent digital music market is likely to thrive as it once did in the physical retail market. Of course, the market may ultimately determine consumers prefer a single source for all music rather than boutiques. If that is the case, pricing and licensing mechanisms will likely adapt, maybe by the wide acceptance of standardized terms and increased pressure on aggregators to implement quality assurance procedures when providing recordings to digital retailers.

Having told the office that music licensing is so difficult that the market will never provide a solution and that only digital music services offering every recording ever made will

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[68] *See The 12 Best Record Stores In NYC*, Rebecca Fishbein, GOTHAMIST (August 21, 2014), available at http://gothamist.com/2014/08/21/the_best_record_stores_in_nyc.php (identify a variety of independent record stores in New York City and their focus).

[69] *Independent Music Labels and Young Artists Offer Streaming, on Their Terms*, Jonah Bromwich, THE NEW YORK TIMES (July 6, 2014), *available at* http://www.nytimes.com/2014/07/07/technology/independent-music-labels-and-young-artists-embrace-streaming-on-their-own-terms.html.

[70] *Id.*

[71] *Id.*

survive, opponents of the free market argue further that those who control musical compositions and sound recordings have undue market power that hinders competition because "there are not good substitutes reasonably available to the users of intellectual property rights in the marketplace."[72] Although antitrust analysis relies upon cross-elasticity of demand, or the identification of substitutes, in order to define relevant markets, market power is shown by direct proof that a market participant controls prices or excludes competition, or may be inferred if a participant has a large market share of the relevant market.[73] Where barriers to entry are low, however, any assumption of undue market power is unfounded. In other words, if a market participant's rivals have or can create alternatives, entry barriers are low and any inference of market power should be rejected.[74]

The argument that no substitutes for a particular song or catalog are available is red herring and pernicious because of the manner in which it plays on the emotional attachment many of us have to particular songs or recordings. Of course no artistic substitute for a great song exists; how could it? Whether a particular recording can be duplicated is not the relevant question. The question is whether the relevant economic use of a musical composition can be replicated.[75] Clearly it can.

The experience of the synch market makes it clear that music publishers do not control prices, cannot exclude competition and that no significant barriers to entry into the market exist. As discussed above, music supervisors regularly substitute one song or recording for another

[72] DiMA Initial Comments at 15.
[73] *Top Markets v. Quality Markets*, 142 F.3d 90 at 97-98 (2nd Cir. 1998).
[74] *See, id*. at 98-99 (holding that evidence of a firm's 70% market share was rebutted by the ease of entry of a competitor).
[75] *See, e.g., Twin Labs v. Weider Health and Fitness*, 900 F.2d 566, 568-69 (2d Cir. 1990) (holding that because the plaintiff could create its own magazine or advertise through other channels, it could not compel the defendant to provide advertising space in its nutritional supplement magazine, even though the defendant's magazine held a dominant market position).

when the price of a particular work is too high for a project.[76] Indeed, the low cost of recording music and having it distributed to digital music services means that almost anyone can record and release a track on almost any large digital music service. As a result, if a potential licensee does not like the price being charged by a music publisher for a particular song or catalog, it has the ability to license music from independent labels, artists and publishers or commission its own music.[77]

Large streaming music services do not compete for consumers based on the price of a particular recording or catalog, but rather on the basis of features and branding of their music offerings. The catalog of music offered by a streaming music service, therefore, is one component of the feature-set that drives competition among digital music services. The fact that The Beatles catalog, some of the most important popular music ever recorded, is only available through iTunes, but consumers still use and even pay for Spotify, Beats, Rdio, Mog and other services demonstrates that a service can be successful without every recording made. Such a state of affairs is not surprising. As noted above, the "stock" of music available at record stores has always varied and record stores regularly distinguished themselves based not only on the scope of their collection, but also on their connection with their customers. It was not, and is not, necessary to be all things to all people.[78]

This argument is used by digital music services to justify limiting the price of, and guaranteeing their access to, the full range of music produced in the last century without having to compete with other streaming music services for the privilege of such access. Services want to compete on the basis of usability, elegance of design, delivery of music targeted at particular consumers and other features driven by design, technology and data. They do not want to

[76] *See* Response to Issue No. 7, *infra* p. 11.
[77] *See* Response to Issue No. 7, *infra* p. 11.
[78] *See* Response to Issue No. 7, *infra* p. 23.

compete over one of the two most essential inputs to their product, musical compositions. Making musical compositions a commodity enables digital music services to devalue the contribution of music to their business.

