

**Before the
United States Copyright Office
Washington, D.C.**

In the Matter of)	
)	
Music Licensing Study:)	Docket No. 2014-3
)	
Second Notice of Inquiry)	

Comments of National Public Radio, Inc.

Introduction

National Public Radio, Inc. (“NPR”) hereby submits its comments in response to the Second Notice of Inquiry (“Second NOI”) in the above-captioned proceeding concerning whether and how existing music licensing methods serve the music marketplace, including new and emerging digital distribution platforms.¹ As set forth below, there is a clear need for (1) safeguards in the event individual music publishers withdraw their works from a performing rights organization’s repertoire and (2) an *expansion* of the Section 115 compulsory license, including to cover sound recordings and the synchronization of music with visual matter.

NPR is a non-profit membership corporation that produces and distributes award winning noncommercial educational (“NCE”) programming, including All Things Considered[®] and Morning Edition[®], through more than 1000 public radio stations nationwide. NPR Member

¹ See Music Licensing Study: Second Request for Comments, 79 Fed. Reg. 42833 (July 23, 2014). The comment deadlines were subsequently extended. See Music Licensing Study, 79 Fed. Reg. 44871 (Aug. 1, 2014). NPR filed comments in response to the initial Notice of Inquiry, Music Licensing Study: Notice and Request for Public Comment, 78 Fed. Reg. 14739 (Mar. 17, 2014). See Comments of National Public Radio, Inc., Docket No. 2014-03 (filed May 22, 2014) [hereinafter “NPR Comments”].

stations and other public radio producers also use broadcast and other distribution platforms, including satellite, mobile, and the Internet, to further public radio's educational mission.

As NPR's initial comments explained, public radio uniquely engages the public through thoughtful curation that facilitates discovery of new and underappreciated musical artists and genres.² Now-mainstream musical genres, such as Celtic, Folk, Bluegrass, and World, were introduced to new audiences by public radio. Public radio also provides access to more traditional genres, such as classical and jazz, that are no longer widely heard in commercial media.

Compulsory licensing has been central to public radio's presentation of music and other cultural programming. Section 118 of the Act, in particular, provides a compulsory license that allows public broadcasting entities and copyright owners to obtain licenses for "published nondramatic musical works and published pictorial, graphic, and sculptural works." 17 U.S.C. § 118. Section 114(b) of the Act allows public broadcasters the right to use sound recordings in "educational television and radio programs" that are "distributed or transmitted by or through public broadcasting entities" without requiring them to obtain a license from the copyright holder to reproduce, prepare derivative works, or distribute copies of the work to the public. *Id.* § 114(b). As a diverse system of content producers and distributors and locally licensed, locally owned and governed, locally staffed, and locally programmed public radio stations, public radio is heavily dependent upon the Section 118 and Section 114 blanket licenses to clear a wide range of musical works and sound recordings for traditional broadcasting and streaming of music-oriented programming.

² NPR Comments at 2.

As public radio seeks to use new digital platforms to deliver music and cultural content to existing and new audiences, it already faces significant time and resource challenges clearing the use of music through individual marketplace negotiations outside of the existing compulsory licenses. Existing and expanded compulsory licensing is therefore essential, and increasingly so, to public radio's ability to offer compelling music and cultural content to the public.

Argument

I. Publisher Withdrawals From Existing Performing Rights Organizations Could Be Extremely Disruptive, And Appropriate Safeguards Should Accompany Any Such Withdrawal

Compulsory licensing performs an essential function for public broadcasting by facilitating the licensing and use of musical works and sound recordings in a relatively cost effective manner by assuring immediate access to works, subject to a determination of appropriate rates and other terms. Allowing rights holders to withdraw their works with respect to some uses or users would accord the rights holders undue leverage in any music licensing negotiation. If a rights holder can effectively pick and choose among users with respect to the use of musical works via particular platforms, public radio's ability to use technology to offer services in new and different ways could be significantly compromised.

Withdrawing some works from a performing rights organization's catalog will also increase the administrative and financial cost of clearing musical works as users will have to identify and clear or exclude the withdrawn works from use. That task would be especially difficult for a decentralized system, such as public radio, which encompasses a wide variety of content producers and distributors of which NPR is only one. It would also tax the limited resources of public media entities to produce compelling content for a variety of platforms. The prospect of individual marketplace negotiations may seem like the ideal in a perfect world, but

public radio is ill-equipped to engage in marketplace negotiations on an ongoing basis to clear most or even a significant portion of music use.