Opposition to allowing songwriters and music publishers to license music in the free market is grounded in opportunism. Organizations and companies that would never countenance the impingement on their freedom that songwriters and music publishers suffer embrace governmental regulation and price control as a shortcut to lower costs and higher profits. Such a shortcut relieves them of the hard work every other company in the U.S. performs to solve the problems inherent in selling products that requires multiple inputs or parts. As the Office has previously noted, technological innovation and traditional market principals suggest that compulsory licenses are no longer needed.[79]

III. Sound Recordings

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

NMPA believes music publishers must be included as interested parties in Section 112 and 114 CRB ratesetting proceedings.

IV. 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?

Other countries have implemented systems for fair and efficient licensing of musical works without adopting a compulsory license scheme similar to that created under Section 115.

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

These systems, although not the free market songwriters and music publishers deserve, are better at setting rates and terms that approximate the free market than the regulatory system currently in place in the United States. Of course, they still suffer from artificial divisions among rights and territories that the free market would eliminate. The following examples illustrate how a wide variety of licensing systems may be used for the effective licensing of musical works. While mechanical royalty fees set in the United States are generally applicable to all parties negotiating within the free market, many of the following countries negotiate fair mechanical royalty fees on an individualized basis.

United Kingdom

In the United Kingdom, users of musical works license mechanical rights through MCPS, part of the PRS for Music organization, rather than by procuring a compulsory license, which does not exist in the United Kingdom. Licenses vary based on the category of use, such as digital downloads, non-subscription on-demand services, interactive subscription webcasts, etc. Rates for these licenses are not set by a government created court but instead by MCPS, using a formula taking into account several factors including the Published Dealer Price, Retail Price, or a pro-rated royalty distribution formula.[80] Licensees are required to adhere to the license terms and rates set by MCPS unless they choose to appeal to the U.K Copyright Tribunal in accordance with Section 118 of the United Kingdom's Copyrights, Designs and Patents Act 1988, in which case the Tribunal may either confirm or deny the proposed licensing scheme. If a licensee disputes the terms of the original licensing scheme set by the MCPS and approved by the

[80] *Music Audio Products*, PRS FOR MUSIC, http://www.prsformusic.com/creators/memberresources/MCPSroyalties/mcpsroyaltysources/musicaudioproducts/Pages/musicaudioproducts.aspx (last visited Sept. 11, 2014).

Tribunal, then the licensee may refer the scheme to the Tribunal and the Tribunal can make a decision to uphold or vary the scheme in accordance with the particulars of the licensee's case.[81]

Sweden

In Sweden, creators of musical works are given exclusive mechanical rights and must provide permission for any such use. Mechanical rights are administered by NCB, which is affiliated with STIM in Sweden.[82] Creators and their publishers typically register their works with NCB, which is then authorized to grant licenses and collect mechanical royalties on the copyright owners' behalf. The fees for licensing are calculated as a percentage of the selling price subject to a minimum price floor.[83] Further considerations in the calculation of mechanical rights fees include the number of copies, published price to the dealer, where the work was shown, and NCB's administration costs.[84] Based on these considerations, NCB has a "Standard Contract" that set royalty rates to address the needs of most users.[85] These provisions in this contract are based on collective agreements negotiated between the Bureau International de Societes Gerant les Droits d'Enregistrement et de Reproduction Mecanique, of which NCB is a full member, and the International Federation of the Phonographic Industry, which represents the users of the mechanical right, and any new Standard Contract between these two organizations supersedes the existing Standard Contract after a transitional period of 6 months.[86] NCB and IFPI groups meet on a regular basis to discuss the potential need for renegotiations of terms and

[81] Copyrights, Designs, and Patents Act, 1988, c. 48, § 119 (U.K.).
[82] *Organization Structure*, NORDISK COPYRIGHT BUREAU, http://www.ncb.dk/05/5-1-3.html (last visited Sept. 11, 2014).
[83] *Audio recordings – price list*, NORDISK COPYRIGHT BUREAU, (Jan. 1, 2014) http://www.ncb.dk/pdf/a-pricelist-en.pdf.
[84] *Payments*, STIM, http://www.stim.se/en/CREATORS/Payments/ (last visited Sept. 11, 2014).
[85] *2012 Sound Carrier Contract*, NORDISK COPYRIGHT BUREAU 51–65 http://www.ncb.dk/pdf/s-a-std-contract-en.pdf.
[86] *Id.* at 36.

conditions of the Standard Contract.[87] The Contract also provides for a conciliation process between one representative each from NCB and the local branch of the International Federation of the Phonographic Industry in the event that disputes regarding the interpretation of implementation of the Standard Contract arise.[88] If this fails, "an arbitrator shall be appointed by the Maritime and Commercial Court of Copenhagen."[89]

France

In France, users of musical works license the reproduction of those works through SACEM, which sets the license fee for such uses. The potential user must first submit a list of the works he wishes to reproduce as part of an application process, after which SACEM will confirm that it represents these works and provide an estimate of license fees.[90] The French Intellectual Property Code sets out that royalties shall be paid to SACEM and that the "amount of monies to be paid by the user of a work shall be determined in accordance with usual practice in each of the categories of creation involved."[91] Typically, the license fee is calculated on the basis of the sales price of the record, the number of works reproduced and their playing time, and then as a percentage of the price of each copy distributed with a set minimum fee.[92] French intellectual property law affords the government no part in the setting of licensing fees, although the government is authorized to order SACEM to cease collecting royalties and to dissolve the society altogether.[93]

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[87] *Id.* at 36–37.
[88] *Id.* at 37.
[89] *Id.*
[90] *Authorization to produce a record*, SACEM, http://www.sacem.fr/cms/site/en/home/users/useful-informations-record/authorization-to-produce-a-record (last visited Sept. 11, 2014).
[91] CODE DE LA PROPRIÉTÉ INTELLECTUELLE art. R111-2 (Fr.).
[92] *The license fee for producing a record*, SACEM, http://www.sacem.fr/cms/site/en/home/users/Rates/the-license-fee-for-producing-a-record (last visited Sept. 11, 2014).
[93] CODE DE LA PROPRIÉTÉ INTELLECTUELLE art. L321-11 (Fr.).

Within SACEM, there is a Mechanical Rights Management Committee that oversees the administration of mechanical rights. The committee is composed of six authors, six composers, six publishers, and two author-directors appointed by SACEM's Board of Directors for a renewable term of one year. Decisions regarding royalty fees by the Committee may be submitted to the Board of Directors for without a right of appeal.[94] Fees are then generally negotiated between SACEM and each music user individually. However, in the case that SACEM and an applicant cannot come to an agreement, a Court determines whether the rate proposed by SACEM is "reasonable" based on a comparison to the value of the rights in trade.

Germany

In Germany, users license the mechanical rights to a musical work through GEMA. Composers must consent to the license, but that composer may not unreasonably refuse consent.[95] German Copyright Law affords the government no part in the setting of licensing fees or the arbitration of fee disputes. GEMA establishes tariffs for the exploitation of a creative work based on profits from that particular use or other criteria that may form a reasonable basis for valuing a use like how much of the work is exploited.[96] GEMA is required to grant mechanical rights to any person who requests a license subject to all parties' agreement on the terms of remuneration. If not agreement is reached, the requesting user may obtain a license subject to reservation by paying the fees on the terms demanded by GEMA.[97] In practice, these fee rates

[94] *Articles of Association*, SACEM, 15–16 (June 19, 2012), http://www.sacem.fr/files/content/sites/en/files/mediacenter/about_sacem/statuts2012_english.pdf.
[95] Gesetz über Urheberrecht und verwandte Schutzrechte Urheberrechtsgesetz [UrhG] [Copyright Law], Sept. 9, 1965, BUNDESGESETZBLATT, Teil I [BGBL. I], as amended by Gesetz [G], July 16, 1998, BGBL. I at 19 (Ger.), *available at* http://www.wipo.int/edocs/lexdocs/laws/en/de/de080en.pdf.
[96] Urheberrechtswahrnehmungsgesetz [Copyright Administration Law], Sept. 9, 1965, BUNDESGESETZBLATT, Teil I [BGBL. I], as amended by Gesetz [G], May 8, 1998, BGBL. I at 5–6, § 13 (Ger.), *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=229503.
[97] *Id.* § 11.

are decided by a subset of GEMA members called "full members" who vote directly on rates for mechanical licenses after negotiating with an association representing music users.[98]

If a user and GEMA are not able to come to an agreement and a license is obtained with reservation, the parties may apply to the IP Office of Germany for a rate decision, which is then appealable to the High Court in Munich and the Highest Court in Germany. While a rate decision is pending, the difference between what GEMA has requested and what the user has proposed is placed in escrow to be distributed after a final rate has been determined.