If rights holders in musical works are able to withdraw entire catalogs from a performing rights organization, therefore, the following safeguards should be put in place:

First, the rights holder and the relevant performing rights organization should publish an agreed-upon listing of the works being withdrawn so that users of such works can take steps to pursue alternative license arrangements or discontinue use of such works.

Second, because rights holders may be able to use the withdrawal of their catalog from the performing rights organization's repertory to gain bargaining leverage in direct license negotiations, such direct license arrangements should not be considered to reflect a fair market transaction, at least in the immediate aftermath of the withdrawal and for some time thereafter.

Third, any blanket license obtained prior to the withdrawal should remain in effect for the duration of its term, notwithstanding the withdrawal. Otherwise, users of such works would face the prospect of having to renegotiate the right to use the same musical works within what may be a relatively short period of time.

Fourth, the withdrawing rights holder and the relevant performing rights organization should provide significant advance notice of the impending withdrawal so that users of the relevant works have time to respond to the impending withdrawal.

Fifth, works in which a withdrawing rights holders owns less than 100 percent should remain licensable through a performing rights organization that represents the other rights holder(s) of the work in question.

While these measures would not avoid the disruption associated with a publisher's withdrawal from blanket licensing through a performing rights organization, they would help reduce the harm and should accompany any publisher decision to withdraw their catalog of works from blanket licensing by a performing rights organization.

II. The Section 115 License Should Be Expanded, Not Eliminated

In inquiring about the continuing need for the Section 115 statutory license, the Second NOI assumes that eliminating the license is universally desired and would only benefit the licensing and use of musical works.³ The Second NOI offers no independent analysis of the Section 115 compulsory license, the potential consequences of eliminating the license, or “the realities of the digital marketplace” that are said to justify its elimination. To the contrary, the realities of the public media production process for digital platform use warrant *expanding*, not eliminating, the Section 115 license.

The two alternative models proposed in the Second NOI both involve elimination of the Section 115 license in favor of direct licensing by rights holders and users.⁴ The first model assumes a system of private license negotiations between owners of musical works and users of such works. The second model would encompass sound recordings and involve “an industrywide revenue-sharing arrangement” between owners of musical works and sound recordings, and possibly “audiovisual uses not currently covered by the Section 115 license.”⁵ Expanding the scope of rights licensed under Section 115 under the second approach could offer substantial benefits, but relying entirely on individual marketplace negotiations and allowing rights holders to control who may make such uses and under what rates and terms could be extremely disruptive to the program production process.

³ Second Notice of Inquiry, 79 Fed. Reg. at 42835. *See also id.* at 42833 (“many stakeholders appear to be of the view that the Section 115 statutory license . . . should either be eliminated or significantly modified to reflect the realities of the digital marketplace.”)

⁴ *Id.*, 79 Fed. Reg. at 42834.

⁵ *Id.*

For public radio producers, clearing music elements is cumbersome and time consuming. While streaming of a station's over-the-air broadcast is covered by existing blanket licenses, such licenses currently do not cover an informal audiovisual performance captured for digital platform use, such as an NPR Tiny Desk Concert.⁶ The latter requires clearing the rights to the musical works, the sound recordings, and the synchronization of the audio and visual elements. As a result, program production can encounter long delays as rights are cleared and programming that would serve the public interest often must be withheld due to rights issues. In addition, rights holders may not value educational programming sufficiently to provide less costly licenses or may limit the scope or duration of content use.

These programming decisions and rights clearance issues arise for public radio stations and producers all across the country on a daily basis. It is unrealistic to expect individual content creators and underlying music rights holders to negotiate individual licenses as the predominant, let alone exclusive, means of clearing music rights in public radio programming. The Second NOI also offers no basis for eliminating the Section 115 license other than an assumed preference for individual marketplace negotiations.

Accordingly, NPR recommends a third model consisting of an expanded Section 115 license that would encompass sound recordings and audiovisual works and allow for determinations of the relative value of musical works and sound recordings. Maintaining Section 115 and expanding its scope would facilitate the licensing and use of music while providing a mechanism for fairly compensating the underlying rights holders. Voluntary negotiations could still occur, but interested parties would retain the ability to utilize the Section 115 license instead or in the event voluntary negotiations were not fruitful.

⁶ <http://www.npr.org/series/tiny-desk-concerts/>

In closing, NPR appreciates the efforts of the Copyright Office to improve the music licensing process. We look forward to further assisting that effort, including by exploring ways to avoid disruptions from publisher withdrawals from the performing rights organizations and by improving and expanding existing statutory licenses, such as the Section 115 license.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jonathan D. Hart". The signature is written in a cursive, flowing style.

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