Disputes related to GEMA's tariffs and fees may apply to an Arbitration Board, which is composed of a Chairman or his deputy and two assessors.[99] The Board attempts to settle the dispute. Any settlement decided by the Board is enforceable once it is signed by the Chairman and all parties in the dispute or, if a proposed settlement from the Board receives no written opposition, within one month after service of the proposal to the parties.[100] However, settlements concerning future disputes are null and void.[101]

V. Other Issues

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

RESPONSE TO THE RIAA PROPOSAL

The RIAA, in its initial comments, unveiled a reform proposal (the "RIAA Plan"), which NMPA believes is fundamentally flawed. [102] While short on detail, the RIAA Plan was

[98] Luis-Manuel Garcia, *GEMA and the threat to German nightlife*, RESIDENT ADVISOR (Apr. 24, 2013), http://www.residentadvisor.net/feature.aspx?1757.
[99] Urheberrechtswahrnehmungsgesetz [Copyright Administration Law], Sept. 9, 1965, BGBL. I, as amended by Gesetz [G], May 8, 1998, BGBL. I at 5, § 13(2) (Ger.).
[100] *Id.* § 14.
[101] *Id.* § 14(6).
[102] Comments of the Recording Industry Association of America, Inc. in response to the Copyright Office's Notice and Request for Public Comment on Music Licensing. 79 Fed. Reg. 14,739 (March 17, 2014) ("RIAA Comments"), *available a*t

apparently designed as a seemingly universal approach to resolve stated impediments to the development of an efficient and fair music licensing system for songwriters and music publishers. Since the RIAA placed the proposal on the record, NMPA is compelled to respond on the record with observations why the RIAA Plan is flawed.

NMPA agrees with the RIAA that there should be direct conversations between all stakeholders in the music licensing ecosystem. However, the agenda should not be focused on the RIAA Plan, but rather the timing and details of the phasing out of the Sec. 115 compulsory license system and transition to a free market system, as well as other ways the stakeholders might improve the digital music licensing system in ways that empower, rather than dis-empower musical work owners.

One overarching challenge to the entire process is that there still exists between music publishers and record labels an underlying sense of mistrust, which is based on a history of problematic episodes and antagonistic relationships. While music publishers and songwriters are always trying to improve the relationship, it is not easy building the necessary level of trust needed to accomplish such lofty goals. This is just a reality that must be understood by the Office and the parties as we move forward.

Essentially, the RIAA is seeking to expand the scope of the Sec. 115 compulsory license to authorize almost all forms of exploitation of a sound recording, including, among other things, record label created videos, and "first use" rights. The statutory rate paid to owners of musical works would be a percentage share of the revenue generated by the record label from exploitation of the licensed recording in all formats. The statutory rate would be established through some as yet undetermined negotiating process. The musical work owner ultimately

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http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Recording_Industry_Association_of_America_MLS_2014.pdf.

would cede all rights to take part in the downstream licensing process.[103] In other words, the musical work owner would grant additional rights to the record labels while effectively giving up the right to say "no" in unprecedented ways.

As a practical matter, if the RIAA Plan is adopted, musical work owners would no longer act as partners with record labels. The RIAA rationalizes this approach by claiming a total abdication of approval rights by musical work owners combined with expanding the scope of formats authorized under Sec. 115 would promote greater efficiency and would simplify the music licensing process. With an Orwellian spin, they promote the idea that musical work owners would be enriched if they are, ultimately, disempowered in the digital music marketplace.

There is nothing in the RIAA Plan that could not be accomplished in the free market right now if record labels would simply pick up the phone and talk directly to publishers. There have been significant improvements in licensing practices in the last few years – much of it arising out of the program designed to improve the problem of "pending and unmatched" royalty accounts.[104] The development of these rules, outside of a compulsory license system, can be duplicated in other areas needing reform. NMPA has also facilitated publisher industry wide free market opt-in arrangements directly with labels, and this has resulted in ground breaking new licensing arrangements covering video, lyrics, and user-generated content – and years earlier New Digital Media Agreements (NDMA) covering ringtones and other new offerings - all negotiated in the free market – not under an antiquated compulsory license regime.[105]

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[103] *Id*. at 2.
[104] Susan Butler, Music Confidential, Issue 35, 2012.
[105] *See YouTube, NMPA Reach "Unprecedented" Deal to Pay Independent Music Publishers*, Ed Christman, BILLBOARD (November 17, 2011), *available at* http://www.billboard.com/biz/articles/news/publishing/1160146/youtube-nmpa-reach-unprecedented-deal-to-pay-independent-music*; Fullscreen to Purge Unlicensed Music Videos from YouTube Under Legal Settlement*, Todd Spangler, VARIETY (January 9, 2014), *available a*t http://variety.com/2014/digital/news/fullscreen-to-purge-

Perhaps the biggest problem with the RIAA Plan is that it would not, as claimed, create more efficiency. In fact, it could very well worsen the problem. The Plan calls for the musical work owner to negotiate a royalty split with the record label when the work is created - not when the license opportunity is presented to the labels or the musical work owners. This forces the musical work owner to agree to licenses without meaningful understanding of the ultimate service or access model involved or how much the musical work is important to the overall service or modal.

Peter Brodsky, Executive VP, Business & Legal Affairs at Sony/ATV, testified on this point.[106] To paraphrase, he pointed out that there is no way to predict the nuances and particulars of every new licensing opportunity. Trying to do this at the time the work is created greatly complicates the entire process from the perspective of the musical work owner. Some services might be more focused on lyrics, audio only streams or ways to deal with mash-ups. Others may be focused on commercial video. Some may be subscription-based, others may be ad-supported. Ultimately, services and the way they use music works have never been more diverse, a trend which will only continue. There is simply no realistic or fair way to apply a one size fits all approach to mechanical reproduction licensing. Because of this, the optimal time to negotiate the split is when the new license or service is specifically brought to the attention of the musical work owner or when the license request is made. Not when the work is created.

The RIAA, in its zeal to simplify the licensing process, also claims that musical work owners should not have the right to be involved in downstream licensing decisions because the

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unlicensed-music-videos-from-youtube-under-legal-settlement-1201039673/; *Rap Genius Agrees to License with Music Publishers*, Ben Sisario, THE NEW YORK TIMES (May 6, 2014), *available at* http://www.nytimes.com/2014/05/07/business/media/rap-genius-website-agrees-to-license-with-music-publishers.html.

[106] Music Licensing Public Roundtable, U.S. Copyright Office (June 24, 2014), *available at* http://copyright.gov/docs/musiclicensingstudy/transcripts/mls-nyc-transcript06242014.pdf.

economic risks taken by the labels far outweigh the investment of the publishers (a point NMPA contests), and thus the record labels should license without the burden of musical work owner's having a right of approval. They use the movie business model as an example of how the system should work. The NMPA agrees that the movie business is a good example of where the music business should be headed. Of course, all participants in the movie industry operate in the free market.

While the movie industry model might offer some degree of efficiency and seems to be analogous to the RIAA Plan, it is not an apt comparison. Book authors, music publishers, and even actors negotiate their deals directly with the producers of each movie production – not with every movie producer in the marketplace. The terms and approval rights in each deal are always different because each movie and licensor is different. For example, licensing music to a low-budget movie is a fundamentally different proposition than licensing to a big budget movie. So each owner of the underlying rights gets to assess all of the factors necessary to make an informed licensing decision movie to movie before entering into the license. The free market, therefore, has resulted in circumstances where, in most instances, all necessary rights are granted to a movie producer during the production process. Record labels could replicate this process by contacting music publishers and songwriters directly at the outset of a project and negotiating an appropriate agreement without reliance on Sec. 115, controlled composition clauses or other mechanisms that remove owners of musical works from the negotiation.

The RIAA proposal, therefore, is vastly different from the movie business. They want musical work owners to grant labels the rights in a compulsory system, and then the labels license to an unlimited number of licensees in an unlimited number of ways – without any input from the musical work owners. The RIAA is essentially trying to treat each song as a fungible

commodity, like gas or sugar. Music should not work this way, and the analogy certainly doesn't work.

Another disturbing rationale suggested in the RIAA Plan is that musical work owners do not actively seek licensing opportunities, and bring little or nothing of value to the licensing process – and therefore it is proper to exclude them. Quite to the contrary, musical work owners consistently find licenses and develop quality relationships with licensees. Indeed, music publishers and songwriters have been earning the majority of their income from licensing for much longer than record companies.

Because the RIAA Plan would establish a fixed "split" of income, it should include authority to musical work owners to license any sound recording embodying their composition. Since musical work owners often initiate and navigate licensing opportunities, common sense dictates that if a music work owners secures a licensing opportunity, then the record label should not have the right to say "no."

Negotiating a fair revenue split would also be very challenging given the varying uses and difficulty in predicting the future. In addition, record labels have the luxury – because they do not operate under a compulsory license - to enter into equity deals with services, receive substantial, non-refundable advances or make other creative arrangements when merited. Accounting for challenging and unforeseen deal structures make broad statutory rate based on sharing revenue untenable. Perhaps Congress should consider placing the sound recording under a compulsory license. NMPA believes, however, that it is most probable that the RIAA and all record labels would devote all their resources to fighting a proposal designed to subject them to the same restrictions they so easily want to impose on musical work owners.

The RIAA Plan also proposes adoption of a "blanket" licensing approach for mechanical licenses.[107] They casually refer to blanket licensing as a positive development – yet they do not acknowledge the challenges involved in transitioning into such a system. Although blanket licensing of public performance rights works in certain areas, such as general licensing of public establishments, mechanical reproduction licenses have been issued on a song by song, title bound basis for over 100 years. Title-bound licensing is essential to ensuring that music works are accurately matched with sound recordings – and songwriters are accurately paid.[108]

Developing a blanket license system to replace the title bound licensing system without inflicting harm to the musical work owners is highly unlikely and perhaps even impossible. Yet, the RIAA proposes a blanket licensing system without acknowledging the complexity and cost of creating such a system. While they mention they might be interested in helping to fund the process[109], they do not address all the challenges inherent in such a transition.

Like the RIAA, other organizations have proposed expanding government regulation and price controls over musical works in order to address perceived problems with licensing. For example, some have suggested introduction of a compulsory license for mash-ups/remixes and or lyrics. Licensing challenges may very well be real, but government regulation has already been tried and the consensus is it is failing.

No doubt, there are barriers inhibiting the success of some new business models due to licensing difficulties. Licensing music presents unique challenges, and licensing mechanisms that have been built – like the Sec. 115 compulsory license – are models of the past. Obviously, there will be tensions during the transition to a free market system, but free market licensing experiences in the past few years have shown that musical work owners can secure fair market

[107] RIAA Comments, *supra* note 102, at 6.
[108] Initial Comments, *supra* note 3, at 9.
[109] RIAA Comments, *supra* note 102, at 22.

rates and efficiency at the same time, without the burden of a compulsory license system limiting their rights and not the rights of the record labels.

As a final point, no matter what happens with repeal of Sec. 115, there should be no attempt to expand the scope of the Sec. 115 compulsory license – whether as part of the RIAA plan or other plans proposing a compulsory license for mash-ups/remixes and/or lyrics.[110]

While we have outlined serious flaws with the RIAA Plan, we still share some goals and principles with the RIAA and the record labels. The RIAA supports the principles set forth in the SEA, and both labels and musical work owners are committed to resolving the musical work data problem, and to continue to improve licensing efficiency – at times supporting a compulsory license (e.g., the SR digital public performance right) and at other times a free market approach (e.g., the way the labels presently license their sound recording rights, minus the non-interactive digital public performance right). And certainly the record labels share the same respect for musical works as a property interest – although it would seem that musical work owners respect that interest more than sound recording owners respect the property interest of musical work owners. But most importantly, it is clear that the RIAA proposal is more pro-musical work owner than many of the perspectives and proposals made by other stakeholders, most importantly those representing the interests of users of music.[111]

[110] *See This American Copyright Life: Reflections on Re-equilibrating Copyright for the Internet Age,* Peter S. Menell, JOURNAL OF THE COPYRIGHT SOCIETY OF THE U.S.A. (April 4, 2014), 318-323; *Lyrical Restraint: Lyrics Sites and Copyright Infringement*, Sam Guthrie, ENTERTAINMENT AND SPORTS LAWYER, Vol. 31, Number 2 (Summer 2014), 1, 25-28.

[111] *See, e.g.,* Comments of the Digital Media Association. in response to the Copyright Office's Notice and Request for Public Comment on Music Licensing. 79 Fed. Reg. 14,739 (March 17, 2014), *available at* http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Digital_Media_Association_MLS_2014.pdf; Comments of Bob Kohn in response to the Copyright Office's Notice and Request for Public Comment on Music Licensing. 79 Fed. Reg. 14,739 (March 17, 2014*), available at* http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Bob_Kohn_MLS_2014.pdf.

The Proper Philosophical Foundation of Copyright

A number of commentators opined that the Office should be guided by the principle that copyright is a utilitarian theory, not a property interest, so that intrusions and encroachments on copyright owners' rights seem less severe.[112] This enables such commentators to contend that, while musical work owners might be harmed by subjecting them to a compulsory licensing regime or other regulations, the harm is regrettable, but acceptable. This worldview of copyright, therefore, is used to absolve any guilt of those supporting a compulsory system that brings them great benefit, but diminishes the property interest of the music work owners in ways that they would never accept if applied to them.

In contrast, NMPA and other artist/author groups and industries based on creative authorship believe that copyright is a property interest. This view does not preclude application of exceptions and waivers in copyright where strong public interests such as free speech are implicated. Indeed, even real property owners may have their property taken by the government, but they are entitled to fair market compensation under the Takings Clause.[113] Similarly, copyright owners can only accept limitations on their interests when extraordinary efforts made to limit the extent of the restriction and to ensure that the value of the property is not diminished.

Some prominent witnesses[114] – participating as individuals or trade associations representing the interest of entire industries and/or the public - consistently invoke the utilitarian

[112] *See, e.g.*, Comments of the CTIA- The Wireless Association in response to the Copyright Office's Notice and Request for Public Comment on Music Licensing. 79 Fed. Reg. 14,739 (March 17, 2014) at 5, *available at* http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/CTIA_The_Wireless_Association_MLS_2014.pdf ("[C]laims by copyright owners that 'we created it, so it is ours' are inconsistent with law and the Constitution and should not be given weight . . . [T]he law should recognize that once a copyrighted work is created, maximizing consumption of the work maximizes society's welfare").

[113] U.S. Constitution, Fifth Amendment.

[114] *See, e.g.*, Comments of Bob Kohn in response to the Copyright Office's Notice and Request for Public Comment on Music Licensing. 79 Fed. Reg. 14,739 (March 17, 2014), *available at* http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Bob_Kohn_MLS_2014.pdf; Comments of Public Knowledge and the Consumer Federation of America in response to the Copyright Office's

copyright theory as the definitive legal principle that should be used to guide policy makers and the courts when structuring the scope – or even the existence – of the Sec. 115 compulsory license.

Because they do not believe copyright is a serious property interest, but rather a utilitarian economic theory, they view efficiency and low transaction costs as the primary motivating factor when justifying the existence or expansion of a compulsory license system – even if the property interests of the musical work owners are abridged and the value of their property diminished. Guaranteed access, low cost, and ease of licensing motivate these parties. And while many claim the music work owner's rights must be protected – the music work owners' property interest is always secondary to the licensee's interest in promoting an IPO or other exit strategy that will enrich the owners of a digital music service at the expense those whose work forms the foundation of their business. As a result, concerns regarding cost always seem to trump the interests of those creating the music.

The problem, however, is not so much with the debate about how to fix what many believe is not working– it is a fair debate. Rather, it is with the notion, promoted by some witnesses, that the law in the United States is settled on this matter - that copyright must be viewed as an economic theory and not as a property interest. They point to Supreme Court cases[115] (all with questionable lessons on the topic) and a recent generation of Copyright Law

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Notice and Request for Public Comment on Music Licensing. 79 Fed. Reg. 14,739 (March 17, 2014), *available at* http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Public_Knowledge_and_Consumer_Federation_of_America_MLS_2014.pdf; Comments of the Digital Media Association in response to the Copyright Office's Notice and Request for Public Comment on Music Licensing. 79 Fed. Reg. 14,739 (March 17, 2014), *available at* http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Digital_Media_Association_MLS_2014.pdf; Comments of the CTIA, *supra* note 113.

[115] *See* Comments of the CTIA, *supra* note 113, at 2 (referencing *Wheaton v. Peters*, 33 U.S. 591 (1834)); s*ee also* Comments of the National Religious Broadcasters Music License Committee in response to the Copyright Office's Notice and Request for Public Comment on Music Licensing at 4. 79 Fed. Reg. 14,739 (March 17, 2014), *available at*

academics who have promoted a questionable revisionist point of view supporting the contention that there has never been an underlying philosophical property interest foundation to Copyright. Instead, they argue that the rights of the music work owners should not interfere with the dissemination of works or the creation of Internet based services and businesses based on the reproduction, distribution and performance of copyrighted works.[116]

There are, however, a new generation of copyright academics and copyright advocates who are pushing back against this view. They are seeking a much more balanced approach providing the proper property interest rationale that should philosophically work as the primary philosophical foundation for our copyright system.[117]

The Copyright Office has always recognized Copyright as a property interest, rather than one steeped in utilitarian dogma. Marybeth Peters, in particular, made strong statements in favor of the property interest of the songwriter and publisher when she argued, quite persuasively almost ten years ago, that it is time to terminate the Sec. 115 compulsory license.[118] Moreover, the copyright laws of the States that pre-date federalization almost uniformly describe Copyright as a property interest.[119]

The favorite philosophers of the Founding Fathers believed copyright was more than just an economic right. Many spoke of natural law or simply the inherent liberty interests of all

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http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/National_Religious_Broadcasters_Music_License_Committee_MLS_2014.pdf (also referencing *Wheaton v. Peters*, 33 U.S. 591 (1834)).

[116] *See, e.g.*, Comments of Peter S. Menell in response to the Copyright Office's Notice and Request for Public Comment on Music Licensing at 4. 79 Fed. Reg. 14,739 (March 17, 2014), *available at* http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Peter_S_Menell_MLS_2014.pdf.

[117] ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY (President and Fellows of Harvard Coll. eds., 2011).

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

[119] *See* Michael Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFFALO INTELLECTUAL PROPERTY LAW JOURNAL, 28-31 (2001).

citizens, as being the philosophical foundation of copyright, and if so, then clearly they envisioned recognition of a serious property interest.[120]

As stated above, a property interest approach does not preclude exceptions or waivers of copyright, but rather mandates that the analysis start from a different point, and gives preference in the first instance to the property interest of the author – and then policy makers should assess the propriety of adopting limitations. Any evaluation of limitations on Copyright protection should start by granting the proper deference to the property interest of musical work owners.

In his groundbreaking book *Justifying Intellectual Property*, Professor Merges, who earlier in his career flirted much more with a minimalist-copyright perspective – proposes that we should start with the foundational principle that copyright is a property interest.[121] There are, however, other interests that regularly must be assessed and incorporated into the public policy decision of whether or not to limit or expand the rights of authors - e.g., fair use, compulsory licenses, limited terms, etc. But these are what Professor Merges calls "mid-level principles" that should inform the debate, but only as secondary factors.[122] In other words, we should start with copyright as a strong property interest – and then consider exceptions and waivers – but only if they are legally and economically justified.

The essential question is always the same – should the copyright law deprive the musical work owner of their right to say "NO." A study addressing this issue both from a legal and

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[120] The Historical and Philosophical Underpinnings of the Copyright Clause, Marci A. Hamilton, Occasional Papers in Intellectual Property, No. 5, 18-25 (1999) (summarizing the justifications of property interests as related to copyright promoted by Georg Hegel, Karl Marx, and John Locke); *see also* ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY (President and Fellows of Harvard Coll. eds., 2011) (summarizing the justifications of property interests as related to copyright promoted by Georg Hegel, John Locke, Immanuel Kant, and John Rawls); Thomas Paine, *On the Affairs of North America*, THOMAS PAINE FRIENDS, INC., http://thomas-paine-friends.org/paine-thomas_on-the-affairs-of-north-america-1782-01.html (last visited Sept. 12, 2014) ("In all countries where literature is protected, and it never can flourish where it is not, the works of an author are his legal property").

[121] ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 11 (2011).

[122] *Id*. at 139.

economic perspective will be published soon.[123] Based on pre-publication reviews, the conclusion of the authors is that depriving the copyright owner the right to say "no" not only is legally unsupportable (i.e., a violation of the property interest of the author), it also violates the economic principle that the system should strive for efficiency. These authors claim that the deprivation of the right is, in fact, inefficient – essentially turning current conventional wisdom on its head.

In addition to the view that copyright is a property interest, there is also a strong basis for treating copyright as a human right, and perhaps even an inherent human right based in natural law. This is not a majority opinion in the United States yet, but it is a perspective recognized in other parts of the world, and in the United States the perspective is consistently gaining more support in legal and academic circles.[124]

All of this should simply compel the Office to re-iterate its support for the principle that copyright is a property interest, and first and foremost should stand for the proposition that it is appropriate and perhaps constitutionally essential, to re-evaluate any compulsory license system on a regular basis. Undue regulation and price controls distort the market for musical works, limit investment and hinder the grown of the music publishing business. By eliminating the requirement that owners of musical works consent to their use and not compensating them fairly, society has lost untold numbers of songs that should have been written and failed to support the creative genius of songwriters striving to be heard.

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[123] Susan Butler, MUSIC CONFIDENTIAL, Issue 31 (September 5, 2014) ("[A]n Oxford-educated economist with the University College of London's Centre for Law, Economics and Society and the chief executive of U.K. collective rights society PRS for Music are about to publish an economic and legal paper they co-authored about copyright and consent. George Barker and Robert Ashcroft argue that certain copyright laws, which give some companies a 'safe harbor' protecting them from their users' infringements and grant exceptions to the need to obtain consent, are damaging the economy.").

[124] *See, e.g.*, Paul L.C. Torremans, *Is Copyright a Human Right?*, 2007 MICH. ST. L. REV. 271 (2007); Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J., 2331 (2003).

In conclusion, the Office should reaffirm its commitment to a pro-property based approach to Copyright Law. And as a matter of public policy, it should support the following and advise Congress accordingly:

- Immediate passage of the SEA.
- Adoption of an audit right and elimination of the "pass-through" license provisions in Sec. 115.
- Ultimate termination of Sec. 115 – or at a minimum, regular re-evaluation of the compulsory license with a primary view toward protecting the property interest of the musical work owners.
- No expansion of the Sec. 115 compulsory license.

NMPA and HFA appreciate the opportunity to provide comments on these issues and we look forward to the opportunity to continue our involvement in the Copyright Office's Music Licensing Study.

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